



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NAKURU**

**CAUSE NO. 155 OF 2013**

**(Formerly Cause No.315 of 2011 at Nairobi)**

**MICHAEL KIMANI.....1<sup>ST</sup> CLAIMANT**

**CECELIA WANGUI WAITHAKA.....2<sup>ND</sup> CLAIMANT**

**-VERSUS-**

**NGOTHO COMMERCIAL AGENCIES LIMITED..... RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 17<sup>th</sup> October, 2014)

**JUDGMENT**

The memorandum of claim was filed on 09.03.2011 through Gordon Ogolla & Associates. The claimants prayed for judgment against the respondent for pay in lieu of termination notice; pay for public holidays; overtime on Saturdays; overtime on weekdays, underpayments; pay for annual leave due but not taken; refund of contributions to Ngotho Maryland Self Help Group and further claim for 12 months' pay for unfair termination.

The respondent's memorandum of claim was filed on 30.03.2012 through Karanja Mbugua & Company Advocates. The respondent stated that the claimants were not entitled to the reliefs as prayed for and the claimant's case be dismissed with costs.

The court has considered the pleadings, the evidence and the submissions on record. The only issue for determination is whether the claimants are entitled to the reliefs as prayed for. The court makes findings as follows.

1. There is no dispute that the claimants were employed by the respondent and the parties agreed to payment by commission. Accordingly, the court finds that the claims and prayers with respect to underpayment will fail.
2. Throughout the employment relationship there was no dispute about working hours and days of work. The court finds that the claims on overtime, public holidays and Saturdays will therefore fail especially that the evidence shows that the parties agreed on payment by commissions.
3. The court finds that Ngotho Maryland Self Help Group was an entity separate from the respondent and the court further finds that the claims and prayers in that regard will fail.
4. The 1<sup>st</sup> claimant was given compulsory leave by the suspension letter on 2.11.2010 and was to report back to work on 30.01.2011. While on the mandatory leave he discovered that the

respondent had written to tenants the letter dated 1.12.2010 conveying that the 1<sup>st</sup> claimant was no longer in the respondent's employment. The court finds that the termination was unfair as it was without due notice and hearing as envisaged in section 41 of the Employment Act, 2007.

5. The 2<sup>nd</sup> claimant was required by the respondent to go on compulsory leave for 2 months on account of defective electrical cables. The outcome of alleged investigations was not communicated and the claimant filed the suit. The court finds that the claimant was entitled to consider herself terminated. In the opinion of the court the constructive termination was unfair for want of a valid reason as envisaged in section 43 of the Employment Act, 2007.
6. The court has considered that the claimants did not contribute to their termination in any manner, they had served with due diligence at the inception of the respondent's business, they expected to continue in employment and the court finds that each claimant is entitled to 12 months' gross salaries at the rate of their respective last gross monthly pay.

In conclusion, judgment is entered for the claimants against the respondent for:

1. The declaration that the respondent's termination of the claimants' employment was unfair.
2. The respondent to pay each claimant 12 months' gross salaries at the rate of their respective last gross monthly pay; one month pay in lieu of termination notice and pay in lieu of annual leave as prayed for in the memorandum of claim; and the respondent to pay by 1.12.2014 failing interest to be payable at court rates till full payment.
3. The claimants to file and serve the computation of the dues in order (2) above, within 7 days, and to record the quantum on a convenient mention date.
4. The respondent to pay costs of the suit.

**Signed, dated and delivered in court at Nakuru this Friday, 17<sup>th</sup> October, 2014.**

**BYRAM ONGAYA**

**JUDGE**