



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**CAUSE NO. 1082 OF 2013**  
**TERRY MAINA.....PLAINTIFF**  
**VERSUS**  
**EAST AFRICAN PORTLAND CEMENT**  
**COMPANY LIMITED..... RESPONDENT**

Mr. Edward Oonge for Plaintiff

Mr. Mccourt for Respondent

**JUDGMENT**

1. The suit was initially filed before The Chief Magistrate's Court at Nairobi as Civil suit No. 5483 of 2008.

2. In terms of the plaint, the plaintiff was employed by the respondent by a letter of appointment dated 27<sup>th</sup> September 2000 as a human resources officer in job grade 6 at a monthly salary of Kshs.181,530 and housing allowance of Kshs.35,000. The respondent was also to pay school fees for the plaintiff's children.

The appointment was on permanent and pensionable terms subject to six months probation.

3. In terms of the contract, termination was by either party giving three months notice upon completion of probation period. Plaintiff was also entitled to thirty (30) days annual leave.

The plaintiff worked continuously for the respondent until her employment was terminated by a letter dated 31<sup>st</sup> July 2003 by Mrs J. M. Mutua, human resources manger following a show cause letter written to the plaintiff, by Mrs J. M. mutua dated 24<sup>th</sup> May 2003.

4. The plaintiff was charged with two offences of;

- i. leasing of houses for staff without competitive bidding; and
- ii. leasing of houses for staff against Government Housing Policy.

The two offences were said in the letter to have arisen following investigations conducted by The Inspection Audit team appointed by the Ministry of Trade and Industry on 4<sup>th</sup> February 2003.

The plaintiff was notified that the offences were serious, and could render her to be summarily dismissed.

5. The respondent intended to institute disciplinary action against the plaintiff. Meanwhile the plaintiff was to respond to the charges within fourteen (14) days failing which the disciplinary process would proceed without any further reference to her.

6. The plaintiff responded to the notice to show cause vide her advocates Messrs Oraro & Co. Advocates by a letter dated 29<sup>th</sup> May 2003 in which she denied the offences and stated that her role was simply to identify suitable houses for occupation by respondent's staff and that she was not responsible for making the decision to lease or not to lease the identified houses. The decision was a collective management decision.

7. That the respondent was an independent legal entity with its own Board of Directors responsible for making various policies for its governance therefore the second charge of leasing houses contrary to Government Housing Policy did not arise at all. The respondent had in place a housing policy. The plaintiff denies that she committed the alleged offences at all.

8. The plaintiff alleged that this was a calculated witch-hunt against members of one community.

The plaintiff told the court that the respondent unlawfully terminated her salary and did not receive the salary for May 2003. Notice was also given to the landlord in respect of the house occupied by the plaintiff to terminate the lease even before the disciplinary process, an indication of a clear intention to lynch the plaintiff.

9. The respondent responded to the response to the notice to show cause by terminating the employment of the plaintiff by a letter of termination dated 31<sup>st</sup> July 2003 by J. M. Mutua. Mrs Mutua stated in the letter that the response by the Advocates for the plaintiff was unsatisfactory and the employment of the plaintiff was terminated with effect from 1<sup>st</sup> August 2003. Her benefits less liabilities were to be computed immediately and same would be payable on 24<sup>th</sup> August 2003.

10. The plaintiff wrote an appeal to the office of the President dated 18<sup>th</sup> November 2003. The Ministry of Trade and Industry wrote to the managing director of the respondent to investigate the matter on 1<sup>st</sup> December 2003.

11. By a letter dated 24<sup>th</sup> February 2004, the Acting Managing Director M/S Mary W, Ngari confirmed the termination stating that it was for just cause and the decision was ratified by the Board. Mr. Ole Mapelu Zakayo, the Managing Director reiterated to the Permanent Secretary, Ministry of Trade and Industry the contents of the letter earlier written by the Acting Managing Director confirming the termination.

12. The employment of the plaintiff was done together with seven (7) colleagues in senior positions. This was done by the Human Resources Committee which authorised the Managing Director to effect the terminations.

13. The plaintiff testified under oath in support of her case and filed written submissions. The plaintiff is categorical that the termination was wrongful, unfair and maliciously done and prays for the reliefs set out under paragraphs 10 of the plaintiff totaling Kshs.2,826,830 and itemized as;

- a) four 4 months salary Kshs.726,120;
- b) house rent for three (3) months Kshs.105,000;
- c) unpaid school fees benefits Kshs. 589,000;
- d) salary in lieu of notice Kshs.544,590;

e) thirty (30) days leave Kshs.181,530;

f) pension benefits kshs.680,590.

14. The plaintiff also claims general damages for mental distress; anguish and agony as a direct consequence of the defendant's unlawful conduct.

## **Defence**

15. The defendant filed a defence dated 13<sup>th</sup> October 2008, denies the particulars of claim and reiterated that the plaintiff was found guilty of gross misconduct to wit;

i. leasing houses for staff without competitive bidding; and

ii. leasing houses for staff contrary to the company's housing policy.

16. That the conduct by the plaintiff was in contravention of defendant's Standing Rules, Regulations and Policies.

17. That the matter was investigated in February 2003 and the plaintiff was asked to show cause by a letter dated 24<sup>th</sup> May 2003. That the notice to show cause was responded to by a letter dated 29<sup>th</sup> May 2003 written by the plaintiffs Advocates. That upon deliberation, the Human Resources Committee of the Board of Directors resolved that the plaintiff's letter was unsatisfactory and the defendant summarily terminated the plaintiff's employment with effect from 1<sup>st</sup> August 2003.

18. The defendant called Roseline Ominde, (RW1), a legal officer of the defendant to testify in support of its case. RW1 was employed by the respondent in the year 2009 long after the termination of the employment of the plaintiff. RW1 had no personal knowledge of the subject matter and relied on the company records in the plaintiff's file.

19. RW1 told the court that the plaintiff earned Kshs.181,545.55 per month less deductions of a car loan at Kshs.20,000 per month; other loans Kshs.12,500, advance salary Kshs.15,000. That at the time of termination the car loan balance was Kshs.1,300,000. Other loans Kshs.10,000 and advance recovery Kshs.73,032. That these amounts were owed by the plaintiff as at April 2003 and are outstanding to date.

20. RW1 stated that the pension scheme was independent of the defendant and should be claimed directly and not from the defendant upon presentation of the letter of termination. RW1 was not aware if the plaintiff had received the pension from the fund.

21. RW1 added that the plaintiff's personal file went missing from the Human Resource Department and had not been found to date.

22. RW1 stated that the plaintiff was not paid any terminal benefits because her liabilities exceeded the amount due to her from the defendant.

23. Under cross examination RW1 was hard pressed to explain the source of his testimony given that he was not in possession of the plaintiff's records.

RW1 did not explain why if his evidence was true, there is no counter claim before court.

24. RW1 denied that the plaintiff was targeted on the basis of her tribe stating that her written response was not satisfactory hence the termination.

25. RW1 told the court that the monies owed by the plaintiff were written-off as a bad debt. That the defendant had instituted a claim against the plaintiff but the same was struck-off by the court. The

company did not appeal the decision.

26. RW1 also confirmed that no statement of account was filed by the respondent in court.

27. The defendant prays that the suit be dismissed with costs.

## 28. **Determination**

The issues for determination are as follows;

- i. Was the termination of employment of the plaintiff for a valid reason and in terms of a fair procedure?
- ii. Has the plaintiff proved the liquidated claims?
- iii. Is the defendant entitled to any set-off in respect of monies allegedly owed by the plaintiff to the defendant?
- iv. Who to pay the costs of the suit.

### **Issue i**

29. The particulars of employment including terms and conditions thereof are not in dispute.

30. The plaintiff disputes that she committed the two offences levelled against her by the defendant stating that her role was only to identify houses to be leased for staff and these were submitted to management to make a corporate decision on whether to lease the houses or not. That in terms of the company policy, the company leased houses for its staff. That she had no authority as a Human Resources Officer to do that. The defendant was not able to produce any evidence, documentary or otherwise to discredit these allegations by the plaintiff.

31. The testimony by the plaintiff is consistent with the contents of the letter responding to the notice to show cause.

32. It is not in dispute that the plaintiff was not summoned to appear before the human Resources Committee to answer to the charges levelled against her.

33. The decision was therefore taken without following the provisions of Section 41 of the Employment Act, 2007 which mandates an employer before summarily dismissing an employee or terminating the employment of an employee to allow the employee to appear before the employer with a colleague of choice to hear the employee's or the colleague's representation before taking an adverse decision.

34. The respondent did not even attempt to show how leasing of houses for staff was "*against Government Housing Policy*" when it is clear that the respondent is an autonomous corporate entity with its own '*housing policy*' determined by its own board of directors.

35. The procedure followed by the respondent in disciplining the plaintiff clearly contravenes its own procedure titled;

74 "(f) **Disciplining inquiry**, which reads: "*on completion of the investigation the employee will be called upon to show cause why disciplinary action should not be taken against him. He will be required to submit his written explanation to the Human Resources Manager within sixty (60) hours.*"

#### **g). *Disciplinary Committee***

*The Disciplinary Committee shall comprise the Human Resources Manager as chairman and not*

*more than five (5) members from the union at the Branch Level.*

**h). Disciplinary proceedings**

*Charges levelled against the employee shall be read to him and he will be given adequate opportunity to defend himself.”*

36. It is blatantly clear that the defendant violated, not only Section 41 of the Employment Act, but also did not follow its own disciplinary procedure aforesaid.

37. Accordingly, the plaintiff has proved on a balance of probability in terms of Section 47 (5) of the Employment Act, 2007 that the termination of her employment was wrongful and has also demonstrated that the same was not done in terms of a fair procedure contrary to Section 43 (1) as read with Section 45 (1) (2) (a) (b) & (c) of the Employment Act, 2007.

**38. Issue ii**

Is the plaintiff entitled to the reliefs sought?

a) It is not in dispute that the plaintiff was not paid a monthly salary for the month of May 2003. Termination of employment was with effect from 1<sup>st</sup> August 2003. The plaintiff has demonstrated that she is entitled and was not paid salary for the months of May, June and July. The court awards her Kshs.544, 590 accordingly.

b) The plaintiff was also removed from her house while the disciplinary process was on-going. She is therefore entitled to house rent for the three (3) months period in the sum of Kshs.105,000 in terms of the letter of appointment which provided for housing or payment in lieu of housing.

c) The plaintiff has also proved that she was entitled to school fees benefits for the children which was unpaid as at the time of termination in the sum of Kshs.589,000. The same is awarded to her accordingly.

d) Following the finding that the termination of the employment of the plaintiff was unlawful, and in terms of the contract of service, the plaintiff is entitled to payment in lieu of three months notice since she was summarily terminated from employment. The court awards her Kshs.544,590 in lieu of notice.

e) The plaintiff has also proved that she was entitled to thirty (30) days leave or payment in lieu thereof as at the time of the termination. The court awards the plaintiff Kshs.181,530 in lieu of thirty (30) days leave.

f) With regard to the pension benefits, the respondent is directed to provide the necessary clearance and documentation to the plaintiff to access her pension benefits from Alexander Forbes in the sum of Kshs.680,590 within thirty (30) days of this judgment.

**General Damages**

39. In terms of section 49(1) as read with (4) of the Employment Act, 2007, the plaintiff having proved that the termination of her employment was wrongful and unfair is entitled to compensation or general damages in respect thereof.

In this respect, it is apparent that no offence was properly proved against her. She did not contribute to the termination therefore. The plaintiff was prematurely removed from company housing and was not paid any terminal benefits. This was calculated to inflict maximum pain and suffering on her. The plaintiff did not even receive salary for days worked. The plaintiff lost a good job with high career prospects, without notice and in a most cruel manner. The action of the employer violated the dignity of the plaintiff

as she lost her own support and that of her children.

40. The defendant did not file any counter claim. A belated attempt to do so on the date of the hearing more than six (6) years after the suit was filed and defence filed was refused by the court in this suit. The respondent made unsubstantiated insinuations against the plaintiff that she caused her own file to disappear to avoid payment of monies she owed the company.

Nothing would have been easier than to place the counter claim before the court. These allegations added injury to the plaintiff.

41. Considering the circumstances of the case, and the maximum compensation set under Section 49 (1) (c) of the Act, the court awards the plaintiff ten (10) months salary as compensation for the wrongful and unfair termination of her employment in the sum of Kshs.1,815,300.

42. In the final analysis, the court awards to the plaintiff as against the defendant;

- a) Arrear salary of four (3) months Kshs.544,590;
- b) Arrear rental three (3) months Kshs.105,000;
- c) School fees benefits Kshs.589,000;
- d) In lieu of notice Kshs.544,590;
- e) In lieu of leave Kshs.181,530;
- f) Ten (10) months compensation Kshs.1,815,300;

**Total award Kshs.3,598,400;**

- g) The award in (a) (b) (c) (d) & (e) is payable with interest at court rates from the date of termination till payment in full.
- h) The award in (g) is payable with interest at court rates from date of filing suit till payment in full.
- i) The respondent is directed to provide the plaintiff with necessary clearance documents to access her pension in the sum of Kshs.680,590 plus accrued interest since date of termination from defendant's pension provider at the time, Alexander Forbes.
- j) Costs to follow the outcome.

**Dated and delivered at Nairobi this 18<sup>th</sup> day of November 2016**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**