



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 1428 OF 2013

MAINA MUKOMA.....CLAIMANT

VERSUS

CANNON ASSURANCE LIMITED.....RESPONDENT

JUDGMENT

1. By memorandum of claim filed on 4th September, 2013 the claimant pleads as follows:-

(a) On the 15th day of February, 2001 or thereabout, the respondent engaged the claimant to serve in its company as a General Manager/Principal Officer after which he was promoted to the position of Executive Director before becoming the Managing Director in the year 2006.

(b) On the 18th April, 2013 and/or thereabouts, the respondent informed the claimant that they were carrying out investigations touching on him which necessitated his suspension and/or stepping aside from office to pave way for the exercise to be carried out expeditiously in his absence.

(c) Following the letter of suspension dated 18th April, 2013 the claimant duly responded to the said letter vide his letter dated May, 2013.

(d) The claimant herein made follow ups vide his letters of 24th May, 2013 and 3rd June, 2013 respectively making enquiries on the conclusion and outcome of the investigations for the claimant's perusal and consideration which did not receive any response from the respondents.

(e) The respondents without due consideration to the aforesaid letter written to them by the claimant's advocates proceeded to serve the claimant with a letter informing him of scheduled disciplinary hearing set for on 20th August 2013.

(f) The claimant responded to the letter of 19th August, 2013 informing the respondents that he requested for rescheduling of the meeting scheduled for 20th August, 2013 pending the receipt of the investigation report.

(g) The respondents by a letter dated 20th August, 2013 purported to summarily dismiss the claimant despite being served with the claimant's letter dated 19th August, 2013.

(h) The respondents termination of the claimant's employment contract was not only a breach of

the respondent's own laid down procedures but also a breach of the claimant's rights as guaranteed by Article 41 of the Constitution and a further breach of the Employment Act 2007.

(i) The claimant devotedly and diligently served the respondent from 15th February, 2001 to 21st August, 2013, totaling 12 years, 8 months of service with the respondent.

(j) At all material times, the claimant executed his approval mandate as the respondent's Managing Director under the guidance of and direction of the Chairman of the respondent company who also executed all committal documents alongside the claimant for and on behalf of the respondent.

(k) In the above premises, the actions by the respondent in terminating the claimant's employment in a summary manner is irregular, unlawful, unfair, malicious, arbitrary and discriminatory.

Particulars of malice and bad faith

(a) The respondent's refusal to avail the investigation report on the Arusha Skyline Hotel Ltd Guarantee project to the claimant for his perusal and due consideration.

(b) The respondents allegations against the claimant to the effect that the claimant's actions with regard to Arusha Skyline Hotels Ltd were detrimental to the interests of the company as the claimant did not act with the due care and diligence expected of the Company's Managing Director yet:-

(i) The issue of Arusha Skyline Hotels Ltd began in the year 2006 with the knowledge of the respondent top Management and Board of Directors.

(ii) Alleging that the claimant had not followed legal advice when the respondent was indeed aware that the claimant had followed the advise given by the Company's duly appointed legal counsel as well as financial advise from the legal as well as financial advisers of the respondent as demonstrated below:-

(iii) The firm of M/s Waweru Gatonye & Co. Advocates attended all the scheduled company meetings with full knowledge of the respondents and as one of the respondent's legal advisors they had done their due diligence which they communicated to the respondents.

(iv) The respondents considered the merits of the firm of Waweru Gatonye & Company Advocates due to the experience of the principal partner Mr. Waweru Gatonye after several meetings held in their offices thus the allegation that the claimant relied on legal advice of a law firm not retained by the company is malicious.

(v) Alleging that the claimant had compromised the respondents position on the litigation touching on the subject matter by terminating the contract of the Legal Manager while knowing that this was not true as the contract of the Legal Manager was terminated by the Executive Management committee after he deserted duty and the same is the subject matter of a Civil Suit in Industrial Court cause No. 38 of 2013.

(vi) At no time did the claimant act alone as the Mortgage of Right of Occupancy was executed by both the claimant and Chairman of the respondent's company as Directors of the respondent on 9th November, 2006. The additional were duly analysed and approved by the management.

(vii) The claimant benefited from the mortgage facility in line with the respondent company policy as it applied to other management staff and has all along serviced the same effectively without any default in monthly repayment.

2. The respondent on its part refuted the allegations and pleaded as follows:-

(a) In answer to paragraph 4 of the Memorandum of Claim, the respondent stated that at its Board of Director's meeting on 18th April 2013 on matters touching on issuance of a guarantee by the respondent in respect Arusha Skyline Hotels Limited, questions of plausible fraud arose following which the Board decided to set up a special Board Committee to investigate the matter. In order to facilitate the investigations, the Board also decided to suspend the claimant who was its Managing Director with immediate effect pending the conclusion of the investigations. The claimant was privy to the said decisions but was additionally informed of the said decisions by the respondent's letter dated 18th April which was annexed to the Memorandum of Claim as appendix MM2. The claimant duly acknowledged the respondent's right to suspend him pending the conclusion of the investigations.

(b) The respondent admits receiving the letters mentioned in paragraph 6 of the Memorandum of Claim but averred that at no time had there been any agreement between the respondent and claimant that an investigation report would have been generated and or forwarded to the claimant for his perusal or that any such investigation report was the basis for the claimant's suspension as alleged in the said letter or at all. The claimant duly acknowledged the respondent's right to suspend him pending the conclusion of the investigations.

(c) In answer to paragraph 7 and 8 of the Memorandum of Claim, the respondent states that after considering the matters arising in the course of the investigations, the respondent as it was legally entitled to and by a letter dated 12th August 2013 called upon the claimant to attend a disciplinary hearing on 20th August 2013 to show cause why his employment should not be terminated on grounds of misconduct. The grounds in which the respondent was considering terminating the claimant's employment were comprehensively set out in the said letter.

(d) In answer to paragraph 9 of the Memorandum of Claim the respondent stated that the claimant for reasons unknown to the respondent, refused, neglected and or failed to attend the disciplinary hearing on 20th August, 2013. The respondent as it was entitled to do proceeded to consider the matter and make its decision to summarily dismiss the claimant from its employment. The claimant was by a letter dated 20th August 2013 duly informed of the respondents decision to summarily dismiss him from the respondent's employment.

(e) The respondent averred that it had no obligation either in law or agreement to prepare and or avail any investigation report to the claimant as alleged or at all.

(f) The respondent further averred that the claimant's summary dismissal was procedural and within the provisions of the Employment Act, 2007. The respondent duly discharged its duty to inform the claimant of the specific ground on which it was considering terminating the claimant's employment and in giving him the right to attend the disciplinary hearing and show cause why his employment should not be terminated in that:-

(i) The respondent had reasonable and sufficient grounds to summarily dismiss the claimant from its employment as it did under section 44 of the Employment Act and clause 7 of his terms and conditions of employment.

(ii) By its letter dated 12th August 2013 the respondent gave the claimant an opportunity to attend the disciplinary hearing on 20th August 2013 and gave his explanation for consideration.

(iii) The respondent informed the claimant of his entitlement to bring another employee of his choice to the disciplinary hearing.

(g) The claimant's refusal, neglect and or failure to attend the disciplinary hearing had no basis and or effect on the disciplinary hearing and should not be countenanced by the honourable Court.

(h) In further answer to paragraphs 14 and 15 of the Memorandum of Claim, the respondent states that there were two separate and distinct transactions relating to Arusha Skyline Hotels Limited.

(i) The first was a guarantee for USD945,000 properly issued by the respondent to Surety Solutions (PTY) Limited which lapsed in June 2008 without any financial demand being made or accepted whereupon the facility terms automatically came to an end.

(ii) The second was a purported letter of credit/guarantee for USD448,000 purportedly issued under the instruction of the claimant to Exim Bank. It was with regard to that 2nd transaction that questions of plausible fraud arose on 18th April 2013 leading to the suspension of the claimant and eventually his summary dismissal.

(i) The respondent averred that the claimant had in its Memorandum of Claim deliberately mixed the two with intention to distort the truth and mislead the Court. The correct position is as clearly stated by the respondent hereinafter.

(j) On May 2007 or thereabout, the respondent was appointed by a company called Arusha Skyline Hotels Limited and Project General Contractors as project Insurance Underwriters during the construction of a hotel and requested to provide a Bank Guarantee Facility in the sum of US\$945,000.

(k) 28th May, 2007, the claimant who was the respondent's managing director and the respondent's Financial Controller Mr. John Ng'ang'a held a meeting with representatives of Chase Bank Limited when informed Chase Bank (Kenya) Limited of the respondent's appointment as Project Insurance Underwriters as stated above. The respondent then by a letter dated 29th May 2007 applied for the said Bank Guarantee Facility.

(l) By a letter of offer dated 30th May, 2007, Chase Bank (Kenya) Limited offered the facility for a period of 270 days which was accepted by the respondent on 12th June 2007.

(m) As a condition precedent to the issuance of the facility Chase Bank (Kenya) Limited demanded among others a valid Board resolution from the respondent's Board of Directors authorizing the company to obtain the guarantee of US\$945,00/= and a valid Board Resolutions authorizing the bank to place lien over the fixed deposit of Kshs.72 million until the obligation of the bank ceased under the facility terms. The respondent duly supplied Chase Bank (Kenya) Limited with the minutes of its Board of Directors meeting in which the resolution for the facility was authorized by the respondent. The respondent then issued the guarantee for the said sum of US\$945,000/= on 12th June 2007.

(n) The above mentioned guarantee for US\$945,000/= lapsed in June 2008 without any financial demand being issued or accepted and the facility terms automatically came to an end.

(o) Subsequently, the respondent was approached by the developer to provide a guarantee in favour of Garrison Securities SA Switzerland for US\$945,000. On 22nd January 2009, the respondent applied to Chase Bank (Kenya) Limited for another bank guarantee to Garrison Securities SA Switzerland of US\$945,000. The Bank did not reply to the letter of 22nd January 2009 and hence no agreement was reached for the bank to issue another guarantee for US\$945,000 at all and no guarantee was or could be issued by Chase Bank on behalf of the respondent pursuant to the said application.

(p) The Bank (Chase Bank (Kenya) Limited did not reply to the respondent's letter of 22nd January 2009 and hence no agreement was reached for issuance of the bank guarantee for another sum of US\$945,000.

(q) On 22nd February 2009, Arusha Skyline Hotels Limited wrote to the respondent requesting that the respondent provides a 90 days leverage guarantee for a sum of Euros 448,000 in favour of Standard Chartered Bank Limited (Arusha, Tanzania).

(r) On 13th March 2009 the respondent wrote to the Chase Bank (Kenya) Limited with a request for the bank to go through the relevant documents and advise on a proposed issuance of a guarantee for Euros 448,000 to Standard Bank (T) Ltd Arusha branch.

(s) Chase Bank (Kenya) Limited did not respond to the respondent's application dated 13th March 2009 and no agreement was or could be entered into between the respondent and Chase Bank (Kenya) Limited for issuance of such a guarantee pursuant to the request.

(t) Despite the nonexistence of a Facility Agreement between the respondent and Chase Bank (Kenya) Limited as stated above, the claimant wilfully neglected to perform his fiduciary duty to the respondent and or carelessly and improperly performed his duty to the respondent and or colluded with the said Chase Bank (Kenya) Limited and or its employees, servant and agents to the detriment of the respondent and thereby occasioning substantial loss and damages to the respondent.

Particulars of the claimant's negligence and or collusion

(i) Failing to inform and or notify the respondent's Board of Directors that he had on 9th April 2009 or thereabout been informed of an intention to have Exim Bank (Tanzania) Limited issue a letter of facility offer to Chase Bank (Kenya) Limited through Citi Bank Nairobi.

(ii) Failing to inform and or notify the respondent's Board of Directors about a purported issuance of a guarantee by Chase Bank (Kenya) Limited to Exim Bank (Tanzania) Limited or a banking facility or a stand by letter of credit in the amount of Euros 448,000 without any Facility Agreement between the respondent and Chase Bank (Kenya) Limited.

(iii) Allowing and or permitting the issuance of a guarantee by Chase Bank (Kenya) Limited to Exim Bank (Tanzania) Limited or a banking facility or a stand by letter of credit in the amount of Euros 448,000 without any Facility Agreement between the respondent and Chase Bank (Kenya) Limited.

(iv) Failing to inform or notify the respondent's Board of Directors about the purported issuance of a guarantee by Chase Bank (Kenya) Limited to Exim Bank (Tanzania) Limited or a banking facility or a stand by letter of credit in the amount of Euros 448,000 without the authorization by the respondent's Board of Directors.

(v) Allowing and or permitting the issuance of a guarantee by Chase Bank (Kenya) Limited to Exim Bank (Tanzania) Limited or a banking facility or a stand by letter of credit in the amount of Euros 448,000 without the authorization by the respondent's Board of Directors.

(vi) Failing to inform and or notify the respondent's Board of Directors of instructions of the wording of the purported guarantee issued by a third party who was not signatory to the respondent's accounts.

(vii) Failing to inform and or notify the respondent's Board of Directors of the proposed or dictated terms and or amendments to the purported guarantee whose sole effect was to remove all safeguards available to the respondent and expose the respondent to loss.

(viii) Failing to inform and or notify the respondent's Board of Directors of the existence of a purported lien created over the respondent's fixed deposit account in respect of the purported transaction.

(ix) Failing to inform and or notify the respondent's Board of Directors of purported guarantee charges allegedly debited or levied on the respondent's account.

(u) As a result of the claimants wilful neglect to perform his duty to the respondent and or collusion with Chase Bank (Kenya) Limited and or its employees, agents and or servants as stated above, on or about 23rd April 2010, Chase Bank (Kenya) Limited illegally debited the respondent's Fixed Deposit account NO.0001017004 with a sum of Euros 448,000 purportedly in enforcement of a guarantee allegedly issued by it in favour of and called by Exim Bank (Tanzania) Ltd and allegedly arising from a standby letter of credit allegedly issued by the respondent to Chase Bank (Kenya) Limited.

(v) The respondent averred that the loss of Euros 448,000 was caused and occasioned or partly caused and occasioned by the claimant's wilful neglect to perform his duty to the respondent and or collusion with Chase Bank (Kenya) Limited and or its employees, servants and agents, and the respondent is entitled to recover the said sum or any related loss from the claimant.

3. The respondent further counter claimed against the claimant stating that in the year 2004, the claimant applied for and was granted a mortgage facility by the respondent in the sum of Kshs.4,750,000/= to enable the claimant purchase an apartment and a charge was created on the apartment to secure the facility. Thereafter between 2008 and 2013, the claimant without seeking or obtaining approval or consent of the respondent's Board of Directors instructed the respondent's Finance Director to disburse additional funds totaling to Kshs.20,674,532/= for further property purchase. As at 31st July, 2013 the claimant owed the respondent a sum of Kshs.21,129,222 in respect of the mortgage which was well above the secured sum of Kshs.4,750.00. The respondent therefore claimed this sum from the claimant.

4. In his evidence in Court during the trial, the claimant reiterated most of the averments in the memorandum of claim. In addition he stated that by the time he left the respondents employ his salary was Kshs.1,599,205 which was his basic pay including benefits. It was further his evidence that prior to his dismissal his relationship with the respondent was cordial. He had no untoward disciplinary record against him.

5. It was his testimony that on 18th April, 2013 a Board meeting was called to deal with matters arising from a previous Board meeting. One of the matters was Arusha Skyline issue. According to him, his role in the project was to coordinate and facilitate meetings for the project between the respondent, the Bank and external lawyers as well as project owners. He confirmed that the first guarantee by Chase Bank did not materialize and the Bond expired. The same client came again for issuance of a Bond in favour of Garrison Securities. The client this time wanted to deal through Stanchart Bank.

6. According to him the title was recharged. He stated that the decision to execute all the arrangements was made by the respondents chairman, management, and external lawyers. It was his evidence that Stanchart gave some conditions which the project developer could not meet hence the developer moved to Exim Bank. Garrison Security received the funds from Exim Bank but did not release it to the project developers hence the project had not started by the time his services were terminated.

7. He further stated that one of the Board members felt there was fraud in the Arusha transaction and he was asked to step out of the room as the Board members deliberated on the issue. He was called back and issued with the suspension letter. Later on he was asked by the investigator to give his version of events. He stated that the conclusion of the matter took long hence he appointed a lawyer to follow it up. On 12th August, 2013 he received a letter informing him of intention to terminate his services. The letter asked him to attend a disciplinary hearing.

8. According to him, he was not prepared for the hearing so he asked for rescheduling as the allegations were grievous and he wanted a copy of the investigation report. It was Mr. Mukoma's testimony that he was never given a copy of the report. He was dismissed instead. He denied acting to the detriment of the respondent. His actions were on the advice of the respondent's legal department and external lawyers.

9. Regarding funding for his apartment, he stated that he never gave any instructions for additional funding for his apartment and further that he has been servicing regularly, the loan.
10. In cross-examination he stated that the respondent had the right to terminate his services on account of misconduct and dishonesty. Concerning leave he conceded that leave not taken or carried forward without the approval of the company would be forfeited. He admitted not submitting any document to show approval for carrying forward leave.
11. Regarding the second guarantee he stated that there was no Board approval but must have been reflected in the various Board minutes. According to him the second application was a continuation of the first guarantee. Regarding the letter at page 38 of the claimant's bundle of documents, he stated that the letter related to the first guarantee which lapsed in 2008 and that he did not have any other letter from Waweru Gatonye Advocates on the second guarantee. He further stated that he sought legal opinion from Anjarwala and Khan Advocates but was advised to seek a legal opinion from Tanzanian based advocate on the second guarantee. He did not personally seek the recommended legal advice. The witness further stated that he was aware the respondent's account at Chase Bank was debited with 448,000 Euros.
12. Regarding salary for days worked he stated that these were computed and included in the dismissal letter. Regarding bonus, he stated that this was based on one working till retirement and that bonuses are not guaranteed.
13. The respondent's witness Mr. Indajit Talwar informed the Court that the claimant was dismissed because he dealt with issuing of a guarantee for a third party borrowing for Arusha Skyline. According to him the claimant failed to exercise due diligence and never sought the approval of the Board before the guarantee was given. It was his evidence that the 1st guarantee that was given in respect of Arusha Skyline lapsed in June, 2008. In 2009 there was request for another guarantee by Chase Bank. This was a new guarantee. The amount and parties were different. He denied knowledge of the Board's discussion over the second guarantee of 448,000 Euros. There was no Board resolution over the matter.
14. Regarding the apartment loan, it was his evidence that the claimant advanced himself additional loan without approval of the Board.
15. Concerning the disciplinary hearing, he stated the claimant was called for one but asked for rescheduling which was refused by the Board.
16. He conceded that the claimant asked for a copy of the investigation report but was not given one.
17. In cross-examination he stated that loans to the Chief Executive Officer were granted by the Board. The initial loan to the claimant was approved but there was no letter asking for loan enhancement.
18. In her closing submissions before the Court Ms. Guserwa for the claimant submitted that the claimant was never given a fair hearing by the respondent to explain his side of the story.
19. According to Counsel, the commitment of 448,000 Euros by the respondent was indeed effected by the authorized signatories and the chairman could not turn around and disown the same blaming the claimant for management negligence. The claimant could not commit the respondent company alone. According to Counsel, the respondent's witness informed the Court that Board minutes and resolution were kept by the Company Secretary and not the claimant yet none of them was produced before Court to support the allegations by the witness that there was no resolution on the issue of 448,000 Euros which was issued by Chase Bank in favour of Standard Chartered Bank (TZ) Arusha Branch.
20. In view of the foregoing, the claimant submitted that he was neither negligent nor worked in collusion with anybody in so far as the Arusha Skyline Project was concerned. Further the claimant had demonstrated that he worked to the best of his ability by keeping the Chairman and the Board informed of the developments in the Arusha Skyline Project. Regarding the deed of guarantee of 9th November, 2006 Counsel submitted that the same did not cease to exist as the four variations made in respect thereof kept

it alive even after 24th March, 2008. Concerning the termination of the Legal Manager, Mr. Thuo, the claimant submitted that the termination was approved and directed by the respondent's Board as it was impossible for the claimant to terminate the services of such a senior manager without consideration and approval of the Board of Directors.

21. Ms. Guserwa further submitted that the fact that the claimant was never joined as a party in the suit by the respondent against Chase Bank is an indication the claimant was never involved in any irregularities during his professional service to the respondent company.

22. Concerning the advancement of the loan estimated at over 20 million, Counsel submitted that the respondent was aware of the various loans advanced to the claimant on various dates as set out in the statement of accounts since such funds could not be advanced to the claimant without proper application and approval by the investment committee and Board of Directors of the respondent. Further the claimant had been servicing the loans and the counterclaim was only malicious and intended to bring the claimant to ridicule.

23. Regarding the procedure for dismissal of the claimant Ms. Guserwa submitted that it was not in dispute that the claimant was sent on suspension without any prior notice and or justification and while on suspension he was called to attend a disciplinary hearing which proceeded in his absence despite asking to be provided with a copy of the investigation report before the hearing. This according to Counsel denied the claimant a fair hearing. Further, the allegations against the claimant were challenged and not proven since no investigation report was availed to him nor produced in Court to support the allegations. To this end the claimant submitted that in so far as his dismissal was grounded on a report that was not produced in Court nor given to him for his comments, there was no validity in the alleged reasons for his dismissal hence the same was unfair and unlawful.

24. Concerning the remedies sought, Counsel submitted that his client should be reinstated without loss of benefits as his termination was unfair and he was unlikely to get any other employment in the Insurance Industry where he has great experience and expertise.

25. The respondent on the other hand submitted that investigations revealed that the claimant neglected to perform his fiduciary duty to the respondent by failing to inter alia conduct any or reasonable due diligence on any of the parties involved in the transaction. He further failed to follow legal advice relating to instructing a counsel in Tanzania to advice on Tanzanian Law. The claimant further relied on the advice of a law firm not retained by the respondent. Mr. Muthui further submitted that the claimant failed to inform the respondent's board of the emails exchanged between him and Kanyi Muhando of Arusha Skyline and Chase Bank in which the terms of the purported guarantee were apparently discussed.

26. According to Counsel, section 43 and 45 of the Employment Act requires the employer to show valid reason or reasons for termination of the contract. The reasons are the matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the contract of employment. The respondent's burden of proof in respect of the validity of the termination is therefore on a balance of probabilities and not beyond reasonable doubt. In support of this submission counsel relied on the case of **Bernard Shisiali Muhatia v. Speedex Logistics Ltd (2013) eKLR** and **Halsbury Laws of England 4th Edition Vol. 16 paragraph 482**. Applying the principles to the present case, Mr. Muthui submitted that the respondent had proved that it had valid reasons for its decision to dismiss the claimant summarily.

27. According to Counsel, the respondent's letter dated 22nd January, 2009 acknowledging in paragraph 2 that the guarantee for USD945,000 expired in June, 2008 was written by the claimant. Being aware of the procedures that were followed in respect of the first guarantee, the claimant was well aware that there ought to have been a facility agreement or a letter of offer from Chase Bank, acceptance of offer by the respondent and Board Resolution authorizing the issuance of 448,000 Euros for issuance of the guarantee.

28. Further the variation of Deed of Agreement between the respondent and Arusha Skyline was not a facility agreement between Chase Bank and the respondent. It was incumbent upon the claimant to ensure

that the facility agreement was entered into between Chase Bank and the respondent. The claimant in the circumstances acted negligently, recklessly and without authority to the detriment of the respondent. Counsel further submitted that the claimant proceeded to discuss issuance of a guarantee to Chase Bank with Kanji Muhando for Arusha Skyline without bothering to copy or forward the emails to the Chairman or Board of the respondent.

29. According to Counsel the claimant's actions and omissions were detrimental to the respondent's business and interest. They resulted in the respondent losing a colossal sum of money. The respondent therefore had reasonable and sufficient grounds to terminate the claimant's employment as it did under section 44(3) of the Act and clause 7 of his contract of employment.

30. Concerning procedure for removal, the respondent submitted that it invited the claimant for a disciplinary hearing on 20th August, 2013 to show cause why his employment could not be terminated. The grounds upon which the respondent was considering termination of the claimant's contract were specifically and clearly particularized in the language that he understood. The claimant was also informed that he was entitled to bring an employee of his choice to the disciplinary hearing. By his advocates letter dated 19th August, 2013, the claimant stated he would not attend the disciplinary hearing because he had not received an investigation report. They proceeded with the meeting and resolved to summarily dismiss the claimant. The decision was communicated to him by a letter dated 20th August, 2013. According to Counsel at no time had there been an agreement with the respondent that an investigation report would be generated and forwarded to the claimant. It was not a legal requirement. Mr. Muthui further submitted that conducting investigations where an employer is of the view that there is a reasonable cause to do so is the employer's managerial prerogative which must be protected by the Court. In this regard counsel relied on the case of **of Dock Workers Union vs. Kenya Ports Authority (2015) eKLR**. The claimant according to the respondent was given an adequate opportunity to defend himself.

31. Concerning the remedy of reinstatement counsel submitted that this was not available to the claimant since the respondent had valid reasons to summarily dismiss the claimant. There were no exceptional circumstances for granting the order of reinstatement. To support this submission, Counsel relied on the case of **Mundia Njeru Gateria Vs. Embu County Government & 3 Others (2013) eKLR**. Counsel further submitted that the position of Managing Director requires mutual trust yet the employer-employee relationship between the claimant and the respondent was strained. Ordering reinstatement would compel the respondent to maintain a continuous personal and confidential relationship with the claimant in a strained environment against its will.

32. Concerning the claim for salary for days worked in August, 2013 and accrued leave pay, Counsel conceded that the claimant was entitled to these payments and was in fact paid but the same were applied towards offsetting the claimant's liabilities to the respondent and was accounted for in the dismissal letter.

33. With regard to earning for the period September, 2013 to December 2017, Counsel submitted that this was a claim for anticipated salary up to retirement and was not a claim based on the claimant's contract. Citing the case of **Elizabeth Wakanyi Kibe Vs. Telkom Kenya Ltd (2014) eKLR** Counsel submitted that the claimant was not entitled to loss of income/anticipated salary to date of retirement as there was no guarantee of employment to the date of retirement.

34. With regard to the counter-claim, Counsel submitted that there was no dispute that the claimant owed the respondent the sum of Kshs.21,129,222 for loans advanced to him albeit un-procedurally. The respondent was entitled to recover the amount. According to Counsel, the claimant's loan obligations became due and payable on 20th August, 2013 when he left the respondent's employment.

35. Having reviewed and considered the pleadings, oral evidence and submissions by either party, there are four main issues to be decided. First were there in existence valid or justifiable reasons to summarily dismiss the claimant. Second, in carrying out the dismissal did the respondent follow a fair procedure and thirdly is the respondent entitled to judgment on their counterclaim. Fourthly, what are the appropriate remedies available to the claimant should the Court find he was wrongfully dismissed?

36. Before the Court embarks on the first issue as framed, I would like to make the following comments on the role of Chief Executive Officer (Managing Directors).

37. My quick and cursory read of material on company management and corporate governance reveal that the Chief Executive Officer (CEO) of a Company is responsible for leading the development and execution of the Company's long term strategy with a view to creating shareholder value.

38. The Chief Executive Officer's leadership role also entails being ultimately responsible for all day to day management decisions and for implementing the company's long term plans. The Chief Executive Officer acts as a direct liaison between the Board and Management of the Company and communicates to the Board on behalf of the management. More specifically the duties and responsibilities of a Chief Executive Officer include leading in conjunction with the Board in the development of the Company's strategy. He or she ensures that expenditures of the Company are within the authorized annual budget of the company and assesses the principle risks of the company to ensure these risks are being monitored and managed. The Chief executive Officer further ensures that the Directors are properly informed and that sufficient information is provided to the Board to enable the Directors form appropriate judgments.

39. The Chief Executive Officer has fiduciary duty to the Company which can be broken down to the duty of care, the duty of loyalty and the duty of disclosure. The duty of care refers to the Chief Executive Officer's responsibility to consider all available information relevant to business decisions, including advice of experts and employees. The duty of loyalty requires that a Chief Executive Officer always acts in the best interest of the business and its shareholders. This includes responsibility to avoid conflict of interest. Finally, the fiduciary duty of disclosure mandates that a Chief Executive Officer fully informs both the Board of Directors and the shareholders about the major issues facing the business.

40. One of the main reasons for which the claimant was summarily dismissed by the respondent was that he committed the respondent to a financial guarantee without approval of the respondents' Board and second, that he advanced to himself loans over and above the one approved by the Board without first seeking and obtaining additional authority from the Board. The claimant denied these accusations and insisted his actions were above board and that he sought and obtained the necessary approvals.

41. The Board minutes attached to the claimants memorandum of claim and marked as MM9 (page 20) concerned the first guarantee for USD945,000. The minutes were dated 12th June, 2007 and signed by the respondent's Chairman Mr. Talwar and the claimant as the Managing Director. At page 22 of the claimant's bundle of documents was a promissory note dated 12th June, 2007 for USD945,000. It was again signed by the respondent's Chairman Mr. Talwar and the claimant as the Managing Director. From the pleadings, documents filed in support of respective parties and oral evidence in Court, it was not in dispute that the above mentioned financial facility lapsed in June 2008, without any draw down occurring.

42. By a letter dated 22nd January, 2009 written by the claimant, (Page 30 of claimants bundle of documents), the claimant made a new request for a facility of a similar amount to the respondents Bankers in the previous transaction Chase Bank Nairobi. Further by a letter dated 13th March, 2009 the respondent's legal officer Mr. Thuo wrote to Chase Bank as a follow up to an earlier telephone discussion with John Karau the Bank's Legal Advisor that the Respondent had been approached by Arusha Skyline this time to provide a payment guarantee for 448,000 Euros to Standard Chartered Bank Tanzania Arusha Branch. Mr. Thuo requested the Bank to go through the documents enclosed in his letter and advise on the issuance of the proposed guarantee.

43. In a file note dated 9th March, 2009 from Mr. Thuo, the Legal Officer to the respondent (page 43 of the claimants bundle of documents) he updates the claimant that following their discussion with a Mr. Musa as well as the claimant, Mr. Musa was advised that the variation of the charge was the best way to proceed with the second transaction. The claimant and a Mr. Maro were to obtain a search from Moshi Land Registry to confirm that the charge was validly registered and that there were no encumbrances to the property.

44. This proposal appeared to have been accepted and consequently by a Board resolution of the Directors of Arusha Skyline Hotels Limited passed on 19th February, 2009 it was resolved that clause 6.6 of the agreement between the respondent and Ms. Arusha Skyline Hotels entered into on the 9th day of November, 2006 be varied to allow the guarantor (respondent) to register in its favour a legal charge for USD700,000.

45. It was further resolved by the said Arusha Skyline Hotels that the respondent be requested to issue a Bank Guarantee to Ms. Standard Chartered Bank Tanzania Arusha Branch.

46. I have deliberately attempted to delve into great detail about certain salient features of the two transactions namely the initial one for USD945,000 and the second one for 448,000 Euros and two scenarios emerge. With regard to the first guarantee that indisputably lapsed on June 2008, there were respondent's Board minutes to back the same. However on the second guarantee for 448,000 Euros there appear to be very little evidence if any of the respondent's Board involvement in it. On the other hand Ms. Arusha Skyline at every critical stage in stage in this transaction backed their action by a Board resolution as demonstrated earlier in this judgment.

47. I had earlier in this judgment endeavoured to outline some of the corporate governance principles which are expected of an average Chief Executive Officer/Managing Director. One of them was that a Chief Executive Officer must ensure that the Directors are properly informed and sufficient information is provided to the Board to enable the Directors form appropriate judgment.

48. To begin, the initial guarantee for USD945,000 which lapsed in June 2008 was sanctioned by the respondent's Board and there was evidence on record to that effect. The evidence of sanction by the respondent's Board of the second transaction does not seem to be documented. The claimant contended that this was not necessary because the initial guarantee was still good. But this is contradictory because his own letter of 22nd January, 2009 referred to earlier acknowledges that the first guarantee expired in June, 2008. How can something expired be reinstated? But assuming reinstatement was possible, considering the level of financial exposure involved any reasonable Chief Executive Officer would not act on assumption but would have had the issue reconfirmed by the Board of Directors. The fact that Arusha Skyline Hotel at any critical stage in the transaction resorted to its Board of Directors for a resolution could have triggered the claimant to act the same way and sought the respondent's Board's approval or reconfirmation.

49. Therefore without considering other reasons for suspension and eventual dismissal, the Court hereby finds that there existed valid and justifiable reasons to terminate the claimant's contract of service summarily as he was guilty of gross-misconduct.

50. Regarding procedure adopted in the claimants dismissal, the Court has carefully reviewed and considered the suspension letter dated 18th April, 2013, the show cause letter dated 12th August 2013 and is reasonably persuaded that they fully informed the claimant of the charges against him for which the respondent was contemplating terminating his services. The claimant was a senior officer of the respondent and actively interacted with the issue of the Arusha Skyline Hotel besides the accusations against him were clearly laid out and all was required of him was to respond. He instead asked to be furnished with an investigation report. What was there to be investigated if at all yet both the claimant and the respondent were fully aware of the Arusha Skyline issue and the only question left was whether the claimant as the Chief Executive Officer should bear responsibility? All he needed at this juncture was to appear before the disciplinary panel and give his side of the story but he did not. The respondent cannot be faulted for dismissing him thereafter.

51. In conclusion the Court finds and holds that there existed valid and justifiable reasons to dismiss the claimant summarily and that the dismissal was carried through a fair procedure. The claim is therefore found without merit and is hereby dismissed. The claim having been dismissed the Court will not consider the issue of the remedies sought.

51. Regarding the counterclaim for the loans allegedly taken by the claimant without authority, the

claimant does not deny the loans. The loans were accessed in course of the claimant's employment. It may well be true that they were irregularly accessed but the claimant has not denied them. If his employment were to continue he would have serviced them through his monthly salary. This was the expectation of both the claimant and the respondent. It would therefore be onerous and punitive to order the claimant to settle such a considerably large sum in one cheque. The Court will therefore not enter judgment as sought by the respondent but will instead direct that the claimant continues to service the loan as has been the case during the existence of his employment with the respondent and a default will constitute a new cause of action for which the respondent can seek appropriate remedies from the Court.

52. There will be no order on costs.

53. It is so ordered.

Dated at Nairobi this 30th day of September 2016

Abuodha Jorum Nelson

Judge

Delivered this 30th day of September 2016

In the presence of:-

.....for the Claimant

and

.....for the Respondent.

Abuodha Jorum Nelson

Judge