



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**

**CAUSE NUMBER 1256 OF 2013**

**PAUL LEBOO.....CLAIMANT**

**VERSUS**

**DAVID MUTUTO MUMO.....1<sup>ST</sup> RESPONDENT**

**GRITS INDUSTRIES LIMITED.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The claimant in this suit averred that he was employed by the 2<sup>nd</sup> respondent as General Manager in Nairobi and Kitui where the 2<sup>nd</sup> respondent's flour mill was located. His net salary was Kshs.100,000/= per month. He further averred that his contract of employment provided that he would be advanced a car loan amounting to Kshs.2.1 million to be recovered from his salary at the rate of Kshs.15,000/= per month.
2. According to the claimant on or about 7<sup>th</sup> November, 2012 the 1<sup>st</sup> respondent arbitrarily and without any justifiable cause terminated his services without paying him his terminal dues. The respondents further took away his car after having paid Kshs.201,000 on account of the car loan.
3. The claimant contended that while in Botswana the 2<sup>nd</sup> respondent enticed him from his employment where he was earning Kenya shillings equivalent of 120,000/= and that his services were terminated before he could settle down in his employment with the respondents.
4. In view of the foregoing the claimant contended that he suffered loss and damage and sought an order of the Court for compensation in the sum of Kshs.2,270,000/= which comprised of the amount repaid as car loan, unpaid salary for 5 months, Kshs.120,000 per month for the unexpired period of his work permit in Botswana and thirteen months salary as damages for wrongful termination.
5. The respondent refuted the respondent's claim and averred that the claimant's contract was lawfully terminated in accordance with the terms of contract. Regarding the car, the respondent averred that it was the claimant who voluntarily returned the car to the respondent after he admitted inability to finance the loan balance then owing.
6. The respondent further denied that they had any role at all in the claimant terminating his employment in Botswana since the claimant was recruited after he applied for employment at the respondent's firm. The respondents further counter-claimed some Kshs.400,590 which they

averred was on account of private use of the motor vehicle by the time the vehicle was returned and expenses of service.

7. In his oral testimony in Court the claimant reiterated most of the averments in the statement of claim and further stated that he came to know the 1<sup>st</sup> respondent for the first time in 2010 in Botswana and was informed by him that he intended to start a milling plant based in Kenya. He incorporated the second respondent and asked me to join as the General Manager. He was issued with a letter of appointment containing his terms and conditions of service. On 7<sup>th</sup> November, 2012 while on leave, the claimant stated that the 1<sup>st</sup> respondent called him to meet him at the factory. When he went he was handed a termination letter.

8. The reason for termination as contained in the letter was continued poor business performance. According to him when he was hired, he was to start the operations of the 2<sup>nd</sup> respondent. It was his evidence that all he found was a steel structure. He oversaw the construction of the floor, the office block and the installation of the milling plant. This took him about a year. After the installation, the machine was commissioned, they milled samples and introduced them to the market in Kitui area. According to him, there was no poor business performance as the business had just started.

9. Concerning the car, it was his evidence that he was using the car both for personal and official duties and that he used it mostly to promote the 2<sup>nd</sup> respondent's products.

10. Regarding notice of termination and leave, it was his evidence that he was never paid in lieu of leave and that he was never paid three months wages in lieu of notice. He further stated that he was forced by circumstances to return the car since it was not registered in the name of the respondents but of a third party.

11. Regarding his status in Botswana, he stated that he was working for a company known as spinworld Pty and was earning an equivalent of Kshs.120,000/= per month and if he had not come to Kenya to work for the respondents he would have worked until March, 2014.

12. In cross-examination he stated that he was paid until date of termination and that performance was a condition in the letter of appointment. He further stated that he did not resign from his job in Botswana and that upon termination he returned to it.

13. The 1<sup>st</sup> respondent gave evidence stating that the claimant was a personal friend and that when he met him in Botswana he had financial problems. He suggested to him that he comes to Kenya and run for him the business of second respondent which he was setting up. According to the 1<sup>st</sup> respondent, there were two limiting factors to the appointment one was that the claimant had to accept the appointment and second, he had to ensure the business was performing. It was his evidence therefore that the claimant's services were terminated on 7<sup>th</sup> November, 2012 on grounds of poor business performance and that the claimant was given 3 months notice as provided in the contract and paid his salary for the three months while serving notice. It was his testimony that upon being served with notice of termination, the claimant proceeded on leave and never returned.

14. Concerning the company vehicle, the 1<sup>st</sup> respondent testified that the claimant was allocated a company car instead of a loan. According to him, the company purchased for the claimant a car for his full time use. The claimant was to make monthly instalment of Kshs.15,000/= and that by the time of his termination the company had recovered Kshs.135,000/= leaving a balance of Kshs.400,590 which the respondents counterclaimed from the claimant.

15. In cross-examination he stated that the car was in the name of the seller and the transfer was to be done once the agreed amount was paid in full. Regarding the business of the 2<sup>nd</sup> respondent, he admitted that it was a new venture and the claimant came at the commencement of the

company. He further admitted that he could not tell production level at the time the claimant was terminated but it was below per. He further stated that he had no documents on production orders. Concerning targets that the company was expected to break even in one year he however conceded that he had no documents setting targets in Court.

16. By a letter dated 7<sup>th</sup> November, 2012 the respondents terminated the claimants services effective 7<sup>th</sup> February, 2013. This was in accordance with terms and conditions contained in the letter of appointment. The claimant cannot therefore claim that his services were terminated contrary to the contract of employment or the Employment Act. He contended that his services were terminated while he was on leave. Nothing in law prevents an employer from terminating the services of an employee who is on leave provided there are justifiable reasons for doing so and procedures laid down in the contract or Employment Act are followed since an employee on leave is still in the employment of his employer and subject to terms and conditions of service. There may be arguments over the rationale and or fairness of terminating an employee while on leave but where circumstances demand it and such employee is afforded an opportunity to be heard as stipulated under section 41 of the Employment Act, termination can still occur.

17. The claimant herein in his evidence which was not disputed by the respondent, stated that on 7<sup>th</sup> November, 2012 he was called by the 1<sup>st</sup> respondent and issued with termination letter on the grounds of poor performance. It is not clear and no evidence was placed before the Court on whether before terminating the claimant's services the respondent explained to him in what way and extent his performance was considered below par and whether the claimant was offered an opportunity to make any representations concerning the accusations against him. Further, the 1<sup>st</sup> respondent admitted in cross-examination that he had no document or report on the targets that were set for the claimant and in what way the claimant failed to execute his duties leading to poor performance. The foregoing if conjoined with the claimant's testimony that the company had just been established and by the time his services were terminated for non-performance they had just released the first samples into the Kitui area market, serve as a proof that the claimant services were terminated for invalid and or unfair reasons and the Court so finds. The Court therefore awards him eight month's salary as compensation for unfair termination of services.

18. Concerning the claim and counter-claim over the car and related expenses, it was a term of the claimant's contract that he would be provided with a vehicle for company business. The contracts further provided that an interest free car loan of Kshs.2.1 million would be advanced and recovered at the rate of Kshs.15,000/= per month. The respondent neither provided the claimant with the official car nor provided him with the Kshs.2.1 car loan. The 1<sup>st</sup> respondent instead informed the Court that they decided to buy the claimant a car but repay for it at the rate of Kshs.15,000/=. It was further his evidence that by the time the claimant's services were terminated he repaid Kshs.135,000/= leaving a balance of Kshs.400,590/= which the respondents counterclaimed for. Whereas no sale agreement for the car was produced to reveal the agreed purchase price by a simple arithmetic, taking the amount repaid and the balance outstanding at the point of termination would show the car was purchased at Kshs.535,590/=. The 1<sup>st</sup> respondent however stated that the vehicle would have been transferred to the claimant's name once the full purchase price was paid. This means the respondent never paid for the vehicle and could therefore not counterclaim for it. Further, on proper construction of the employment contract the car loan was personal and in addition to the company vehicle which the respondent never provided but opted to buy a car. The counterclaim therefore fails and is hereby dismissed with costs.

19. In conclusion the Court finds that the claimants services were unfairly terminated by the respondent for reasons given earlier in the judgment and awards him Kshs.800,000/= being eight months salary as compensation for unfair dismissal. The claimant will further have the costs of the suit.

20. It is so ordered.

Dated at Nairobi this 30<sup>th</sup> day of October 2015

Abuodha J. N.

Judge

**Delivered this 30<sup>th</sup> day of October 2015**

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge