



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**  
**CAUSE NO. 389 OF 2013**

**KIMUTAI LANGAT**

**CLAIMANT**

**V**

**KENYA CREDIT TRADERS LIMITED**

**RESPONDENT**

**JUDGMENT**

1. Kimutai Langat (Claimant) through a Claim lodged with the Court on 12 November 2013 against Kenya Credit Traders Ltd (Respondent) challenged his summary dismissal on the ground of insubordination. The insubordination allegedly arose as a result of the Claimants failure to respond to letters seeking his explanation for poor performance.
2. The Respondent filed a Response on 5 December 2013. It also filed its bundle of documents on 22 May 2014, and a further list on 13 June 2014.
3. The Claimant filed a supplementary list of documents on 30 November 2015.
4. The Cause was heard on 30 November 2015 when the Claimant testified and on 6 September 2016 when the Respondent's General Manager testified.
5. After close of hearing, the Claimant filed written submissions on 16 September 2016, while the Respondent filed its submissions on 30 September 2016.
6. The Court has considered the pleadings, evidence and submissions and identified the questions for determination as, *whether the summary dismissal of the Claimant was unfair and if so, appropriate remedies.*

**Whether summary dismissal was unfair**

**Law on dismissals**

7. Termination of employment is now regulated by statutory law and more so the Employment Act, 2007, in the case of ordinary employees.
8. Section 35 of the Employment Act, 2007 envisage written notice of termination of employment but subject to sections 36 and 44 where applicable; section 41 envisage a hearing (procedural fairness) while section 45 require existence and proof of valid and fair reasons for the termination.
9. On the procedural aspects, section 43 of the Act obligates the employer to prove the reasons for termination of employment, while the duty on the employee (Claimant) is a low threshold one outlined in

section 47(5) to demonstrate that an unfair termination of employment occurred.

10. The duty on the employee can be demonstrated by showing that no written notice in terms of section 35 of the Act was given or that there was no hearing as contemplated by section 41 of the Act.

11. Section 47(5) of the Act also requires the employer to justify a dismissal.

### ***Procedural fairness***

12. The primary or principal reason for the summary dismissal of the Claimant was insubordination with the particulars being that he had failed to respond to a letter dated 2 November 2011 calling upon him to tender explanations as to extremely poor performance for the period 18 September 2010 to 17 September 2011, and a reminder dated 29 December 2011.

13. The failure to respond to the letters was followed up with a meeting between the Claimant and the Respondent's General Manager and Operations Manager on 27 January 2012.

14. The Claimant admitted in cross examination that he saw the letter dated 2 November 2011 and the reminder of 29 December 2011 and that he did not respond to the same.

15. He also confirmed that he attended the meeting with the Respondent's Managers on 27 January 2012.

16. The reminder of 29 December 2011 specifically called upon the Claimant to explain why he did not respond to the letter of 2 November 2011 before 6 January 2012, but he did not.

17. An oral meeting was called for and held on 27 January 2012.

18. The procedural hearing envisaged under section 41 of the Employment Act, 2007, can, depending on the nature and scope of employment and enterprise be conducted orally/face to face or through correspondence or a combination of both.

19. Where an employer has a disciplinary policy in place, it ought to comply with such policy.

20. In the present case, the Claimant was put on written notice by the Respondent to make certain explanations but he ignored to respond and even in Court he did not offer any explanation as to why he did not respond.

21. A face to face meeting was held after which the Claimant was dismissed.

22. In the Court's view and in the circumstances of this case, the Court is satisfied that the Respondent was in substantial compliance with the requirements of procedural fairness because the Claimant knew that the Respondent wanted him to explain his performance but he failed to so explain and that he was also called upon through the letter of 29 December 2011 to explain the failure to respond and again he failed, which failure was followed with a face to face meeting.

23. The Court finds the summary dismissal was procedurally fair.

### ***Substantive fairness***

24. The Court has already alluded to the primary or principal reason for the summary dismissal of the Claimant (the failure to comply with requests for explanations as to the poor performance).

25. The discussion is therefore whether such conduct by the Claimant fundamentally breached an obligation arising under the contract of employment in terms of section 44(3) of the Employment Act, 2007.

26. In my view, the failure by the Claimant fell under the ground of knowingly failing or refusing to obey a lawful command to explain the poor performance.

27. The Court therefore finds that the summary dismissal was substantively fair.

### **Appropriate remedies**

#### ***Leave allowance***

28. Leave allowance as an entitlement is not pegged to the manner of separation.

29. The Respondent's witness admitted that the Claimant was owed Kshs 2,008/- on account of leave travelling allowance.

#### ***1 month pay in lieu of notice***

30. This head of relief is not tenable in light of the Court's finding on the question of fairness of dismissal.

#### ***Amounts held on security account***

31. The Claimant sought Kshs 25,134/50 on account of monies withheld as security which the Respondent's witness admitted was payable after 6 months of separation.

32. The Court will find that the said monies should be paid to the Claimant.

#### ***Compensation***

33. Compensation does not arise because of the finding on fairness of dismissal.

### **Conclusion and Orders**

34. The Court finds and holds that the summary dismissal of the Claimant was fair, but awards him and orders the Respondent to pay him

(a) Leave allowance	Kshs 2008/-
(b) Security account	Kshs 25, 134/50
<b>TOTAL</b>	<b>Kshs 27,142/50</b>

35. Save for the 2 heads of relief, the Cause is dismissed with no order as to costs.

**Delivered, dated and signed in Nakuru on this 14<sup>th</sup> day of October 2016.**

**Radido Stephen**

**Judge**

#### **Appearances**

For Claimant Mr. Kipkoech instructed by Gordon Ogola, Kipkoech & Co. Advocates

For Respondent Ms. Wachira instructed by Kagucia & Co. Advocates

Court Assistant Nixon