REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2248 OF 2014

(Before Hon. Lady Justice Hellen S. Wasilwa on 11th July 2016)

JAMES O. OLOO ……..……………….……………….……………..…. CLAIMANT

VERSUS

TANA AND ATHI RIVER

DEVELOPMENT AUTHORITY ……......…………………………….RESPONDENT

JUDGMENT OF THE COURT

1. The Claimant herein has filed a Statement of Claim through the firm of Chigiti & Company Advocates dated 31st October 2014 for unfair and wrongful termination. The Claimant seek orders against the Respondent as follows:

i. ***A declaration that the Claimant's dismissal from employment by the Respondent was wrongful and in violation of statutory and constitutional provisions.***
ii. ***Compensation***
iii. ***Special damages particularized as:***

Unpaid salary with effect from the month of July 2012 to date being:

July 2012 to June 2013 Kshs 105,432 x 12	***1,265,198.00***
July 2013 to June 2014 Kshs 110,244 x 12	***1,322,928.00***
July to October 2014 Kshs 115,056 x 4	***460,224.00***
House Allowance Kshs 60,000 x 26(months)	***1,560,000.00***
Medical Allowance Kshs 2500 x 12	***65,000.00***
Responsibility Allowance Kshs 15,000 x 26	***390,000.00***
Airtime Allowance Kshs 9,000 x 26	***234,000.00***
Commuter Allowance Kshs 20,000 x 26	***520,000.00***

Two Months Payment in lieu of Notice	
Being Kshs 211,932 x2	***443,112.00***
Severance Pay Being Kshs ½ x 110,244)	***55,122.00***
TOTAL	***6,315,570.00***

iv. ***A declaration that the Claimant is entitled to be reinstated to his employment in the same capacity***
v. ***Costs***
vi. ***Interest***
vii. ***Any further relief that this Honorable Court may deem fit to grant***

Facts of the Claim

2. The Claimant was appointed to the position of Chief Manager Finance and Accounts with effect from 1st November 2011 earning a salary of Kshs. 105,432 per month. He received a letter from the Acting Managing Director dismissing him from the service of the Authority with effect from 29th June 2012. He appealed against the decision but the appeal was never acknowledged and up to date he is yet to receive communication.

3. The Respondent has filed a Response to the Memorandum via the firm of Anthony M. Mulekyo Advocates dated 20th of January 2015.

4. In it, they admit that the Claimant was in their employment as the Chief Manager Finance and Accounts but they deny all the allegations set out in the Memorandum and put the Claimant to strict proof thereof.

5. The Respondent avers that the appointment of the Claimant was governed by the relative law and the Authority's Staff Regulations as specified in the Authority's Code of Regulations and any other terms as may come into force. He therefore was to serve for a six months probationary period subject to Section 2.1.5 of the Authority's Code of Regulations.

6. The Respondent avers that during this probationary period he failed to demonstrate suitability for the permanent appointment and was therefore not confirmed and was consequently dismissed vide a letter dated 28th June 2012.

7. The Respondent avers that the Claimant is bound by the provisions of the Employment Act and the TARDA Code of Regulations by signing the appointment letter dated 17th October 2011 which clearly outline the provisions.

8. The Respondent further states that there was gross misconduct on the part of the Claimant which were knowingly and in conjunction with former Managing Directors writing a letter dated 18th May 2012 advising the Authority's bankers of signatories different to those authorized by the directors in a special board meeting of 19th March 2012 and illegally withdrawing funds from the Authority's accounts on various dates between 29th March 2012 and 28th June 2012.

9. The Respondent avers that it was for those reasons that the board confirmed that the Authority would not confirm him but dismiss him with immediate effect.

10. The Respondent raises a preliminary objection as the relationship between the parties is subject to Section 42 of the Employment Act which specifically states under subsection 1 that it shall not apply where a termination of employment terminated a probationary contract and moreover under subsection 4 that a party may terminate the contract during probation by not giving less than seven

days notice of termination of the contract or by payment by the employer to the employee of seven days wages in lieu of notice.

11. The Respondent therefore states that as a preliminary objection that there is no cause of action for dismissal in respect of a contract duly concluded as the Claimant had not served his probation to its conclusion. Further that the provisions of Section 36, 41 and 45 are expressly ousted and the Court therefore has no jurisdiction to entertain the cause.

12. The Respondent further avers that the Claimant had also grossly in subordinated the Managing Director by delaying and defying implementation of instruction from the Managing Director's office moreover, he had been asked to explain why his department was delaying in preparing the board papers for the meeting of 29th May 2012 via a letter dated the same day but he did not respond.

13. The Respondent avers that the Claimant failed in his duties to the detriment of the Authority.

Claimant's submissions

14. They submit that the termination of the Claimant falls short of the threshold required under Section 45(2) of the Employment Act and that the reason for termination was not fair as it is the Claimant who disclosed the financial in-discrepancies. Further, the Claimant submits that there was no misconduct on his part, and any action done was done with the full knowledge and blessing of his immediate superior.
15. The Claimant testifies that he was not given the chance to be heard, and only learnt of his dismissal through the termination letter. He emphasizes that he ought to have been suspended first as investigations were carried out and hearings conducted.

16. The procedure followed falls short of the one laid out by Section 45(2) (c) of the Employment Act. This they emphasize also violates the rights accorded to him under Article 27 of the Constitution which guarantees the right to equal benefit of the law. Article 28 guarantees the right to dignity and Article 47 guarantees the right to fair administration of the law.

17. They rely on the case of **Shankar Saklani vs. DHL Global Forwarding (K) Limited [2012] eKLR** where the Court stated as follows:

> ***"A hearing and notification on the part of the employer are mandatory where it is contemplated to terminate the contract of employment on the grounds of misconduct, poor performance or physical incapacity of the employees;***
>
> ***(b) 'gross misconduct' that justify summary dismissal under Section 44(4) and conduct amounting to a fundamental breach of an employee's obligation as envisaged in Section 44(3) of the Act are 'misconduct' for which a notification and hearing are necessary as envisaged under Section 41 of the Act;***
>
> ***(c) Section 35 of the Act prescribes the period to pay wages daily is terminable by either party at the close of any day without notice. That is the only circumstance where a termination notice is not required and for the obvious reason that service of the notice would be impracticable or of little practical value. The Court holds that to be the only circumstance in which the employer can terminate a contract of service without a notice as envisaged under Section 44 (1) of Act. Thus, Section 44(1) of Act does not entitle the employer to terminate without notice in any other circumstance other than in a contract to pay wages daily and misconduct. In all other cases, the Court holds that Section 44(1) of the Act only entitles the employer to terminate on account of gross misconduct with less notice than which the employee is entitled by any statutory provision or contractual term.***

18. The Claimant submits that the opportunity to be heard and defend himself was vital.

19. The Claimant further submits that an employee must be actively involved in any performance appraisal especially where the employee has observed poor performance, they refer to the decision of Justice Ndolo in **Jane Wairimu Machira vs. Mugo Waweru and Associates [2012] eKLR** where she held as follows:

> ***"In the case of** Kenya Science Research International Technical and Allied Workers Union (KSRITAWU) vs. Stanley Kinyanjui and Magnate Ventures Ltd (Industrial Court Case No. 273 of 2010)* ***the court stated thus: "the proper procedure once poor performance of an employee in noted is to point out the shortcomings to the employee and give the employee an opportunity to improve over a reasonable length of time. In our view 2-3 months would be reasonable. "I agree with this opinion and add that an appraisal of the performance of an employee must of necessity involve active participation of the employee. A credible performance appraisal process must be evidently participatory. A comment made by a supervisor without the participation of an employee cannot pass for a performance appraisal. Even where there may be disagreement between an employee and their supervisor on the verdict of a performance appraisal, the disagreement must be documented to show that an appraisal did indeed take place. I therefore find that the comment made by RW1 to the effect that the Claimant's probation had been extended does not constitute an appraisal of the Claimant's performance. Consequently, I find that the Claimant appointment was confirmed by default upon expiry of the two months' probation period set in the letter of appointment".***

20. The Claimant submits that his performance was not discussed with him and the letter written to him on the 29th of May 2012 cannot be an appraisal as it did not give him the opportunity to be heard.

21. The Claimant submits that at the time of his dismissal his employment had been confirmed. His warning letter came seven months and dismissal eight months after his appointment. At no point within the 6 months' probation period was an issue raised as to his performance. The Respondent failed to conduct a job appraisal or extend his probation which can be interpreted to mean that his appointment was confirmed by default.

22. The Board went against TARDA's Service Charter as regards response time to complaints. The Police dismissed the Authority's bid to open a case against the Claimant as malicious and witch hunt. They purported dismissal proceedings were contrary to the following provisions:

    - ***TARDA code of regulations 2.15 as regard the probation period and notice required of either party;***
    - ***Public Service Disciplinary Manual 2008***
    - ***ISO9001:2008***
    - ***Civil Service Code of Regulations (2006)***

23. The Claimant submits that he was not given any notice of dismissal contrary to Section 35, Section 36 of the Employment Act which amounts to a violation of the Claimant's rights. They submit that even in cases of alleged misconduct, an employee has a right to notice, albeit a shorter period of notice.

24. The Claimant submits he has lost his dignity as a result of the unfair termination occasioned by the Respondent he has discharged his burden of proof and prays for the Court to award as prayed.

The Respondent's Submission

25. The Respondent submits that the Claimant was unable to perform his duties effectively, he delayed to prepare the board meeting papers and as a result many scheduled meetings did not take place a fact testified to and undisputed in Court. As a result the board decided not to confirm his appointment and this was not a case of unfair termination as alleged by the Claimant.

26. They reiterate their reliance of Section 42 of the Employment Act that an employer may terminate an employee on probation by not giving less than seven days' notice of termination of the contract or wages in lieu thereof. They submit that employment during probation is at will, and protection afforded to regular employees under unfair dismissal laws are not available to employees whose contract are terminated while on probation.

27. This was the decision in **Danish Jalang'o & Another vs. Amicabre Travel Services Ltd Cause [2014] eKLR** Rika J held that procedural fairness does not apply in the case of employees on probation.

28. The Respondent submits that they were under no obligation whatsoever to hear the Claimant or put him on his defence on the charges/accusations against him. They cite the case of **Abraham Gumba vs. Kenya Medical Supplies Authority [2014]eKLR** where this Court held that Section 42 (1) of the Employment Act 2007 does not place any obligation on the Employer to give an Employee on probation, any formal charges or hear the Employee in his defence as contemplated under Section 41 before termination.

29. They therefore submit that the Claimant does not have a cause of action and the suit should be dismissed with costs.

30. As to his prayers, the Respondent submits that the Claimant does not have the right of reinstatement as the board already found that he was unsuitable for the job. They rely on the case of **Clendon Lewis v Howick College Board of Trustees [2010] NZCA 320** where it was held that:

> ***"The test for practicability requires an evaluative assessment by the decision maker and the factors to be considered have been clearly identified by this court in NZEI case. We see no basis on the working of s 125 of the Employment Relations Act to import into the test a distinction between procedural and substantive grounds for unjustified dismissal. We consider that a unitary approach to issue of reinstatement is preferable".***

31. And the decision of Rika J in **Lawrence Onyango Oduori vs. Kenya Commercial Bank [2014] eKLR** to the effect that:

> ***"The employment relationship is dynamic and based on mutual trust and confidence. Long passage of time works against the possibility that such trust and confidence can be rebuilt. Changes in the employment place also make it impracticable for the former employee to readily fit in the previous job. The court is satisfied the prayer for reinstatement is not practicable or reasonable."***

32. The Respondents also submit that the Claimant is not entitled to special damages. He was not employed at the material time and was still under probation. They cite the case of Court of Appeal decision in **Kenya Ports Authority versus Edward Otieno MSA Civil Appeal No. 120 of 1997** where it was held that:

> ***"Other than the basic salary all other emoluments are only enjoyed by those in actual employment and are never included in payment in lieu of notice."***

33. And the decision in **George Kangethe Kinani Versus Associated Steel Limited HCC No 775 of 1987** where Bosire J (as he then was) ruled that:

> ***"Some of such emoluments are not paid for services rendered but as a means of enabling an employee to perform his services."***

34. For the foregoing reasons, the Respondents pray that the Claim be dismissed with costs.

35. Having considered the averments of both parties, the issues for consideration are as follows:

1. ***Whether Claimant was on probation as at 29th June 2012.***
2. ***If not whether there were valid reasons to dismiss him.***
3. ***If due process was followed before his dismissal.***
4. ***What remedies if any the Claimant is entitled to.***

36. On the 1st issue, the Claimant was employed by the Respondent on 1st November 2011. According to his appointment letter:

> ***"Probationary period will be six months during which time the period of notice to terminate employment will be one month by either party".***

37. Going by this statement 6 months from 1st November 2011 would have ended on 30th April 2012. By 29th June 2012 however, when Claimant was dismissed, he had to been served with a confirmation letter.

38. Section 42(2) of Employment Act states as follows:

> ***"A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee".***

39. This Section is couched in mandatory terms in respect to the probationary period. In case of the claimant then this probation period be extended, then it would have been done in agreement with the Claimant. There is no indication that immediately after 30th Arpil, the Claimant was informed of any extension of this probationary period and even if this was done, he was to be consulted.

40. There is no indication that this was done. Failure to write to the Claimant to inform him that he was either confirmed on or probation does not change the position of the law and it is therefore this Court's finding that the Claimant was not on probation at the time of dismissal on 29th June 2012 and the letter stating that he had not been confirmed is actually a disguised dismissal.

41. Claimant's status is very important in this respect because it determines the manner in which dismissal/termination could be effected. An employee on probation may be dismissed by giving the requisite notice without assigning any reasons.

42. However, an employee who has been confirmed can only be dismissed/terminated with valid reasons.

43. In the said letter addressed to the Claimant dated 28.6.2012 reasons are assigned for his non confirmation of appointment and dismissal whether these reasons are valid or not was not feted because Section 41 of Employment Act was not adhered to. Section 41 of Employment Act states as follows:

> "**(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.**
>
> **(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any,**

chosen by the employee within subsection (1) make".

44. Section 41 of Employment Act would have enabled the Respondents to test the veracity of these allegations against the Claimant and for Claimant to defend himself but this was not done.

45. Section 45(2) of Employment Act which states as follows:

2. ***A termination of employment by an employer is unfair if the employer fails to prove:***

a. ***that the reason for the termination is valid;***
b. ***that the reason for the termination is a fair reason:-***

    i. ***related to the employee's conduct, capacity or compatibility; or***
    ii. ***based on the operational requirements of the employer; and***

c. ***that the employment was terminated in accordance with fair procedure.***

46. Given that due process was not followed, I find the termination unfair and unjustified. However Section 45(3) of Employment Act states as follows:

"(3) An employee who has been continuously employed by

his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated".

47. Given that the Claimant served for only 8 months, he cannot complain about unfair termination. I will therefore only award the Claimant as follows:

1. ***1 months gross salary in lieu of notice = 165,432/=***
2. ***Reinstatement is not an option as it is now over 3 years since Claimant was dismissed.***
3. ***8 months prorata leave being 8/12 x 165,432 = 110,288/=***
4. ***Compensation for breach of the employment contract being an equivalent of 6 months salary = 6 x 165,432 = 992,592/=.***

TOTAL = *1,268,312/=*

5. ***Issuance of a Certificate of Service.***

6. ***Costs of this suit.***

Read in open Court this 11th day of July, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Abidha holding brief for Chigiti for Claimant – Present

No appearance for Respondent – Absent