



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO 110 OF 2016**

**JONATHAN CIANO.....CLAIMANT**

**VERSUS**

**UCHUMI SUPERMARKETS LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The claimant was appointed as a Specialized Receiver Manager of the respondent, on a renewable contract with effect from 14<sup>th</sup> July, 2006. He was subsequently appointed to the position of Chief Executive Officer (CEO), when the respondent's receivership was lifted.

2. The claimant avers that he served the respondent with due diligence hence its business grew both locally and regionally. Indeed, by all indication, everything seemed well in the employment relationship until 10<sup>th</sup> June, 2015, when the claimant was directed to proceed on leave by the respondent's Board so as to allow for a forensic audit to establish whether there was misappropriation of funds. The claimant avers that on 15<sup>th</sup> June, 2015, he was asked by the Chairperson of the respondent's Board to attend a meeting where he was given a letter terminating his services on grounds of gross misconduct and gross negligence. He denies the allegations of gross misconduct and gross negligence and has termed the termination as unfair and unlawful. It is against this background that he now prays for the sum of **Kshs 47,410,222/=** being notice pay; accrued leave days; compensatory damages for unfair and unlawful termination; salary for 13 days worked in June, 2015; and gratuity.

3. The respondent opposed the claim and denied that the claimant executed his duties with due diligence and to its satisfaction. The respondent further averred that whilst engaged in the course of his employment and on a frolic of his own, the claimant acted negligently and failed to exercise any reasonable care and skill expected of a CEO. That as a result, the respondent had suffered trading losses leading to its near collapse and erosion of its stocks on the Nairobi Stocks Exchange. The respondent further contended that the claimant had conscientiously and voluntarily resigned from his position on 13<sup>th</sup> June, 2015 and later on 22<sup>nd</sup> June, 2015 from its Group of Companies. That as such, the termination letter of 15<sup>th</sup> June, 2015 from the respondent's Board Chair was unnecessary as the claimant had ceased employment.

4. The matter proceeded for part hearing on 23<sup>rd</sup> September, 2021 when the claimant rendered testimony in support of his case. The matter was adjourned to 22<sup>nd</sup> November, 2021, when the defense presented and closed its case, thus marking the end of the trial.

**Claimant's case**

5. In his testimony before Court, the claimant stated that he was the respondent's Group CEO and that he was head hunted for the position since the respondent had been delisted from the Nairobi Stock Exchange (NSE) and placed under receivership. That his main task was therefore to re-operationalize the respondent. That subsequently, he embarked on a rescue plan and under his leadership, the respondent started reopening its branches strategically, paying off suppliers and recruiting more employees. That as a result, the respondent's sales increased tremendously. That sometimes in 2010, the respondent was readmitted back to the NSE and around the same time, he was also appointed as the interim CEO of the respondent upon lifting of the receivership. That indeed, between 2007-2014/2015, the respondent was making profits. That the only loss it registered was in 2015/2016 but at the time, its capital value had increased. It was the claimant's testimony that by the time he was terminated from employment, the respondent was valued at about Kshs 7 billion and the only outstanding loan was in the sum of Kshs 182 million on account of the ICDC.

6. As regards, the Rights Issue, the claimant testified that the respondent's Board approved the same and it yielded slightly below Kshs 1 billion against the target of Kshs 1.5 billion. Nonetheless, he maintained that it was well subscribed. The claimant added that the Rights Issue was the Board's project and not the management's. That there were various players including transactional advisors, legal experts, the receiving bank and a marketer. That it is the receiving bank that received all the proceeds of the Rights Issue.

7. It was his further testimony that on 9<sup>th</sup> June, 2015, the respondent's Board indicated that it would conduct an audit on the Rights Issue hence together with the Finance Manager, they were asked to proceed on leave. That he asked the Chair of the Board to allow him resign from his position as CEO, but his request was declined. That he was informed by the Chair of another meeting that was slated for 15<sup>th</sup> June, 2015. That he went ahead and showed his letter of resignation to the Chair, who informed him that the same had been rejected by the Board and that his employment would be terminated. Subsequently, he was given a letter of termination dated 15<sup>th</sup> June, 2015. That as he received his letter of termination, he noted in writing that he will await the outcome of the forensics audit.

8. That on his way from the meeting, he received a 411 SMS alert, to the effect that his employment had been terminated on grounds of gross misconduct and gross negligence. That subsequently, he was not allowed near the office hence could not do a proper handing over. That afterwards, he resigned as a Director in all the other subsidiaries of the respondent as well as other companies, where he was a director. That he also resigned from his position as chair of the disciplinary committee of the Institute of Certified Public Accountants of Kenya (ICPAK). It was the claimant's further testimony that to date he is yet to be served with the forensics report from the audit commenced by the respondent upon his exit. That further, he was never investigated despite presenting himself to the DCI.

9. He concluded his testimony by stating that following his termination, he was not paid terminal dues by the respondent, including the salary for the period worked in June, 2015 and his gratuity. That the negative publicity had affected him badly to the extent of ruining his career which had spanned close to 30 years.

10. In cross examination, he denied that his wife was one of the suppliers of the respondent as that would have amounted to a conflict of interest. He further denied recruiting any person, including the then Finance Manager, Chadwick Okumu, to the management of the respondent.

11. In further cross examination, the claimant maintained that his strategic plan was a success. And that during his tenure, the respondent had moved from a negative income to profitability. He further defended the respondent's reopening of the branches and termed the same as a cautious outreach. He also denied responsibility for the economic down turn experienced by the respondent. He blamed the same on the respondent who it averred had recruited consultants who lacked experience in retail business. He defended his tenure by stating that the suppliers and staff salaries were always paid on time.

### **Respondent's case**

12. The respondent called oral evidence through its Human Resource Manager, Ms. Elizabeth Oyombe, who testified as RW1. She adopted her witness statement to constitute part of her evidence in chief. She told Court that she was well versed with the claimant's case based on the records held in his personal file. Ms. Oyombe stated that the claimant was not terminated and that he is the one who tendered a resignation letter on 13<sup>th</sup> June, 2015. That as such, the termination had no effect and the claimant could not claim unfair termination.

13. Ms. Oyombe further stated that the respondent was seriously run down and brought to its knees as a result of the claimant's poor management. That further, the claimant failed to adhere to his contractual terms and did not conduct the affairs of the respondent with prudence. That as at today, the respondent is on its knees and is unable to pay suppliers and settle debts incurred while the claimant was the CEO. Ms. Oyombe further told Court that the claimant's terminal dues had been computed but was not certain whether the same had been paid out to him. She asked the Court to dismiss the claim with costs.

14. In cross examination, Ms. Oyombe admitted not seeing any audit in respect of the claimant's case.

### **Submissions**

15. The claimant submitted that the issuance of the termination letter by the respondent signified its refusal to accept his resignation. It was further submitted that the respondent had failed to prove the validity of the reasons for the claimant's termination. That the respondent had failed to discharge the burden of proving that the claimant's termination was fair and justified as required under sections 41, 43 and 45 of the employment Act. The case of **Abisalom Ajusa Magomere vs Kenya Nut Company Limited (2014) eKLR**, was cited in support of the claimant's submissions.

16. On the other hand, the respondent denied that the claimant's termination was unlawful, wrongful and unfair within the meaning of the Employment Act. It submitted that the claimant had not approached the Court with clean hands and that he was not entitled to the prayers sought. In support of its submissions, the respondent invited the Court to consider the findings in the case of **Pius Kimaiyo Langat vs Cooperative Bank of Kenya Ltd (2017) eKLR** and **Pius Machafu Isindu vs Lavington Security Guards Limited (2017) eKLR**.

### **Analysis and determination**

17. Flowing from the pleadings, the submissions and evidence on record, this Court is being called to resolve the following questions;

**a) Was the claimant's resignation valid?**

**b) If the answer to (a) is in the affirmative, was the claimant's subsequent termination of any effect?**

**c) If the answer to (b) is in the affirmative was the claimant's termination unfair and unlawful?**

**d) Is the claimant entitled to the reliefs sought?**

**Was the claimant's resignation valid?**

18. On record and as part of the respondent's documents, is a letter of resignation dated 13<sup>th</sup> June, 2015, emanating from the claimant. I will reproduce the same, thus;

*"Dr. Jonathan Ciano, MBS*

*P O Box 49711-00100*

*Nairobi*

*13<sup>th</sup> June 2015*

*Lady Khadija Mire*

*Board Chairperson*

*Uchumi Supermarkets Ltd*

*P. O. Box 73167-00200*

*Nairobi*

*Lady Chairperson*

*Termination of Contract Service as Group CEO*

*I have worked in Uchumi for the last nine years by the end of June 2015, I have given it all including my passion and total commitment to the best of my ability with milestones well documented in the intervening period.*

*In the recent past retail sector particularly in East Africa has gone through rocky patches and in particular from 2013-2015. Over fifteen retail operators in the region have folded and or taken over.*

*With the delayed Right Issue funding that was envisaged in 2012 (AGM approval) of over fifteen months watered down by the price erosion through the corporate invasion and attacks of Uchumi share from various circles during the delayed R1 launch, among others the share price remains low and requirement for funding working capital has lagged behind business and transaction needs.*

*With current change in shareholding and board in Uchumi the six weeks hold back from Board for approval to borrow so as to fund the suppliers overdue to restore suppliers and customers confidence, demonstrating lack of confidence to the Uchumi executive and CEO it has become very difficult for me to successfully implement the corrective action.*

*In view of the foregoing I wish to terminate the remain part of my contract within the precepts of the appointment terms with immediate effect as per the date above.*

*However, in order to ensure smooth handover, I am available to handover during the notice period and also ready to give cooperation to ensure strength of our brand is not eroded any farther.*

*Meanwhile on leave or when the board would require me to resume I will be available as I also prepare to pursue my personal agenda with the family who I also plead you allow me to protect from stress they are going through currently.*

*I wish to thank the Board, yourself and my team of 4500 staff in Uchumi profusely for the time and cooperation it has accorded me during the period.*

*Thank you again*

*Jonathan Ciano"*

19. In his testimony in chief, the claimant told Court that he handed over the letter of resignation to the Chairperson of the respondent's Board but she declined to receive the same.

20. There is no response from the respondent, acknowledging or accepting the claimant's letter of resignation. It is therefore imperative to determine whether the said resignation was effective and valid?

21. The Black's Law Dictionary (10<sup>th</sup> Edition) defines the term resignation to mean: -

**“The act or an instance of surrendering or relinquishing an office, right or claim. A formal notification of relinquishing an office or position; an official announcement that one has decided to leave one’s job or organisation, often in the form of a written statement.”**

22. In the instant case, the claimant unequivocally announced his intention to relinquish his position as the group CEO of the respondent with immediate effect.

23. In the case of **Edwin Beiti Kipchumba vs National Bank of Kenya Limited [2018] eKLR**, Rika J found that **“resignation by an Employee from employment, is basically termination of employment at the instance of the Employee. It is a unilateral act. The Employment Act does not require the Employer to accept a notice of termination issued by the Employee, for that notice to take effect.”**

24. I fully agree with the position espoused in the above decision and find that once the claimant had formally notified the respondent of his intention to relinquish his position as the group CEO, the same took effect immediately and it did not matter whether or not the resignation was accepted.

25. In the circumstances, I find and hold that the claimant’s resignation was valid and did not require further action on the part of the respondent. It was complete on its own.

26. Having found as much, was the subsequent termination by the respondent effective?

### **Effect of the termination by the respondent**

27. The respondent issued the claimant with a letter of termination dated 15<sup>th</sup> June, 2015. The letter reads as follows;

“15<sup>th</sup> June, 2015

To: Jonathan Ciano

Nairobi

Dear Jonathan

#### **RE: TERMINATION OF CONTRACT**

*The Board of directors of Uchumi Supermarkets Limited has terminated your contract with immediate effect. The Board terminates your contract due to the following:*

i. Gross misconduct; and

ii. Gross negligence.

Yours faithfully,

Khadija Mire

Board Chair.”

28. It is evident that the letter of termination from the respondent came two (2) days after the claimant had already tendered his letter of resignation. Thus, was the same of any legal consequence?

29. In the case of **William Kariuki vs Kenya Civil Aviation Authority [2008] eKLR**, the Court held that **“In this Court’s opinion, the plaintiff having resigned from the defendant’s employment and the defendant having accepted that resignation which fact was being acknowledged in the letter complained of, the relationship of employer/employee had been thereby severed.”**

30. Further, in the South African case of **Lottering vs Stellenbosch Municipality, (2010) 31 ILJ 2923 (LC)**, the Court found as follows: -

**“That the resignation is a final unilateral termination of the employment contract and once the applicant had submitted the first resignation that was the end of the contract. This means that there was no longer a contract of employment once she resigned.”**

31. In yet another case of **Kennedy Obala Oaga vs Kenya Ports Authority [2018] eKLR**, the Court cited the South African case of **Mtati vs KPMG (Pty) Ltd (2017) BLL 315 (LC)** where it was held that where an employee tenders a resignation immediately, there and then, the employer is deprived of jurisdiction to continue with the disciplinary process as resignation takes effect immediately. The Court went on to hold that **“Authority to discipline the Employee is based on the existence of a contract of employment. Without a contract, there is no authority.”**

32. Following with the holding in the above decisions which I wholly adopt, it is the Court's finding that the claimant's resignation took effect immediately thus signifying the end of the employment relationship and subsequently, the respondent lost jurisdiction over him as an employee. That included the right to terminate his employment.

33. To this end, the claimant's resignation being valid and having taken effect on 13<sup>th</sup> June, 2015, the employment relationship was severed and the contract of employment ceased with immediate effect. Therefore, as at 15<sup>th</sup> June, 2015, when the respondent purportedly terminated the claimant's employment, the employment relationship had long ceased to exist. There was nothing to terminate. The claimant had fired the first salvo and effectively extinguished the contract of employment. The termination by the respondent was akin to flogging a dead horse.

34. Indeed, upon receiving the letter of termination, the claimant remarked as follows in writing: -

*"I acknowledged receipt with gratitude and I wish to refer to my termination of contract letter dated 13 July (sic) 2015. I also await the forensic audit exercise findings to furnish the board with response for the benefit of our (illegible) and staff. Thank you. Signed. Jonathan Ciano"*

35. From the foregoing, the claimant was very clear in his mind that he had already tendered his resignation and was no longer an employee of the respondent.

36. It was of no legal consequence for the respondent to terminate a non-existent contract of employment. In this respect, I find and hold that the purported termination by the respondent through its letter dated 15<sup>th</sup> June, 2015, to be of no effect hence is null and void.

37. Having found that the termination by the respondent to be null and void, it is not logical to determine whether the same was unlawful and unfair. As held in the case of **Kennedy Obala Oaga vs Kenya Ports Authority (supra)**: -

**"Summary dismissal was null and void, not based on an Employer-Employee relationship, and it makes no sense to inquire whether, or declare, such a decision is fair or unfair. The decision must be treated as if it was never made. It was null and void, without any legal consequences. To say it was unfair, would suggest that decision has legal consequences.**

38. Therefore, I do find that no determination can be made by the Court as regards the fairness or otherwise, of the termination by the respondent.

#### **Reliefs**

39. As there has been no finding on unlawful termination, the claim for compensatory damages cannot be sustained.

40. The respondent acknowledged that the claimant had accrued 24 leave days and as such, I find that he is entitled to be compensated for the same.

41. The claimant is also entitled to salary for the days worked in June, 2015.

42. The respondent in its defence admitted that as per its computation, the claimant is entitled to terminal dues in the gross sum of **Kshs 6,574,850.95/=**. There is no evidence that the said dues were paid out to the claimant. In the circumstances, the claimant is entitled to the said terminal dues which constitute salary, untaken leave days and gratuity.

#### **Orders**

43. In the final analysis, the Court arrives at the determination that the claimant effectively resigned on 13<sup>th</sup> June, 2015 and his subsequent termination on 15<sup>th</sup> June, 2015, by the respondent was null and void.

44. The claimant is entitled to the sum of **Kshs 6,574,850.95/=** being his terminal dues and the respondent is to release the same forthwith.

45. The claimant shall be entitled to the costs of the suit, as it is the respondent's conduct of purporting to terminate him after he had tendered his resignation, that triggered the instant suit. The respondent should therefore bear the consequences arising therefrom.

**DATED, SIGNED and DELIVERED at NAIROBI this 31<sup>st</sup> day of March, 2022.**

.....  
**STELLA RUTTO**

**JUDGE**

**Appearance:**

For the Claimant Mr. Wathome

For the Respondent Ms. Matata

Court Assistant Barille Sora

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court had been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**STELLA RUTTO**

**JUDGE**