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Strathmore University

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**CEO's Employment Rights During Dismissal Stage Under the
Employment Act**

---- An Analysis of Typical Kenyan Court Judgments

By

Wu Pengfei

111973



Master of Laws

2022

CEO's Employment Rights During Dismissal Stage Under the Employment Act

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Wu Pengfei



**Submitted in partial fulfilment of the requirements for the Degree of
Master of Laws at Strathmore University**

Strathmore University

Nairobi, Kenya

OCT 2022

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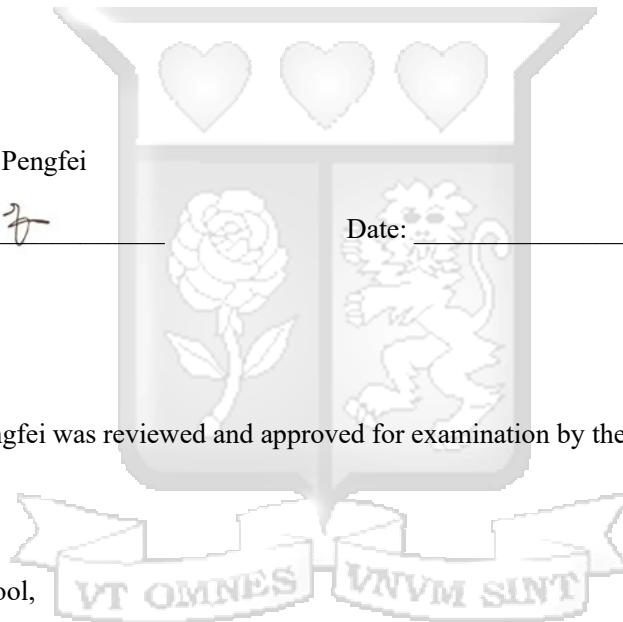
Approval

The thesis of Wu Pengfei was reviewed and approved for examination by the following:

Dr. Francis Kariuki,
Strathmore Law School,
Strathmore University

Dr. Peter Kwenjera,
Dean, Strathmore Law School,
Strathmore University

Dr. Bernard Shibwabo,
Director of Graduate Studies,
Strathmore University



Abstract

This study explored the basic definition of CEO under employment acts in different countries, typical CEO dismissal cases in Kenya, focusing on CEO employment rights, reasons of CEO dismissal, reasons why these disputes were finally filed as lawsuits in the courts, and how court entered into judgments on CEO dismissal cases. This study also tried to understand how companies could avoid CEO dismissal disputes, and how CEOs can seek their rights when facing with unfair or unlawful termination.

Anyone who focuses on corporation management and relevant studies will benefit from this study. The outcome of this study will assist CEOs to understand how to protect their employment rights; assist companies to have a better corporate governance, to meet compliance requirements, and to avoid potential CEO dismissal disputes from a structural level; in the meanwhile, this study will also assist legislators to have a look at the practice of employment legislation regarding CEO dismissal cases. The suggestions of this study can also provide a view of how the court may enter into judgment if a certain company and CEO seek to sort out CEO dismissal disputes out of court.

The outcome of this study is based on the research results of the current Kenya legislation and court judgments, which makes this study closer to the actual practice of CEO dismissal disputes.

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List of Abbreviations

Australia - The Commonwealth of Australia

CA - Canada

CEO - Chief Executive Officer

COTU(K) - Central Organisation of Trade Unions

CP Clause - Conditions Precedent Clause

ELRC - Employment and Labour Relations Court (Industrial Court)

FKE - Federation of Kenya Employers

GFD - Group Finance Director

HODs - Heads of Departments

HR Manual - Human Resources Manual

KKR - Kohlberg Kravis Roberts & Co.

KNBS - Kenya National Bureau of Statistics

LTIPs - Long-Term Incentive Plans

M&A - Mergers and Acquisitions

M&AA - Memorandum and Articles of Association

MLSP - Ministry of Labour and Social Protection

MoU - Memorandum of Understanding

MSME - Micro, Small and Medium Establishment

NASDAQ - National Association of Securities Deal Automated Quotations

NSE - Nairobi Securities Exchange

NYSE - New York Stock Exchange

PoA - Power of Attorney

PRC -The People's Republic of China

SHA - Shareholders Agreement

SMEs - Small and Medium Enterprises

SPA - Share Purchase Agreement

SZSE - Shenzhen Stock Exchange

UK -The United Kingdom of Great Britain and Northern Ireland

US -The United States of America

ZA - The Republic of South Africa



List of Cases

748 Air Services Limited v Theuri Munyi [2017] eKLR

Abigail Ayako v Kenyatta International Convention Centre [2018] eKLR

Alex Wainaina Mbugua v Kenya Airways Limited [2017] eKLR

Angela Ndambuki v Kenya National Chamber of Commerce & Industry [2018] eKLR

Bardal v. Globe & Mail Ltd. (1960), 24 D.L.R. (2d) 140 (Ont. H.C.) [Bardal], CA.

Benson K Nguti v Kenfreight (E.A) Limited [2014] eKLR

C.P.C. Industrial Products v Angima, Civil Appeal No. 197 of 1992, Kenya

E&LRC Cause No. 593 of 2015, Nursing Council of Kenya v. County Government of Nairobi & 5 Others, Kenya

Kenneth Wanjohi Kareithi v Olympia Capital Holdings Limited [2019] eKLR

Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eAZA

Kenya Ports Authority v Edward Otieno, Civil Appeal No. 120 of 1997, Kenya

Kenya Reinsurance Corporation Ltd v Eunice Mbogo [2019] eKLR

Kenfreight (E.A) Limited v Benson K. Nguti [2019] eKLR

Lake v GBST Holdings Limited [2019] QSC 253, Australia.

Munir Sheikh Ahmed v National Bank of Kenya [2020] eKLR

Pamela Nelima Lutta v Mumias Sugar Co. Ltd [2017] eKLR

Paul Wanyangah v Market Development Trust t/a Kenya Markets Trust [2017] eKLR

Post Bank Credit Limited (In Liquidation) v Nyamangu Holdings Limited, Kenya

Richard Boro Ndungu v KPMG East Africa Association & 3 others [2017] eKLR

Rift valley Textiles Ltd v Edward Onyango Oganda, Civil Appeal No. 2 of 1992, Kenya

Rose Aoko Ogwang Odhiambo v National Gender & Equality Commission [2018] eKLR

Safaricom Limited v Ocean View Beach Hotel Limited & 2 Others [2010] eKLR

Shem Andrew Gichimu v Higher Education Loans Board [2020] eKLR

Salomon v A Salomon and Co Ltd [1897] AC 22

Stephen Kirimi Ringera v David Mwiraria & 2 others [2016] eKLR

Teresa Carlo Omondi v Transparency International-Kenya [2017] eKLR

Xiao Yuhang v Ameba Fund Management Co., Ltd (2018) Yue 01 Min Zhong 19428 Hao, PRC

Yang Yan v Beijing Shenzhou Jierui Network Technology Co., Ltd (2018) Jing 0108 Min Chu 24242 Hao, PRC

Zanali “Zain” Jaffer v Vungle Inc. San Francisco County Superior Court, 000-19-574451, US

Michelle Harding v Petzetakis Africa (Pty) Limited, September 2011, ZA

List of Statutes and Conventions

Italy Civil Code, 1969

Kenya Arbitration Act, 1995

Kenya Companies Act, 2015

Kenya Companies (Beneficial Ownership Information) Regulations, 2019

Kenya Employment Act, 2017

Kenya Employment and Labour Relations Court Bill, 2011

Kenya Employment and Labour Relations Court (Procedure) Rules, 2016

Kenya Employment (General) Rules, 2014

Kenya Insolvency Act, 2015

Kenya Labour Institutions Act, 2007

Kenya Labour Relations Act, 2011

Kenya Labour Relations (General) Regulations, 2014

Kenya Trade Union Regulations, 1975

Regulation of Wages (General) Order, 2019

PRC Company Law, 2018

PRC Labour Law, 2018

Spain Royal Decree 1382/1985

US Fair Labor Standards Act, 1938

US Model Business Corporation Act, 2007

US National Labor Relations Act, 1935

US Taft-Hartley Act, 1947



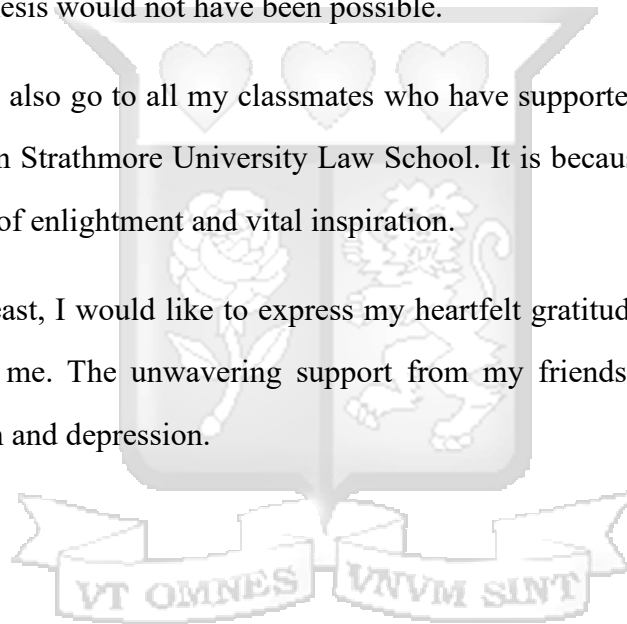
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Dedication

To my beloved parents who have offered their assistance whole heartedly from my birth. I would also like to dedicate this work to my girlfriend, my soulmate who has encouraged me and always stood by my side through ups and downs without a word of complaint.



Chapter 1: Introduction

1.1 Background to the Problem

This study is about Chief Executive Officer (CEO) dismissal and CEO employment rights under the Employment Act of Kenya, and the methods used in this study will be research and analysis on statutory laws and court cases of Kenya.

The basic issue of this thesis is that, what is a CEO's role in a company, and how to define the identity of a CEO in a company. Hence, as a commencement of this thesis, this research is also relevant to section 93A¹ of the Kenya Companies Act, 2015 and Kenya Companies (Beneficial Ownership Information) Regulations, 2020. Most founders and owners of a company are in a management position of a company, especially for Small and Medium Enterprises (SMEs). However, some of them (Founder CEOs) request employment benefits, while the others treat themselves as shareholders and do not claim any salary, even if the company gains good profit.²

CEOs make decisions and some of the decisions have extreme consequences to the company.³ In some companies, besides holding the identity of CEO in the company, CEOs are also founders and majority shareholders of a company. As for some professional CEOs, it is elementary to define them as employees. However, if professional CEOs hold a certain number of shares of the company, or get some other exclusive management power, the identity of the CEO can also be different.⁴

By researching different countries' economies and litigation history, there is a phenomenon that during the rapid economic growth period of most countries, senior executives' labour disputes against their companies also grows rapidly.⁵ In this paper,

¹ Every company (registered in Kenya) shall keep a register of beneficial owners of shares.

² See cases listed in Chapter 2.2.

³ Sani Saidu, *Theoretical and Conceptual Review of CEO Power*, International Journal of Academic Management Science Research (IJAMSR), Vol. 3 Issue 2, February 2019.

⁴ See Chapter 1.3 CEO's character as employee and employer.

⁵ See cases listed in Chapter 2.2, more Senior Executives Labour disputes filed in Kenyan Courts since 2015.

14 most typical CEO dismissal cases were cited. There were 4 cases⁶ filed in the court between 2010 and 2014, and 10 cases⁷ were filed in the court after 2015. Also, in the international field, the growing occurrence of CEO dismissals, and increasing academic interest in this area, motivated scholar's comprehensive multidisciplinary synthesis of the extant literature.⁸ Following the global economic development trend, Kenya becomes a rather magnetic place for new investments than before.⁹ By researching labour dispute litigation cases in Kenya, as the cases listed in Chapter 2.2, it can be found that labour dispute cases between CEOs and companies increased rapidly between 2015 and 2020.¹⁰ Among those cases, the CEO's capacity in a company varies. A CEO can be an employer because he/she shall recruit staff on behalf of the company, and in the meanwhile, a CEO is also an employee of a company for the reason that they are appointed to this position by the board of directors or the shareholders. In some cases of this research, CEOs in Kenya are founders or partners of the company, hence they shall be defined as beneficial owners or employers even if they were not directors. However, as long as they are appointed as CEOs, they shall be regarded as employees at the same time.

1.2 Problem Statement

⁶ The 4 most typical CEO dismissal cases filed in the court before 2015 and I cited in this thesis are: 748 Air Services Limited v Theuri Munyi [2017] eKLR, Rose Aoko Ogwang Odhiambo v National Gender & Equality Commission [2018] eKLR, Paul Wanyangah v Market Development Trust t/a Kenya Markets Trust [2017] eKLR, Kenya Reinsurance Corporation Ltd v Eunice Mbogo [2019] eKLR.

⁷ The 10 most typical CEO dismissal cases filed in the court after 2015 and I cited in this thesis are: Pamela Nelima Lutta v Mumias Sugar Co. Ltd [2017] eKLR, Alex Wainaina Mbugua v Kenya Airways Limited [2017] eKLR, Teresa Carlo Omondi v Transparency International- Kenya [2017] eKLR, Abigail Ayako v Kenyatta International Convention Centre [2018] eKLR, Stephen Kirimi Ringera v David Mwiraria & 2 others [2016] eKLR, Richard Boro Ndungu v KPMG East Africa Association & 3 others [2017] eKLR, Angela Ndambuki v Kenya National Chamber of Commerce & Industry [2018] eKLR, Kenfreight (E.A) Limited v Benson K. Nguti [2019] eKLR, Shem Andrew Gichimu v Higher Education Loans Board [2020] eKLR, Munir Sheikh Ahmed v National Bank of Kenya [2020] eKLR.

⁸ Rapp Tammy L.; Davis Walter D.; Gilson Lucy L.; and others, Chief Executive Officer Dismissal: A Multidisciplinary Integration and Critical Analysis, [J]Group & Organization Management Volume 46, Issue 2. 2021. pp. 362-398.

⁹ Kenya Vision 2030, *A Globally Competitive and Prosperous Kenya*, October 2007, p. 6.

¹⁰ See Chapter 2.1.

There is a long-existing conflict between the identity of the employer, founder, partner, owner, boss, manager (inclusive of CEO), beneficial owner and shareholder in a company. This paradox may also result in the problem of whether CEOs should be regarded as employees or employers. In most cases analyzed in this paper, from the perspective of common employees, CEOs are in a management position with absolute management power, and they are regarded as employers on behalf of the companies. The research of in this thesis will not challenge the principle mentioned in the *Salomon v A Salomon and Co Ltd* case, i.e., a limited liability company has an independent legal identity from its shareholders. The purpose of this thesis is to find out whether shareholder-CEOs can benefit from the rights of an employee when there occurs a dispute between the company and its CEO, because the owner of a company cannot sue the company for employment benefits. If a CEO can also be defined as an employer, agent or representative of the employer in a certain employment case, then, there will be some conflict in defining the CEO as an employee, and there may also be some problem in calculating the CEO termination benefits in dismissal arrangements.

The difference in definition sometimes can be case by case, usually, companies will not sue their former senior executives, but in those cases where former senior executives claimed their compensation with an extremely high number and the court supported the claimant, companies may apply for an appeal (such as in the case *748 Air Services Limited v Theuri Munyi*, the appellant complains the industry court (employment and labour relations court) made the order on payment to the respondent - commercial director, one of the appellant's ex-senior executives, and made an appeal in the Court of Appeal)¹¹, or apply for a counterclaim in the first trial (such as in the case *Pamela Nelima Lutta v Mumias Sugar Co. Ltd*, the respondent applied a Notice of Preliminary Objection shortly after the plaintiff - finance director, one of the appellant's ex-senior executives, made the application to the court).¹² The judgments of the above-mentioned two cases were made according to the Employment Act, 2007. But maybe the two cases

¹¹ *748 Air Services Limited v Theuri Munyi* [2017] eKLR

¹² *Pamela Nelima Lutta v Mumias Sugar Co. Ltd* [2017] eKLR

were simply assumed to be employment issues, and it was not discussed whether senior executives should belong to “employee” or “employer”.

It may take further subsidiary legislation to define specific conditions. In the *Human Resource Guideline of Pennsylvania State* of US, it is defined that the management position shall “direct the work of employees”¹³, and it also differentiate the two roles of “senior executive” and “employee”. In addition, the *Human Resource Guideline of Pennsylvania State* defines that for those who are in non-management position, if they are in higher-level jobs, their responsibilities may include: evaluation of employee performance” and “employees” are paid for their “functional” expertise and NOT for supervising responsibilities.¹⁴

1.3 Rationale of the Study

This study is necessary because more CEO dismissal cases are on the road, companies may have confusing whether they need to treat their CEO, especially founder-CEO as an employee, and the CEO of a company may have problem in terms of how to protect his or her rights when he or she was faced with CEO dismissal by the incoming shareholders. This study is based on the high-speed development of Kenya’s business environment. Following the global economic development trend, Kenya becomes a rather attractive place for new investments than before.¹⁵ As the position of CEO is more volatile today than ever¹⁶, and CEO dismissal disputes are no longer regarded as a story in the silver screen and far away from Kenya’s market. The CEO dismissal disputes are no longer regarded as cases that only happen among the international companies located in Kenya, more local companies are gradually faced with increasing numbers of CEO dismissal cases. As more local companies are growing, these

¹³ The Human Resource Guideline of Pennsylvania State.

¹⁴ The Human Resource Guideline of Pennsylvania State.

¹⁵ Kenya Vision 2030, *A Globally Competitive and Prosperous Kenya*, October 2007, p. 6.

¹⁶ Brian L. Connelly, Qiang John Li, Wei Shi, Kang Lee. CEO dismissal: Consequences for the strategic risk taking of competitor CEOs[J]. *Strategic Management Journal*,2020.

companies' founders are gradually lost the majority shareholder position by selling the shares of the company, or the company grown up and became capable to recruit professionals to take the CEO position in the local company. By researching labour dispute litigation cases in Kenya, it can be found that the labour dispute cases between CEOs and companies increased rapidly between 2015 and 2020. As a result, it is of great importance to foresee all the potential risks so as to avoid them from the corporate governance level.

1.4 Significance of the Study

This study is important as it can discover and provide answer in terms of the lawful CEO dismissal procedure, companies will be faced with less CEO dismissal disputes, and CEOs will better understand how to protect their rights. Through the research on previous cases, this study provides suggestions to the legislators, the board of directors and shareholders of a company, and to the CEOs on how to avoid CEO dismissal disputes, especially for those who focus on corporate governance. Companies could understand more about proper CEO dismissal procedures (especially from the analysis of lawful CEO dismissal procedures, and the requirements of prepare basic company internal documents that can guide CEO dismissal procedures), and CEOs could learn from this paper when they face dismissal, especially unprocedural dismissal (particularly from the analysis of the reasons for CEOs to sue the companies, and the analysis of Kenyan Court judgment, and those judgments made in favour of the CEOs will help more). The results of this study may also affect scholarly research, theory, practice and policy. There may be more studies regarding senior executive's dismissal, and how relevant policies could be modified with the development of CEO dismissal practice.

1.5 Objectives

The research aim of this thesis is to find out the reasons for CEO dismissal and what are required to constitute lawful CEO dismissal procedures under the Employment Act of Kenya.

Following research objectives would facilitate the achievement of this aim:

- a. Finding out the reasons for companies to dismiss their CEOs in Kenya.
- b. Analyzing the impacts of improper CEO dismissal procedures on Kenya CEOs who later commenced a lawsuit against the company.
- c. Analyzing relevant Kenyan court judgments on CEO dismissal disputes, and identifying factors impacting CEO dismissal in the judgments by the court in the sections above.
- d. Getting a conclusion on what are lawful dismissal procedures towards a CEO.

This paper discusses the dismissal and employment rights of CEOs and does not regard challenging the concept of a company's "separate legal personality" introduced by the case *Salomon v A Salomon and Co Ltd*¹⁷ as one of its objectives.

1.6 Conceptual Framework

This thesis is based on the hypothesis that CEOs are the most influential shareholders in most companies, they can decide how much salary he or she will be paid, and even infringe the creditors' interest such as paying himself or herself a very high salary to avoid these monies to be paid to the creditors of the companies. According to the Kenya Employment Act, 2007, an "employee" means a person employed for wages or a salary and includes an apprentice and indentured learner;¹⁸ an "employer" means "any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of

¹⁷ *Salomon v A Salomon and Co Ltd* [1897] AC 22

¹⁸ Section 2, Employment Act (Act No. 11 of 2007)

such person, public body, firm, corporation or company.”¹⁹ In other words, a foreman or a manager belongs to the category of “employer”.

Section 67 of Kenya Employment Act - Definition of insolvency defines “employer” with two parts: “(a)if the employer is a person...” and “(b)if the employer is a company...”²⁰. From the definitions we can know that an “employer” can be either “a person” or “a company”. In section 185(4) of Kenya Insolvency Act, 2015, “a company is associated with the bankrupt if the bankrupt is an officer or employee of the company or is in a position to appoint or control the appointment of its directors.”²¹ Accordingly, the term “employee” is also different from the term “officer”. In section 3(5) of the second schedule of the Kenya Insolvency Act, in the case of the liquidation of a company, “employee” does not include a nominee or relative of, a trustee for, a director of the company.²² It takes further research to confirm whether the definition of “employer” in the insolvency issue can be also applied to other issues, but “the agent, foreman, manager or factor of such person, public body, firm, corporation” listed in section 2 of Kenya Employment Act - Interpretation of “employer” will not be regarded as “employer” in the insolvency procedure.

According to my research, decisions from Kenyan Courts reveal that CEOs are employees, but how Kenyan Courts would make the judgment when a CEO is also a director and shareholder, especially when the CEO also holds the majority shares of the company? This means they are also the owner²³ of the company, and not merely an employee in the CEO position. Some confusion might arise when it comes to the employment rights of CEOs.

There are two types of CEOs according to the research conducted in this paper. The

¹⁹ Section 2, Employment Act (Act No. 11 of 2007)

²⁰ Section 67, Employment Act (Act No. 11 of 2007)

²¹ Section 185(4), Employment Act (Act No. 18 of 2015)

²² Section 3(5) of the Second Schedule, Employment Act (Act No. 18 of 2015)

²³ Under Kenya Companies (Beneficial Ownership Information) Regulations, “a beneficial owner is a natural person who directly or indirectly: “holds at least ten percent (10%) of the issued shares of the company; exercises at least ten percent (10%) of the voting rights in the company; holds the right to appoint or remove a director of a company; or exercises significant influence or control over a company.”

first type of CEOs has more employer's characters. The characters are as follows:

a. They are founding shareholders with at least 10% ordinary shares of the company;

b. They are founding directors with any amount of (ordinary or other types of) shares of the company;²⁴

c. They are founding managers of any type who can be defined as the owner under the Kenya Companies Act;

d. They used to be common employees, but have purchased at least 10% ordinary shares of the company when they are dismissed by the companies;

e. They used to be common employees with less than 10% ordinary shares of the company, but are later appointed as the directors of the company.

The second type of CEOs are pure employees, and they have the right to claim equal employment rights as all the other employees under the Kenyan Employment Act. The characters are as follows:

a. They used to be shareholders and directors of their company, but all shares have been sold when they are dismissed by the company;

b. They are incoming CEOs who do not have other positions in the company, and hold less than 10% ordinary shares of the company when they are dismissed by the company;

c. They are incoming directors without any shares of the company when they are dismissed by the company;

d. They used to be common employees but are later appointed as CEO, and have purchased less than 10% ordinary shares of the company when they are dismissed by

²⁴ For example, foreign companies in Kenya, shares are 100% owned by company registered in a foreign country, the shareholders are not individual, but the foreign company will also arrange directors to take control of everything of their business in Kenya.

the company;

e. They used to be common employees without any shares of the companies, but are appointed as CEOs and directors²⁵ of the company.

CEOs who hold the characters of type one can also be regarded as founders or owners of a company, while CEOs who hold the characters of type two are more likely to be simply regarded as employees. Those CEOs who belong to type two are entitled to claim for termination benefits automatically, while those CEOs who belong to type one may face the confusion of identity clarification when they claim for termination benefits.

This study is based on the definition of the above two types of CEOs, and the differences between them. Most research and analysis in this thesis will analyze CEOs who are neither shareholders nor directors and the court practice of CEO dismissal cases in Kenya and some other countries.

1.7 Research Questions

This study seeks to answer four principal questions.

- a. What are the main reasons for CEO dismissal in Kenya?
- b. What are the reasons and grounds for a CEO to sue a company?
- c. How do Kenyan courts evaluate unlawful dismissal in CEO dismissal disputes?
- d. What are proper CEO dismissal procedures in Kenya?

1.8 Methodology and Approach

²⁵ Section 111(3) of Kenyan Companies Act defines the director as an employee, for the purpose of calculating NSSF, NHIF and employee benefits, “For the purpose of this section, a director of a company is to be regarded as an employee of the company.” The liquidation procedure is an exception, in the section 3(5) of the second schedule of Kenya Insolvency Act, in the case of the liquidation of a company, “employee” does not include a nominee or relative of, a trustee for, a director of the company.

This study depends mainly on first-hand data regarding CEO dismissal and relevant topics, such as statutory laws, cases, theories, and government announcements. These firsthand data are collected from the Kenya Law Report²⁶ website and the Kenya government departments' (e.g., Kenya Company Registry²⁷, Kenya Ministry of Labour and Social Protection²⁸, Kenya National Employment Authority²⁹) official website.

The paper also draws from second hands data regarding CEO dismissal and relevant topics, such as newspapers, reports, textbooks, philosophical treatises, journal articles. These second-hand data are collected from Strathmore University library, some accounting firm's (e.g., Deloitte³⁰) official websites, some of Kenya law firms' (e.g., Anjarwalla & Khana³¹) official websites.

Some of the above first-hand data and second-hand data focus on the business impact of a CEO in a company and the general employment matters, and some others may focus on corporate governance. The research of this paper is based on the analysis of both the first-hand data and second hands data, and draw conclusions herein.

1.9 Literature Review

When it comes to CEO dismissal, there are sufficient quantities of legal researches. However, only a few of them are analyzed by their authors from the same or similar angle taken by this paper, which is trying to find out whether a CEO shall be regarded as an employer or an employee.

After collecting the data of previous researches towards CEO dismissal, it is found that those researches can be divided into three different categories, namely from a business perspective (such as research called *CEO Compensation and Board Structure*³²,

²⁶ <<http://www.kenyalaw.org/lex//index.xql>> and <<http://kenyalaw.org/caselaw/>>on 17 May 2020.

²⁷ <<https://brs.go.ke/companies-registry.php>> on 29 June 2021.

²⁸ <<https://labour.go.ke/>>on 29 June 2021.

²⁹ <<https://nea.go.ke/web/>>on 29 June 2021.

³⁰ <<https://www2.deloitte.com/ke/en.html>>on 29 June 2021.

³¹ <<https://www.africalegalnetwork.com/kenya/>>on 29 June 2021.

³² Chhaochharia, V., and Y. Grinstein. "CEO Compensation and Board Structure." *Journal of Finance*, 64 (2009), 231.

according to some researches regarding CEO dismissal among 60 Nairobi Securities Exchange Listed companies called *Debt Capital, Firm Performance and Change of CEO in Firms Listed on the Nairobi Securities Exchange, Corporate Ownership & Control*³³); from a legal perspective (such as *Labor Law: Scope of the Term “Employee”*³⁴); and from a corporate governance perspective (such as journal article *A Model of CEO Dismissal*³⁵).

This thesis mainly discusses the employment rights of CEOs, and is based on the differences between CEOs as employers and CEOs as employees. Mostly, CEOs are employees, but the identity can sometimes bring confusion: compared with directors or shareholders - they are more likely employees; compared with other staff of the company, they tend to belong to employer’s category. One problem would be, if an employee sues the company and joins the CEO in the case, should the CEO join as the “defendant”, “interested party” or “non-interested party”? CEOs might be listed in numerous types of cases, but there is a high possibility for them to be listed in labour dispute cases since managing company staff is one of the fundamental responsibilities a CEO bears. It is common in these cases that the CEO will be sued as a defendant due to some misconduct of himself or herself, or, if the CEO is responsible for some fault in the termination.

In most cases where CEOs are dismissed by the company, the CEO dismissal cases are described as employment cases.³⁶ Some CEOs do not have other titles, such as director, shareholder, or owner of the company. The basic research of this paper was seven hundred and fifty-five cases related to CEO dismissal in Kenya Law Report. After checking all these related cases, this paper analyzed 14 most typical cases, and get the

³³ Odhiambo Luther Otieno, Sam Ngwenya, *Debt Capital, Firm Performance and Change of CEO in Firms Listed on the Nairobi Securities Exchange, Corporate Ownership & Control / Volume 13, Issue 1, Autumn 2015, Continued-6.*

³⁴ Bert Bookham Meek, John Harold Swan, 1944. *Labor Law: Scope of the Term “Employee”*, *California Law Review*, Vol. 32, No. 3.

³⁵ Fredrickson, J. W., Hambrick, D. C., & Baumrin, S. 1988. *A Model of CEO Dismissal*. *Academy of Management Review*, 13(2): 255-270.

³⁶ See cases listed in Chapter 2.2.

conclusion herein.

The *Human Resource Guideline of Pennsylvania State* says that management position shall “direct the work of employees”³⁷, distinguishing “CEO” from “employee”.³⁸ It also defines the non-management positions in higher-level jobs, and their responsibilities may include: evaluation of employee performance and employees are paid for their “functional” expertise and for supervising responsibilities.³⁹ The CEO’s definition in Kenya sometimes differs from case to case. Usually, a company will not sue a former CEO, but if the former CEO has claimed high compensation, and the court made the judgment in favor of the claimant, companies may apply for an appeal⁴⁰, or submit a counterclaim in the first trial.⁴¹ According to the Kenya Employment Act, 2007, section 2 - Interpretation, an “employee” is “a person employed for wages or a salary and includes an apprentice and indentured learner.”⁴² And an “employer” means “any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company”.⁴³ That is to say, a foreman or a manager can be an “employer”. But in section 67, on the definition of insolvency under the same Act, there is a more specific description of “employer” under different situations: “(a) if the employer is a person...” and “(b) if the employer is a company...”⁴⁴, which means an “employer” is either “a person” or “a company”. It takes further research to find out whether the definition of “employer” in the insolvency issue can be also applied to other issues, but it is clear that “the agent, foreman, manager or factor of such person, public body, firm, corporation”⁴⁵ listed in Section 2 of Kenyan Employment Act - Interpretation of “employer” will not be defined as “employer” in

³⁷ The Human Resource Guideline of Pennsylvania State.

³⁸ The Human Resource Guideline of Pennsylvania State.

³⁹ The Human Resource Guideline of Pennsylvania State.

⁴⁰ *748 Air Services Limited v Theuri Munyi* [2017] eKLR.

⁴¹ *Pamela Nelima Lutta v Mumias Sugar Co. Ltd* [2017] eKLR

⁴² Section 2, Kenyan Employment Act (Act No. 11 of 2007)

⁴³ Section 2, Kenyan Employment Act

⁴⁴ Section 67, Kenyan Employment Act

⁴⁵ Section 2, The Kenyan Employment and Labour Relations Court Bill, 2011

the insolvency procedure.

In the United States (US), there are also some paradoxes of whether a company's CEO is an employer or employee. For example, the US *National Labor Relations Act*, "the term 'employer' includes any person acting as an agent of an employer, directly or indirectly."⁴⁶, and "the term 'employee' ... shall not include ... any individual employed as a Supervisor."⁴⁷ *The Fair Labor Standards Act* of US also defines a company's CEO as an employer.⁴⁸ But in US *Model Business Corporation Act*, an "Employee" includes an officer but not a director, which means the companies' CEOs are defined as employees.⁴⁹

In Italy, the CEO of a company is also a member of the Board of Directors, and the Directors (which include CEOs) are not employees, they are appointed by the shareholders' meeting and do not stipulate any employment relationship with the company because of their office.⁵⁰

1.10 Chapter Breakdown

The goals of this study are accomplished within six distinct chapters.

Chapter 1: Introduction

Chapter one introduces the background of the problems, problem statement, theoretical framework, research questions, methodology and approach, as well as the chapter

⁴⁶ US National Labor Relations Act, S.2(3)

⁴⁷ US National Labor Relations Act, S.2(3)

⁴⁸ US Fair Labor Standards Act, S.203(d), "Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization."

US Fair Labor Standards Act, S.213(a)(1), "§ 213.Exemptions (a) Minimum wage and maximum hour requirements - The provisions of sections 206 ... and section 207 of this title shall not apply with respect to— (1)any employee employed in a bonafide executive, administrative, or professional capacity ... or in the capacity of outside salesman..."

⁴⁹ US Model Business Corporation Act § 1.40. A director may accept duties that make the director also an employee.

⁵⁰ Deloitte: Deloitte Legal Perspectives International Dismissal Survey, May 2015. p.49.

breakdown of this thesis.

Chapter 2: Company's Actual Reasons to Dismiss CEOs

Chapter two focuses on the introduction of typical CEO dismissal cases in Kenya, and the actual reasons.

Chapter 3: Reasons for the CEOs to Sue the Companies

Chapter three focuses on analyzing the main reasons of CEOs to commence a lawsuit against the company.

Chapter 4: Kenyan Court's Perspective on CEO Dismissal Disputes

Chapter four analyses how the courts get the conclusions on CEO dismissal cases, and how these disputes are settled.

Chapter 5: Proper CEO Dismissal Procedures

Chapter five concerns the basic documentation to guide CEO dismissal procedure, and proper CEO dismissal procedures.

Chapter 6: Findings, Conclusions and Recommendations

Chapter six focuses on the findings, conclusions and recommendations concerning the research questions of this thesis.

Chapter 2: Company's Actual Reasons to Dismiss CEOs

2.1 Introduction

This chapter introduces the actual reasons for a CEO to be dismissed by a company. Many companies will check the Employment Act and internal management requirements carefully before commencing the dismissal, while some other companies tend to take immediate action once it decides to dismiss its CEO. Once the directors or shareholders of a company get into consent to dismiss the CEO, many of the following dismissal procedures were just like going through a process, because the conclusion of the process was decided even before any procedure was taken. And under such conditions, some unprocedural actions tend to be taken if a company takes every step too fast.

2.2 Distinguish CEO as Employee from CEO not as Employee

As a commencement of the analysis in this chapter, we shall have an overview of whether or not a CEO is an employee, because traditional legal concepts are often inadequate to specify⁵¹. Usually, CEOs receive a cash component embracing their base salary and benefits called managerial emoluments, an annual cash bonus⁵² and long-term awards. The latter consists of share options and long-term incentive plans (Ltips) while in the US they additionally include restricted stock awards.⁵³ All these benefits make the CEO's identity integrated into the shareholder's part, and more likely to be an employer.

The term "CEO" in Oxford Lexico Dictionary refers to "the highest-ranking person in a company or other institution, ultimately responsible for taking managerial decisions."

⁵¹ Bert Bookham Meek, John Harold Swan, 1944. Labor Law: Scope of the Term "Employee", California Law Review, Vol. 32, No. 3.

⁵² "Public US survey data from a consulting firm and document that many bonus plans are fixed-target plans in which executives do not receive any payoff until they reach a lower bound of the performance measure." Holthausen, R. W., Larcker, D. F. and Sloan, R., 'Annual bonus schemes and the manipulation of earnings', Journal of Accounting and Economics, Vol. 19, 1995, pp. 29-74.

⁵³ Share options awarded to executives are treated as call options.

⁵⁴ A CEO is the person who makes all key decisions regarding a company, which includes all sectors and fields of the business such as operation, marketing, business development, finance, human resources, etc.⁵⁵

In European practice, “in 60% ... countries, managing directors do not fall under the compulsory labor rules”⁵⁶. There is a long list of EU countries that do not estimate executives (e.g., CEO, directors) as employees. In Bulgaria, the relation between Executives (Managing Directors) and the company is regulated by a Management Agreement⁵⁷. In Italy, members of the Board of Directors (e.g., CEOs) are not employees⁵⁸. Spain has special legislation to govern the special relationship of Top Executives⁵⁹. In the US, the term ‘employer’ “includes any person acting as an agent of an employer, directly or indirectly”⁶⁰, the term also “includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.”⁶¹; the term ‘employee’ “shall not include ... any individual employed as a supervisor”⁶², but “includes an officer but not a director. A director may accept duties that make the director also an employee”⁶³.

The CEO labour market has the characters of small numbers of buyers and sellers, high risk to participants, and institutionalized gaps between buyers and sellers.⁶⁴ Although a CEO may belong to type one⁶⁵, there is no legislation or judgments discovered in Kenya

⁵⁴ Oxford Lexico Dictionary, the definition of CEO: A chief executive officer, the highest-ranking person in a company or other institution, ultimately responsible for taking managerial decisions.

⁵⁵ A general job description of Chief Executives Officer.

⁵⁶ Deloitte: Deloitte Legal Perspectives International Dismissal Survey, May 2015. p.8.

⁵⁷ Deloitte: Deloitte Legal Perspectives International Dismissal Survey, May 2015. p.19.

⁵⁸ Deloitte: Deloitte Legal Perspectives International Dismissal Survey, May 2015. p.49.

⁵⁹ Spain Royal Decree 1382/1985.

⁶⁰ US National Labor Relations Act S.2(2).

⁶¹ US Fair Labor Standards Act, S.203(d).

⁶² US National Labor Relations Act S.2(3).

⁶³ US Model Business Corporation Act §1.40.

⁶⁴ Khurana, Rakesh, 2000, Three-party exchanges: The case of executive search firms and CEO search, Harvard Business School Working Paper.

⁶⁵ See Chapter 1.3.

to state “CEOs who are also the founders or owners of a company cannot claim for CEO termination benefits”. Therefore, within the scope of this study, the person who works as the CEO of a company, shall be entitled to claim for CEO termination benefits, unless the company is about to insolvent and the creditors of the company say otherwise. It may not be easy to make it clear whether most company’s CEOs are merely employees or not, in order to diversify the difference between CEOs and other employees, this thesis introduced the factors of working hours requirements on CEOs, barbarians⁶⁶ at the gate influence the role of the company founder as company CEO, and the factors resulting in founder CEOs not taking salaries.

2.2.1 How Founder CEO Became a Pure Employee When the Barbarians are at the Gate

In the book *Barbarians at the Gate: The Fall of RJR Nabisco*⁶⁷, RJR Nabisco faced a leveraged buyout by Kohlberg Kravis Roberts & Co., and finally, Kohlberg Kravis & Co. took the management of RJR Nabisco without getting the consent of RJR Nabisco’s previous management team. This book introduced the concept of barbarians at the gate among the share purchase practice of listed companies. Companies, especially listed companies, can be faced with malicious purchase⁶⁸. If the listed company’s founder CEO only holds a minimum number of shares, he or she can be easily chased out from the company by the incoming shareholders (the Barbarians) after malicious company.

2.2.2 Factors Resulting in Founder CEOs Taking no Salary

Based on the research among most country’s legislations, CEO is a job title of employee

⁶⁶ A company trying to take over the management of the target company through a leveraged buyout, and purchase a very high percentage of the target company’s shares without any discussion or communication with the target company. Mostly happens on listed companies.

⁶⁸ A situation in where a company tries to buy another company that does not want to be bought.

⁶⁸ A situation in where a company tries to buy another company that does not want to be bought.

even if CEOs are different from other employees and many employment policies are not applicable to CEOs. However, there are also some conditions that CEOs are company founder and/or shareholders with absolute voting rights. They have solely absolute management power and can decide how to arrange all the employee's salaries of the company.⁶⁹ They can request no salary in the initiation procedure, and request for an extremely high salary when the company is about to collapse. As in the case *Yang Yan v Beijing Shenzhou Jierui Network Technology Co., Ltd*, the claimant was the founder CEO with 45% shares of the respondent, the claimant didn't take any salary during his three years' service at the company, even if there exists an CEO employment contract, but the claimant commenced a lawsuit in the court against the company when he was chased out from the CEO position by the other shareholders.⁷⁰

Despite the identity conflict of the company founder and company CEO, officers in other senior executives' positions who work in the company on behalf of the beneficial owners, may also not take salaries. Most founder CEOs did not take salaries before the business growing in large sizes. Some of them may just not taking salaries for the sake of decreasing company expenditures and the survival of the business; while some of them may just mixed the identity of the company and the founding CEO, which results in the disregard of the corporate entity⁷¹.

2.3 Brief Introduction of Typical CEO Dismissal cases in Kenya

Some typical CEO dismissal cases in Kenya include *Teresa Carlo Omondi v Transparency International- Kenya*⁷², *Rose Aoko Ogwang Odhiambo v National Gender & Equality Commission*⁷³, *Paul Wanyangah v Market Development Trust t/a*

⁶⁹ In most companies, especially SMEs, the identity of company owner, founder, shareholder, director, CEO are mixed, and the CEO decides everything in the company solely.

⁷⁰ *Yang Yan v Beijing Shenzhou Jierui Network Technology Co., Ltd* (2018) Jing 0108 Min Chu 24242 Hao, PRC.

⁷¹ William Mitchell Law Review: "Disregard of the Corporate Entity," Vol. 4: Iss. 2, Article 3 (1978).

⁷² *Teresa Carlo Omondi v Transparency International-Kenya* [2017] eKLR

⁷³ *Rose Aoko Ogwang Odhiambo v National Gender & Equality Commission* [2018] eKLR

*Kenya Markets Trust*⁷⁴, *Stephen Kirimi Ringera v David Mwiraria & 2 others*⁷⁵, *Richard Boro Ndungu v KPMG East Africa Association & 3 others*⁷⁶, *Eunice Mbogo v Kenya Reinsurance Corporation Ltd*⁷⁷, *Angela Ndambuki v Kenya National Chamber of Commerce & Industry*⁷⁸, and *Benson K Nguti v Kenfreight (E.A) Limited*⁷⁹, together with some other most typical senior executives dismissal cases. There were 7 cases dismissed by the court, and the court made the judgment in favor of the claimant in another 7 cases.

The reasons for CEO dismissal vary, and the reasons why these cases appeared in the court were that the parties failed to get into consent on whether to terminate the CEO's employment contract or how to deal with the details of the termination.

CEO dismissal cases in Kenyan courts are not many yet, among all the CEO dismissal cases, and some of the ex-CEOs were no longer in CEO's position. For example, in the case *Richard Boro Ndungu v KPMG East Africa Association & 3 others*, the claimant was a CEO, but by the time he was terminated, his job title was partner of KPMG. And in the case of *Eunice Mbogo v. Kenya Reinsurance Corporation Ltd*, the job title of the claimant was Managing Director, and he applied to renew the contract, but never got a reply from the respondent.

2.4 Reasons for CEO Dismissal

The main reasons given by companies for dismissing a CEO in Kenya include redundancy, CEO's involvement in "fraudulent activities"⁸⁰ or inappropriate relationship with others, or "micromanaged the staff"⁸¹, or poor performance. However,

⁷⁴ Paul Wanyangah v Market Development Trust t/a Kenya Markets Trust [2017] eKLR

⁷⁵ Stephen Kirimi Ringera v David Mwiraria & 2 others [2016] eKLR

⁷⁶ Richard Boro Ndungu v KPMG East Africa Association & 3 others [2017] eKLR

⁷⁷ Kenya Reinsurance Corporation Ltd v Eunice Mbogo [2019] eKLR

⁷⁸ Angela Ndambuki v Kenya National Chamber of Commerce & Industry [2018] eKLR

⁷⁹ Benson K Nguti v Kenfreight (E.A) Limited [2014] eKLR

⁸⁰ Pamela Nelima Lutta v Mumias Sugar Co. Ltd [2017] eKLR

⁸¹ Paul Wanyangah v Market Development Trust t/a Kenya Markets Trust [2017] eKLR

when the case goes to court or arbitration, the CEOs claim that they were dismissed without reasonable procedure or proper reasons.⁸²

Most Kenyan cases were filed in the court as unlawful termination. Instead of terminating without proper procedure, which results in Unlawful Termination in most Kenyan CEO dismissal cases, the main reasons for CEO dismissal worldwide include CEO's scandals, inside trading, accounting fraud, resume falsification, illicit affairs, company's reaction against the regulation atmosphere, the shocking of the emerging technologies' influence and etc.⁸³

2.4.1 Dismissal of Company's Founder and CEO Due to Decision of the Board of Directors

CEO dismissal does not assume that the Board's decision is totally rational, even if the Board may view it as such, but is also influenced by political and social forces.⁸⁴ Founder CEO's identity is one of the influencing factors of CEO dismissal⁸⁵, and founder CEOs are more likely to be dismissed when the board and the organization play a major role.⁸⁶

Similar to the case in the book *Barbarians at the Gate: The Fall of RJR Nabisco* that discussed in Chapter 2.2.2, in the Vanke-Baoneng case⁸⁷, Baoneng Group purchased up to 32% of Vanke's shares in the Shenzhen Stock Exchange (SZSE) through leverage buyout at almost 26 times of its actual capital since 2015 without any negotiation with Vanke's executives' team. China Vanke Co., Ltd is a real estate company ranked 208

⁸² See Chapter 4.

⁸³ A general analysis of reasons for CEO dismissal.

⁸⁴ Fredrickson, J. W., Hambrick, D. C., & Baumrin, S. 1988. A Model of CEO Dismissal. *Academy of Management Review*, 13(2): 255-270.

⁸⁵ Ge Baoshan, Xu Tite, How do Founder-CEO Identity and Performance Interplay with CEO Dismissal: Based on U. S. Public Company Data, (*J Economics & Management*, 2021(02). p.95.

⁸⁶ Ge Baoshan, Xu Tite, How do Founder-CEO Identity and Performance Interplay with CEO Dismissal: Based on U. S. Public Company Data, (*J Economics & Management*, 2021(02). p.95.

⁸⁷ Sang Yop Kang, The Vanke-Baoneng Case and Beyond: Hostile Takeover and Corporate Governance in China, Peking University School of Transnational Law Research Paper, Jun 2020.

in the Fortune Global 500 with a profit of 5.6 billion USD in the year of 2020⁸⁸. The company founder and CEO of Vanke, Mr. Wang Shi, faced Baoneng's increasing influence in the board of directors meeting of Vanke, and was almost chased out by Baoneng in Vanke's 2015 Annual shareholders meeting. Baoneng continually threatened Mr. Wang Shi's CEO position for almost 1 year. Only by the time Vanke gets other shareholders through private placement of shares, Vanke finally decreased Baoneng's influence in Vanke's board of directors meeting.

During the period of Vanke-Baoneng case in 2015 and 2016, some other company's founders & CEOs also worried that similar things may happen to their companies. And it happened in the third quarter of 2016, Baoneng group purchased 4.13% shares of Gree Electric Appliances Inc of Zhuhai (Gree Electric) through SZSE. The CEO of Gree Electric took a group of immediate action such as private placement of shares in costly projects to decrease the company's working capital for recent several years, inviting Hillhouse Capital Group as a new shareholder to purchase more shares in SZSE, and posting on many public media to attract public attention that the barbarians were at the gate, and the barbarians were trying to grab Gree Electric's management power.

The Vanke's case and Gree Electric's case listed above shows that, if the founder & CEO of a company does not directly or indirectly hold majority shares of the company, it is so hard to defend himself or herself when the barbarian is at the gate and trying to chase him or her out of the company. In most companies' management structure, the CEO position is under the management of the board of directors, and the directors are designated by shareholders, and the board of directors meeting is also under the shareholders meeting. When a barbarian took the significant majority of shares of a company, then, the founder & CEO will be under the management of the barbarian, and it will be extremely hard to protect himself or herself from being dismissed by the shareholders meeting's decisions. Another founder CEO dismissal case also revealed to be faced with such problem. In the case *Yang Yan v Beijing Shenzhou Jierui Network*

⁸⁸ <<https://fortune.com/company/china-vanke/global500/>> on 4 Mar 2021.

*Technology Co., Ltd*⁸⁹, the claimant was dismissed when his CEO employment contract expires, the claimant was a shareholder with 45% shares, and he also took the position of CEO. The claimant claimed for 3 years unpaid salary when he was dismissed as CEO by all the other shareholders when his 3 years CEO employment contract finished. The claimant never received any payment during his 3 years' service as the CEO, and he never requested unpaid salary according to the CEO Employment Contract. The high level of CEO compensation is a result of powerful managers setting their own pay.⁹⁰ When a CEO is also a shareholder, maybe he will receive salaries as wrote in the CEO employment agreement for the purpose of keeping sufficient working capital of the company, but when the CEO was dismissed by other shareholders through shareholders meeting, a high compensation of CEO dismissal may arise. Actually, this case can be easily defined as false litigation, and the reason of the false litigation might be for the purpose of paying less company debts before the insolvency procedure of a company. However, the fact that the claimant and all the members of the defendant promised in the court that it's not a false litigation, the court accepted the parties' promises and made the judgment in favor of the claimant. The PRC CEO dismissal dispute practice is quite different from all the other countries. Despite the salary part, there may be more performance evaluation bonuses and other types of bonuses. Sometimes, the company and the CEO agreed on the termination, but they did not get into consent with the way to calculate performance bonus and other types of extra payments. And that's why a dispute arises even the parties have already agreed on terminating the CEO's employment contract.

2.4.2 CEO Dismissal Due to Misconduct

CEOs are often dismissed because of corporate misconduct or poor performance. Yet,

⁸⁹ Yang Yan v Beijing Shenzhen Jierui Network Technology Co., Ltd (2018) Jing 0108 Min Chu 24242 Hao, PRC.

⁹⁰ Carola Frydman and Dirk Jenter: CEO Compensation, Annual Review of Financial Economics, Vol. 2 (2010).

it is often difficult to predict when boards will dismiss the CEOs, as the same behavior often results in different decisions across firms.⁹¹

Different company might have different standards towards the definition of the word “misconduct”. However, if a company decides to dismiss a CEO for the reason of misconduct, the company shall provide sufficient and valid evidence to support itself. If a company dismiss a CEO for the reason of misconduct but is not able to give any evidence, the company tends to pay for failing to prove what the company defenses.⁹² After all, the company is the party who bears the responsibility of keeping documents.

The scope of misconduct can be wide, and for the purpose of better introduction, it is roughly divided into positive misconduct and negative misconduct.

2.4.2.1 Positive Misconduct

Positive misconduct refers to a CEO actively conducting certain actions that are wrong, and eventually those actions resulted in his or her dismissal. Some examples of positive misconduct would be making actions on behalf of the company while lacking the authorization from the board of directors or Power of Attorney (PoA) from the company, wrongful relationship with other employees or business-related personnel, etc.

Positive misconduct might be the instinct reason for the dismissal of a CEO. However, the evaluation of the company might be different from the way the CEO thinks about it. If a company focuses on any possible minor mistakes of a CEO, then, normal conduct might be drawn as a misconduct behaviour. In the case of *Lake v GBST Holdings Limited*⁹³ regarding CEO summary dismissal, GBST summarily terminated Mr. Lake without warrant by claiming him of “not following GBST’s share trading policy and being in possession of price sensitive information at the time he was selling his shares”

⁹¹ Weber, L.; M. Wiersema Dismissing a tarnished CEO? Psychological mechanisms and unconscious biases in the board's evaluation[J] California Management Review, 2017.

⁹² Section 1006, Kenyan Companies Act.

⁹³ *Lake v GBST Holdings Limited* [2019] QSC 253, Australia.

and “causing a GBST subsidiary company to enter a lease for the apartment ... without authority or prior approval from the Board.”⁹⁴ The court found that there was no evidence of inside trading, and the lease agreement was approved by the chairman of GBST’s board of directors, and declared the termination was wrongful. If the inside trading can be proved, it can be a positive misconduct or even a criminal offence; and if it can be proved that the claimant entered into an agreement for his personal benefit without the approval or the consent of the board of directors, such behaviour can be regarded as misconduct. However, the claimant provided sufficient evidence against the defendant’s claim and successfully defended himself.

Similarly, in the case of Mr. Kevin Ken Tsujihara resigning from the position of Chairman and CEO of Warner Bros. Entertainment Inc. (a leading company in US film industry, which was founded in 1923), he had a sexual scandal with a UK actress, and this information was revealed to the public. Mr. Kevin was an employee of Warner Bros for more than 20 years who resigned from the position immediately after the scandal was known to the public. Instead of the company commencing a dismissal by the company, in this case, the ex-CEO resigned from the position with the intention of trying to minimize the negative impact on the company. However, the detailed resignation arrangement was not disclosed to the public.

2.4.2.2 Negative Misconduct

CEOs may also be dismissed for their negative behaviour. Refusing to behave the wrongful instruction from the board of directors can be considered as a type of negative behaviour.

A typical dismissal can be in the following case, the managing director of Petzetakis Africa (Pty) Ltd was instructed by the group CEO and chairman of the board to summarily dismiss two employees without holding disciplinary hearings. The

⁹⁴ *Lake v GBST Holdings Limited* [2019] QSC 253, Australia.

managing director refused to comply with the instructions, but this negative behaviour later resulted her dismissal. Based on the special condition of this case, the dismissal was found to be automatically unfair.⁹⁵

The case *Shem Andrew Gichimu v Higher Education Loans Board*⁹⁶ in Chapter 3.4⁹⁷ also provides a scenario that the CFO of the institution refused to follow the CEO's instruction of increasing the salary of the COO. Because the CFO believed that such instruction should be wrongful. And the respondent of this case decided to dismiss the plaintiff for the sake of "The plaintiff willfully disregarded instructions from the CEO to adjust the salary of the COO."⁹⁸ This also belongs to a negative behaviour as the claimant (ex-CFO) made a subjective judgment that the CEO's instruction was wrong, and used his negative behaviour to refuse to proceed the instruction.

2.4.3 CEO Dismissal Due to Poor Performance

As the highest administrative official in charge of daily affairs of an enterprise, CEO takes much more responsibilities of a company performance than other staff. Accordingly, a CEO's scope of job description will be much wider. It is a commonplace that the work of a CEO will be strictly evaluated every year by the Board, such as whether the leadership of the CEO is qualified, whether the company is getting better or worse in profit-making, have the company strategies been well executed as early planned and so on. Failing to meeting the requirements of job description might result in a warning of poor performance and eventually the dismissal of the CEO. In different companies, the CEO dismissal is more likely to happen with poor individual and firm

⁹⁵ Reddy, Verushka, Dismissed for refusing to dismiss: labour law, [J] Without Prejudice Volume 12, Issue 4. 2012. pp. 18-19.

⁹⁶ *Shem Andrew Gichimu v Higher Education Loans Board* [2020] eKLR

⁹⁷ See Chapter 4.6.4.

⁹⁸ *Shem Andrew Gichimu v Higher Education Loans Board* [2020] eKLR

performance,⁹⁹ and the “performance is a strong driver of dismissal”¹⁰⁰ among all reasons for CEO dismissal.

In a study towards US public companies, non-founder CEOs are more likely to be dismissed than founder-CEOs regardless of firm performance. A drop in performance can lead to the firing of non-founder CEO.¹⁰¹ However, a similar study involved Nairobi Securities Exchange (NSE) listed companies found that firm performance does not have a significant effect on the change of CEO among NSE listed companies.¹⁰²

2.4.3.1 Poor Firm Turnover

Professional CEOs are responsible for the decrease of the company’s turnover. A study conducted among US companies between 1992 and 2010 reveals that 31% of the CEOs in the sample are replaced in this period, either for performance related reasons or following takeovers.¹⁰³ CEO’s poor performance can be easily linked to poor firm performance, which would result in CEO dismissal. Another study conducted among US firms listed in Standard & Poor's Executive Compensation Database (ExecuComp) for the period of 2000 - 2012 found that, “when a firm underperforms, extreme resource reallocation increases the likelihood of CEO dismissal”.¹⁰⁴ The above two studies were conducted among US companies, and it seems that CEO dismissal is closely related to poor firm performance. As for the reasons of poor firm performance, a study called

⁹⁹ “Our results suggest that poor individual and firm performance significantly increase the likelihood of executive dismissal. “Hilger, S., Mankel, S. and Richter, A. “The use and effectiveness of top executive dismissal”, *The Leadership Quarterly*, Vol. 24 No. 1 (2013).

¹⁰⁰ Donald J. Schepker, *The role of Executive Capital and the Market for Alternative Candidates in CEO Dismissal and Labor Market consequences for Dismissed Chief Executives*, University of Kansas, Doctor of Philosophy, 2012.

¹⁰¹ Ge Baoshan, Xu Tite, *How do Founder-CEO Identity and Performance Interplay with CEO Dismissal: Based on U. S. Public Company Data*, (J) *Economics & Management*, 2021(02). p.95.

¹⁰² Odhiambo Luther Otieno, Sam Ngwenya, *Debt Capital, Firm Performance and Change of CEO in Firms Listed on the Nairobi Securities Exchange*, *Corporate Ownership & Control* / Volume 13, Issue 1, Autumn 2015, Continued-6.

¹⁰³ Hom Roy Swarnodeep, *Essays on executive compensation and managerial entrenchment*, Lancaster University, Ph.D., 2013.

¹⁰⁴ Christodoulos Louca, Andreas P. Petrou, Andreas Procopiou. *When Does the Board Blame the CEO for Poor Firm Performance? Extreme Resource Reallocation and the Board's Industry and CEO Experience* [J]. *British Journal of Management*, 2020, 31(3).

“CEO Turnover and Relative Performance Evaluation” with a manually collected sample of 3,365 CEO turnovers from 1993 to 2009 found that CEOs may be fired after poor firm performance caused by factors beyond their control. CEOs are significantly more likely to be dismissed from their jobs for poor business environment. A decline in industry performance from the 90th to the 10th percentile doubled the probability of a forced CEO turnover.¹⁰⁵ There is also a study concerning the same topic among Kenyan companies. It is a study regarding NSE listed companies, and this study finds that CEO dismissal is more likely to happen when the NSE listed companies are faced with debt problem.¹⁰⁶

2.4.3.2 Poor Individual Performance

The supporting studies regarding the link between the poor individual performance and CEO dismissal among NSE listed companies also suggest that “the firms in which an individual shareholder has influence or controlling interest are reluctant to replace their CEOs, even when performance is below average”¹⁰⁷. The reason might be that the costs for a company to find an alternative CEO is too high, or the company is also well acknowledged about the industry and understands that performance is not the only factor that drives the change of CEOs.

Work achievements, extra profit brought to the company, positive influence that the shareholders or board of directors cares about, are key factors that influence a CEO’s performance evaluation. CEOs with poor performance are easier to identify and less costly to replace in industries that consist of similar firms than those in heterogeneous

¹⁰⁵ CEO Turnover and Relative Performance Evaluation [J]. DIRK JENTER, FADI KANAAN. The Journal of Finance. 2015 (5)

¹⁰⁶ Odhiambo Luther Otieno, Sam Ngwenya, Debt Capital, Firm Performance and Change of CEO in Firms Listed on the Nairobi Securities Exchange, Corporate Ownership & Control / Volume 13, Issue 1, Autumn 2015, Continued-6.

¹⁰⁷ Odhiambo Luther Otieno, Sam Ngwenya, Debt Capital, Firm Performance and Change of CEO in Firms Listed on the Nairobi Securities Exchange, Corporate Ownership & Control / Volume 13, Issue 1, Autumn 2015, Continued-6.

industries.¹⁰⁸

The cases of *Alex Wainaina Mbugua v Kenya Airways Limited*¹⁰⁹ and *Kenfreight (E.A) Limited v Benson K. Nguti*¹¹⁰ were typical Kenyan senior management dismissal cases comparing with some other countries' cases that are also cited in this paper. In the case *Xiao Yuhang v Ameba Fund Management Co., Ltd*¹¹¹, the claimant agreed with the defendant to take the position of Marketing Director and Rotating CEO. During the 3 months probationary period, the claimant took part in shareholders meeting and met clients with the job title of Rotating CEO. However, the defendant claimed the claimant did not meet the requirements of the Rotating CEO in his job description and refused to pay him the Rotating CEO allowance for the probationary period. The court reached the conclusion that the obligation of proving job description and fulfilling job obligation of Rotating CEO shall be on the defendant, and since the defendant did not provide such evidence, the court therefore made the judgment in favor of the claimant.

In that case, the claimant failed to pass his probationary period, and the defendant refused to acknowledge that the claimant took the duty of Rotating CEO, and hence refused to pay Rotating CEO allowance. The defendant provided several evidences to prove that the claimant's main job is Marketing Director. In addition, the defendant provided the reason why the claimant never officially started to work as a Rotating CEO, and why he failed to pass the probationary period. But all these evidences cannot prove that the claimant never worked as a Rotating CEO, which resulted in the judgment the court made herein.

A study called "CEO and board chair roles: To split or not to split?" also finds that pay-performance sensitivity in CEO compensation contracts is significantly lower following a split in the CEO and chairman positions, and significantly higher following

¹⁰⁸ Parrino, Robert, 1997, CEO turnover and outside succession: A cross-sectional analysis, *Journal of Financial Economics* 46, 165–197.

¹⁰⁹ *Alex Wainaina Mbugua v Kenya Airways Limited* [2017] eKLR

¹¹⁰ *Kenfreight (E.A) Limited v Benson K. Nguti* [2019] eKLR

¹¹¹ *Xiao Yuhang v Ameba Fund Management Co., Ltd* (2018) Yue 01 Min Zhong 19428 Hao, PRC.

a combination in these positions.¹¹² Executives are often the targets of criticism and even dismissal when organizational performance belongs to poor performance.¹¹³

2.4.4 CEO Dismissal Due to Redundancy

The CEO dismissal due to redundancy tends to happen in SMEs, where the companies do not have many employees. The management structure of a small or medium company is relatively simple. It is of high possibility that the company is owned by several individual shareholders with one of them being the CEO. When redundancy occurs, it generally happens that some shareholders unite each other to kick out the shareholder who holds CEO position. The economic interpretation is that the longer the CEO's tenure is, the greater the board of directors' assessments are, given that this CEO has survived previous retention/dismissal decisions.¹¹⁴

Redundancy is also one of the main reasons for dismissal under Kenyan employment laws, and specified in section 40 - Termination on account of redundancy¹¹⁵ of Kenya Employment Act.

2.4.5 CEO Dismissal Due to Statutory Illegality

Statutory illegality refers to malpractice or criminal offence committed by the CEO. Usually, it is intentional crime or criminal negligence that results in serious outcomes. And it is very clear that if someone is arrested but soon proved to be exonerated, it should not be regarded as statutory illegality.

¹¹² Dey, Aiysha & Engel, Ellen & Liu, Xiaohui, 2011. "CEO and board chair roles: To split or not to split?," *Journal of Corporate Finance*, Elsevier, vol. 17(5), pages 1595-1618.

¹¹³ Fulmer, I. S. 2009. The elephant in the room: Labor market influences on CEO compensation. *Personnel Psychology*, 62(4): 659-695.

¹¹⁴ Milbourn, T. T. 2003. CEO reputation and stock-based compensation. *Journal of Financial Economics*, 68(2): 233-262.

¹¹⁵ Section 40, Kenya Employment Act.

The statutory illegality on employment issue under Kenyan law is: “arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty”¹¹⁶ and “commits ... criminal offence”¹¹⁷, and it is limited to certain strict conditions.

In the case *Zainali “Zain” Jaffer v Veungle Inc*¹¹⁸ in the US, the claimant is the founder and CEO of the defendant, while the defendant is a world class mobile advertising technology company founded in the UK and with its headquarters in the US.

The claimant was arrested for child abuse and was dismissed within 24 hours after he was arrested. However, even after the District Attorney dismissed all charges to the claimant, the defendant continued to refuse to either revoke the dismissal or pay the claimant annual salary, bonus, stock, and benefits, which resulted in the claimant going to the court and claiming for loss.

In this case, the claimant was arrested and then released, however, the board of directors refused to revoke the decision of dismissing the claimant from the CEO’s position. This case brings another concern that if a person is suspected of a criminal offence, there shall be no presumption of guilt unless there a judgment to say so.

2.4.6 CEO Dismissal Due to Other Reasons

Many other different reasons can also lead to CEO dismissal. Six (6) other reasons are listed as follows: CEO dismissal due to epidemic, business collapses, job changes, poor relationship with others, frequent warning letters, and compulsory retirement. Maybe these reasons do not appear as official reasons for dismissal, but they are the actual reasons for dismissal. Beyond these six (6) reasons, there are also some other types of reasons mentioned in this thesis, such as economic reasons, company refusing to renew

¹¹⁶ Section 44(4)(f), Employment Act, No. 11 of 2007.

¹¹⁷ Section 44(4)(g), Employment Act, No. 11 of 2007.

¹¹⁸ *Zainali “Zain” Jaffer v Vungle Inc*. San Francisco County Superior Court, 000-19-574451, Compliant for Wrongful Termination in Violation of Public Policy, US.

the employment contract when it expires¹¹⁹¹²⁰, gender reasons (ceteris paribus, female CEOs are significantly more likely to be dismissed than male CEOs¹²¹), moral scandals of a company's CEO in social media (coverage of issues in prominent media sources is more likely to result in CEO dismissal¹²²), etc.

2.4.6.1 CEO Dismissal Due to Epidemic

The Covid-19 Pandemic seriously influenced Kenya's labour and economic market since 2020 till now. Many companies faced the option of suspending business or laying off employees to survive the pandemic.

As a government support for companies to survive the pandemic, the *Memorandum of Understanding Between The Tripartite Social Partners - Ministry of Labour and Social Protection, Central Organization of Trade Unions (COTU(K)) and Federation of Kenya Employers (FKE)* dated 30 April 2020¹²³ gives employers the freedom to reopen discussions with their employees or trade unions on challenges they face during the pandemic period, and for the purpose of ensuring companies to be capable to provide job opportunities in the long run, this memorandum of understanding allow companies and employees to consider painful but necessary measures to avoid job losses and cushion enterprises from collapse¹²⁴. The CEO Employment Contract may also list epidemic as a force majeure that the company and the CEO can leverage to terminate the employment contract without taking any responsibility.

¹¹⁹ Teresa Carlo Omondi v Transparency International-Kenya [2017] eKLR

¹²⁰ Kenya Reinsurance Corporation Ltd v Eunice Mbogo [2019] eKLR

¹²¹ Vishal K. Gupta, Sandra C. Mortal, Sabatino Silveri, Minxing Sun, Daniel B. Turban. You're Fired! Gender Disparities in CEO Dismissal[J]. *Journal of Management*, 2020,46(4).

¹²² Jenna J. Burke, Do Boards Take Environmental, Social, and Governance Issues Seriously? Evidence from Media Coverage and CEO Dismissals, [J]*Journal of Business Ethics* 2021. pp. 1-25.

¹²³ <<https://labour.go.ke/wp-content/uploads/2020/05/MOU-BETWEEN-THE-TRIPARTITE-SOCIAL-PARTNERS-MLSP-COTU-AND-FKE.pdf>> on 4 August 2020.

¹²⁴ <<https://ioewec.newsletter.ioe-emp.org/industrial-relations-and-labour-law-june-2020/news/article/1593181229-federation-of-kenya-employers-fke-sign-a-tripartite-memorandum-of-understanding-to-set-the-way-forward-on-covid-19>> on 4 August 2020.

2.4.6.2 CEO Dismissal Due to Business Collapses

Comparing with CEOs working for international corporations and giant companies, the CEOs of MSMEs (Micro, Small, and Medium Establishments), especially those who work for newly established MSMEs, will face a higher risk of job losses due to business collapses and the closure of business.

According to *The 2016 (Micro, Small, and Medium Establishment) MSME Survey Highlights of Basic Report*¹²⁵ conducted by (Kenya National Bureau of Statistics) KNBS¹²⁶, 46% of MSMEs would be closed within 1 year since its establishment, up to 61% of MSMEs would be closed within 2 years since its establishment, and up to 71% of would be closed within 3 years since its establishment. The report also listed various main reasons for closure of establishment¹²⁷, 29.6% MSMEs closed due to shortage of operating funds, 22.9% MSMEs were closed due to shareholder's or management team's personal reasons, and 15.3% MSMEs were closed mainly because of too few customers.

When a company faces insolvency and is ready to commence insolvency procedure, the termination of the CEO's employment seems to be unavoidable. The business collapse may not result in immediate CEO dismissal, in the case *748 Air Services Limited v Theuri Munyi*, "the management committee of Heads of Departments (HODs) of the company led by Munyi were tasked with exploring proposals for cost cutting measures for the company to remain in business. They proposed to the Board a 15% salary reduction for senior management, without affecting other staff but the proposal was reconsidered by the Board which decided the reduction be 50%."¹²⁸ Although the reduction of 50% was accepted, the salary reduction arrangement had only lasted for

¹²⁵ Zachary Mwangi, *The 2016 National Micro, Small and Medium Establishment (MSME) Survey Highlights of Basic Report*, Kenya National Bureau of Statistics, July 2017, p.35.

¹²⁶ Kenya National Bureau of Statistics.

¹²⁷ Zachary Mwangi, *The 2016 National Micro, Small and Medium Establishment (MSME) Survey Highlights of Basic Report*, Kenya National Bureau of Statistics, July 2017, p.37.

¹²⁸ *748 Air Services Limited v Theuri Munyi* [2017] eKLR

eight months before “Munyi was eased out” from the position of Financial Director.

2.4.6.3 CEO Dismissal Due to Job Changes

Job change in this Chapter¹²⁹ means an individual no longer holds his/her previous position, but may not necessarily be dismissed. Such job change can be further subdivided into three conditions: dismissal based on the requirement of the Conditions Precedent Clause (CP Clause¹³⁰) of the Share Purchase Agreement (SPA), and the requirement of the Shareholders Agreement (SHA) in a Mergers and Acquisitions (M&A) transaction; job changes between affiliated companies; and internal rearrangement to change the CEO to work in other senior positions of the same company.

- a. Dismissal Based on the Requirement of the CP Clause of the SPA, and SHA in the M&A

The requirement of the target company's¹³¹ senior executives (inclusive of the Target Company's CEO) and directors providing resignation letter and non-claim statement¹³² can be commonly seen in the SPA of a M&A transaction, and the SHA may also provide some clauses to specify on the resignation of the ex-senior executives (inclusive of the target company's ex-CEO) and directors, the change of management team's structure and the personnel of the board of directors.

The Resignation Letter of the CEO may not necessarily result in the CEO to lose his or her job, the Seller¹³³ of the SPA may provide another job in another company, or the

¹²⁹ Chapter 2.4.6.3.

¹³⁰ Conditions Precedent Clause request the parties of a Share Purchase Agreement to achieve certain conditions before the closing date of the transaction.

¹³¹ The target company of a Share Purchase Agreement.

¹³² A Statement to state the senior executive shall have no further claim against the target company.

¹³³ The party to sell the share in the Share Purchase Agreement.

Buyer¹³⁴ of the SPA may accept the CEO to continue work for the target in another position (e.g., the chairman of the board of directors, independent director. For the purpose of hand over the target company's business smoothly, some of the SPAs may even request the ex-CEO to remain the work in the target company for a certain period, but not in the CEO's position.

b. Job Changes Between Affiliated Companies

Job changes can be commonly seen between different subsidiaries of international companies. In the case *Kenya Reinsurance Corporation Ltd v Eunice Mbogo*, the respondent worked for British American Insurance Company Limited as the General Manager until she was appointed as the Managing Director of the appellant.¹³⁵ Job changes based on the company's arrangement may happen between parent company, subsidiary, affiliated company or some companies that may not have direct connections. The change of CEO position from one company to another may not directly result in the arrangement of termination. There can be a Cooperation Agreement between the former company the CEO worked for and the new company the CEO is going to working for. In this way, the CEO may not need a termination arrangement. In the case *Kenya Reinsurance Corporation Ltd v Eunice Mbogo*¹³⁶, Ms. Eunice Mbogo was the General Manager of British American Insurance Company Limited, and later, she was appointed as the Managing Director of Kenya Reinsurance Corporation Ltd. The change of positions between affiliated companies, and parent company and subsidiaries, is regarded as job change, but it also means Ms. Eunice Mbogo left the General Manager position of British American Insurance Company Limited for the purpose of receiving the Managing Director position in Kenya Reinsurance Corporation Ltd.

There is another case that has the background of internal job change arrangements. In

¹³⁴ The party to purchase the share in the Share Purchase Agreement.

¹³⁵ *Kenya Reinsurance Corporation Ltd v Eunice Mbogo* [2019] eKLR

¹³⁶ *Kenya Reinsurance Corporation Ltd v Eunice Mbogo* [2019] eKLR

the case *Kenfreight (E.A.) Limited v Benson K. Nguti*, Mr. Benson worked for the appellant's affiliated company for several year before working for the appellant, and by the time Mr. Benson K. Nguti was dismissed, he was the General Manger of Kenfreight (E.A.) Limited.

Under such changes, the job change arrangement need to clear the service pay in the previous company, the unpaid leave and other CEO employment benefits, and these fees shall either be paid by the previous company or the new company. Since the change of job position is based on the previous company's request, the previous company is obligated to ensure all the above items' payment obligations arranged properly.

c. Internal Rearrangement to Other Senior Position

The third type CEO dismissal due to job changes can be just internal rearrangement: changing an individual's position from CEO to some other senior position. The internal rearrangement of position can be another reason for terminate the CEO employment contract. While changing the job title in the same company, a CEO may take the position of chairman of the board of directors, and thus he will no longer work as a CEO. In the case *Richard Boro Ndungu v KPMG East Africa Association & 3 others*,¹³⁷ the claimant was CEO for several years before his position changed to a partner of the company. Instead of dismissing a CEO directly, some companies tend to change the CEO to a lower position before dismissal, while others prefer to have a proper negotiation with their CEOs before dismissal.

d. Conclusion

In the event of job changes – CEO dismissal based on the company's request to arrange the CEO to work in another affiliated company or a lower position in the same company, the CEO's refusal to accept this type of change is not a ground for dismissal, and the

¹³⁷ *Richard Boro Ndungu v KPMG East Africa Association & 3 others* [2017] eKLR

company must give the CEO a reasonable period to reflect on the proposed change, so that he or she (the CEO) can properly consider it.¹³⁸

2.4.6.4 CEO Dismissal Due to Poor Relationship with Others

Poor relationship with other employees or board of directors is not a lawful reason stipulates in Kenya Employment Act, but poor relationship with others can be commonly seen as the companies' defense in CEO dismissal cases, for example, the respondents of *Teresa Carlo Omondi v Transparency International- Kenya*¹³⁹ and *Angela Ndambuki v Kenya National Chamber of Commerce & Industry*¹⁴⁰ made such defenses in the court. Poor relationship with others means a CEO is not popular in the company and people are not willing to continue working with the CEO. However, this is not a lawful reason to dismiss the CEO. Also, CEOs may be dismissed for personality reasons, strategic disagreements with the board of directors, or in-fighting with other top managers.¹⁴¹ If any director of the company dislikes someone to be the CEO, then, it is likely that there will be other disharmony in the company.

Although poor relationship with others is not a legal reason to dismiss someone from his or her position, if someone who works as CEO cannot build a good relationship with other employees, it is the company that suffers the most, and the company may face the possibility of collapse eventually.

2.4.6.5 Foreseeable Senior Executives Dismissal Due to Receiving Three Warning Letters in One Day

¹³⁸ Thomson Reuters, Employment and employee benefits in france: overview, Thomson Reuters Practical Law, <https://uk.practicallaw.thomsonreuters.com/0-503-0054>, on 15 March 2020.

¹³⁹ *Teresa Carlo Omondi v Transparency International-Kenya* [2017] eKLR

¹⁴⁰ *Angela Ndambuki v Kenya National Chamber of Commerce & Industry* [2018] eKLR

¹⁴¹ Donald J. Schepker, *The role of Executive Capital and the Market for Alternative Candidates in CEO Dismissal and Laor Market consequences for Dismissed Chief Executives*, University of Kansas, Doctor of Philosophy, 2012.

There were also some other cases in Kenyan courts where the claimants sought remedies before the company issuing a termination notice. In the case *Abigail Ayako v Kenyatta International Convention Centre*¹⁴², the claimant was the Human Resource Manager of the defendant, and received three warning letters in one day. She went to the court to seek remedies. In view of the case details, and considering the claimant was about to retire, the court made a ruling in favor of the claimant.

As a pre-procedure to dismiss an employee on account of misconduct, the Employment Act requests warning letters issued to the employee¹⁴³, and employer shall keep the record of warning letters or other evidence of misconduct of an employee¹⁴⁴.

2.4.6.6 CEO Dismissal Due to Compulsory Retirement

Compulsory retirement can be one of the main reasons in CEO dismissal, especially for CEOs who are already at an elder age and about to retire. CEO dismissal due to compulsory retirement in Kenya only appeared in the case *Richard Boro Ndungu v KPMG East Africa Association & 3 others*¹⁴⁵. In this case, the claimant refused to retire, but the respondent terminated the plaintiff's partnership through compulsory retirement resolution. Although compulsory retirement is not a typical reason for CEO dismissal now in Kenya, it has already become one of the main reasons for CEO dismissal in the US practice. Considering the elder CEO's contribution to the company, US companies tend to pay a very high CEO dismissal compensation for a CEO to commence his or her retirement, thus only few CEO compulsory retirement cases go to court.

2.5 Conclusion

Among all the actual CEO dismissal reasons listed above, most of the reasons are

¹⁴² *Abigail Ayako v Kenyatta International Convention Centre* [2018] eKLR

¹⁴³ Section 45(5)(e), Employment Act, No. 11 of 2007.

¹⁴⁴ Section 74(1)(l), Employment Act, No. 11 of 2007.

¹⁴⁵ *Richard Boro Ndungu v KPMG East Africa Association & 3 others* [2017] eKLR

accepted by the Employment Act and other employment regulations. Under lawful procedures, reasons of CEO dismissal such as misconduct, poor performance, redundancy, statutory illegality, epidemic, business collapses, job changes, compulsory, economic reasons, expiration of fixed term CEO employment contract, moral scandals of the CEO on social medias might be relatively easier to be defined as a lawful CEO dismissal reason. Some other reasons of CEO dismissal can be easily defined as unlawful reason, such as poor relationship with others, gender reasons and etc. The following chapters further analyzed the grounds for CEOs to sue the companies, Kenyan courts' perspective towards CEO dismissal disputes, and the proper CEO dismissal procedure.



Chapter 3: Grounds for Suing the Companies

3.1 Introduction

This chapter analyzed the grounds for commencing judicial proceedings against the company. The analysis is based on the main grounds that CEOs could apply for termination remedies in Kenyan courts. Initiating a lawsuit can be risky for an employee as the next employer may need background research and call the employee's previous employer. Any CEO to sue his or her previous employer has to consider such a problem before bringing legal action against the company.¹⁴⁶ After reviewing all the Kenyan court judgments where CEOs commencing judicial proceedings against the company, it was found that the reasons include that they are not given reasonable termination dues, dismissal reasons or notice in advance, or they get the dismissal information without proper procedure and feel being mistreated.

3.2 Unlawful Termination - Without Cause, no Valid Reason or No Justifiable Reason

The reasons for CEOs to initiate a lawsuit can be that they are not given reasonable termination dues, they get the dismissal information without proper procedure, or they fell being unfairly treated in the job handover procedure after signing the mutual agreement on termination on the contract of service¹⁴⁷.

The dismissal reason for half of the Kenyan cases cited in this thesis is that the parties failed to agree on termination reason. The cases are *Alex Wainaina Mbugua v Kenya Airways Limited*¹⁴⁸, *Teresa Carlo Omondi v Transparency International- Kenya*¹⁴⁹, *Rose Aoko Ogwang Odhiambo v National Gender & Equality Commission*¹⁵⁰, *Angela*

¹⁴⁶ Financial Post website, <https://financialpost.com/executive/management-hr/these-lawsuits-against-an-employer-will-make-it-hard-to-land-a-new-job>, on 25 Aug 2020.

¹⁴⁷ *Kenneth Wanjohi Kareithi v Olympia Capital Holdings Limited* [2019] eKLR

¹⁴⁸ *Alex Wainaina Mbugua v Kenya Airways Limited* [2017] eKLR

¹⁴⁹ *Teresa Carlo Omondi v Transparency International-Kenya* [2017] eKLR

¹⁵⁰ *Rose Aoko Ogwang Odhiambo v National Gender & Equality Commission* [2018] eKLR

*Ndambuki v Kenya National Chamber of Commerce & Industry*¹⁵¹, *Kenfreight (E.A) Limited v Benson K. Nguti*¹⁵², *Shem Andrew Gichimu v Higher Education Loans Board*¹⁵³, and *Munir Sheikh Ahmed v National Bank of Kenya*¹⁵⁴, which were filed before the court for termination without cause, no valid reason, or no justifiable reason.

For example, in the case of *Kenya Reinsurance Corporation Ltd v Eunice Mbogo*,¹⁵⁵ the CEO employment contract was about to expire, and the respondent (Eunice Mbogo) claimed she “sought in writing for the renewal of the contract”, but the appellant (Kenya Reinsurance Corporation Ltd) “had neither terminated her contract nor renewed it.” In the end, the court made the judgment in favor of Ms. Eunice Mbogo.

3.3 Unlawful Termination – Summary Dismissal Without Notice in Advance

Among all the CEO dismissal cases mentioned above, the claimants in case *748 Air Services Limited v Theuri Munyi*¹⁵⁶ and *Paul Wanyangah v Market Development Trust t/a Kenya Markets Trust*¹⁵⁷ claimed they faced summary dismissal without notice in advance.

Normally, a company is required to provide a notice in advance, and organize a hearing procedure before officially issuing a termination notice. But it’s not a general practice, especially when the companies are too hurry to commence the CEO dismissal procedure, and fail to give notice in advance, it can be easily defined as summary dismissal without notice in advance.

3.4 Unlawful Termination – Without Negotiation or Necessary Hearing

¹⁵¹ Angela Ndambuki v Kenya National Chamber of Commerce & Industry [2018] eKLR

¹⁵² Kenfreight (E.A) Limited v Benson K. Nguti [2019] eKLR

¹⁵³ Shem Andrew Gichimu v Higher Education Loans Board [2020] eKLR

¹⁵⁴ Munir Sheikh Ahmed v National Bank of Kenya [2020] eKLR

¹⁵⁵ Kenya Reinsurance Corporation Ltd v Eunice Mbogo [2019] eKLR

¹⁵⁶ 748 Air Services Limited v Theuri Munyi [2017] eKLR

¹⁵⁷ Paul Wanyangah v Market Development Trust t/a Kenya Markets Trust [2017] eKLR

Procedure

Termination without negotiation or necessary hearing procedure was mentioned in the case *Pamela Nelima Lutta v Mumias Sugar Co. Ltd*¹⁵⁸, *Richard Boro Ndungu v KPMG East Africa Association & 3 others*¹⁵⁹, and *Munir Sheikh Ahmed v National Bank of Kenya*¹⁶⁰.

The claimant in the case *Pamela Nelima Lutta v Mumias Sugar Co. Ltd*¹⁶¹ claimed her employment was terminated after a declaration of redundancy, but there was no process in accordance with the Employment Act, 2007. The claimant in the case *Richard Boro Ndungu v KPMG East Africa Association & 3 others*¹⁶² raised the issue before the court regarding the company “unfairly targeting him, intimidation, and non-procedural removal from partnership”. Also, in the case *Munir Sheikh Ahmed v National Bank of Kenya*¹⁶³, the claimant, who was the managing director of the respondent from 2012 to 2016, claimed that the termination was unprocedural, unfair, unlawful, and wrongful.

Sometimes, there may also be some confusion in the hearing procedure. In the case *Paul Wanyangah v Market Development Trust t/a Kenya Markets Trust*¹⁶⁴, the claimant received a letter dated 19th Oct 2016 saying the board of directors meeting, hearing or discipline meeting will be held on 24th Oct 2016, and specified the place for the meeting. But together with the letter, there was a mail message indicated that the disciplinary hearing would be on Tuesday 25th Oct 2016, but the venue was not stated. The claimant failed to attend the hearing as a result of the confusion of the hearing arrangements, and the dispute of this case arises hereafter. Also, the procedure of dismissal without hearing can be reasoned “based on the presumption of guilt”, where the board of directors “rashly and wrongfully usurped the roles of judge, jury, and executioner”¹⁶⁵

¹⁵⁸ Pamela Nelima Lutta v Mumias Sugar Co. Ltd [2017] eKLR

¹⁵⁹ Richard Boro Ndungu v KPMG East Africa Association & 3 others [2017] eKLR

¹⁶⁰ Munir Sheikh Ahmed v National Bank of Kenya [2020] eKLR

¹⁶¹ Pamela Nelima Lutta v Mumias Sugar Co. Ltd [2017] eKLR

¹⁶² Richard Boro Ndungu v KPMG East Africa Association & 3 others [2017] eKLR

¹⁶³ Munir Sheikh Ahmed v National Bank of Kenya [2020] eKLR

¹⁶⁴ Paul Wanyangah v Market Development Trust t/a Kenya Markets Trust [2017] eKLR

¹⁶⁵ Zanalı “Zain” Jaffer v Vungle Inc. San Francisco County Superior Court, 000-19-574451, Compliant for Wrongful Termination in Violation of Public Policy, US.

immediately when they find out their company's CEO was arrested by the police. In the case *Zanali "Zain" Jaffer v Vungle Inc*, the board of directors made 'the presumption of guilt' to the CEO instead of applying 'the presumption of innocence'. The board made the resolution of CEO dismissal "due to a recent arrest and resulting charges". However, no country's legislations will provides that being arrested is equal to committing a criminal offence. Such procedure of dismissal without hearing shall not be made.

3.5 Other Reasons

Some other reasons may also result in disputes between the CEO and the company, such as a company's founding CEO is dismissed by the company through the board meeting or shareholders meeting; the CEO is under constant threat of dismissal such as receiving three warning letters in one day; the CEO meets the performance evaluation requirement but the company says otherwise and refuse to pay performance bonus, etc.

3.5.1 Company Founding CEO to Sue the Company for Dismissal

If a company's founder CEO was dismissed by the company through a board meeting or a shareholders meeting, it means someone created a company and then lost control of it. As discussed in Chapter 2.2.2, if the company is a listed company, a "barbarian" can buy a very high percentage share of the company through stock exchanges, take the management control of that company and chase the company's founding CEO out of the company.

The Memorandum and Articles of Association (M&AA) and its internal procedure can provide a guide on how to sort out various issues. There was a court ruling for the case *Stephen Kirim Ringera v David Mwiraria & 2 others*¹⁶⁶ dated 15 Sep 2016, Mr. Stephen

¹⁶⁶ *Stephen Kirim Ringera v David Mwiraria & 2 others* [2016] eKLR

Kirim Ringera, who is a shareholder, a director, and used to be the CEO, requested the court to issue injunction to restrain his dismissal as the CEO as “he will lose his investment and rights in the company if exclude him from the management of the company.” The court found the dismissal followed the company internal procedure and dismissed the application given the analysis that “there is no such thing as a CEO for life or whose appointment cannot be revoked in accordance with the terms of the agreement of appointment and the Memorandum and Articles of Association of the company.”¹⁶⁷

3.5.2 Under Constant Threat of Dismissal

Senior executives may apply for court injunctions when they face the threat of dismissal, and the court may provide remedies under the conditions when there exists evidence to show there might be a possible unlawful termination procedure to happen, such as receiving three warning letters in one day. The case *Abigail Ayako v Kenyatta International Convention Centre*¹⁶⁸ is a special case because it shows senior executives can also seek remedies before receiving the termination notice. The claimant was the human resource manager of the claimant, and she was not yet fired but was threatened to be dismissed when she started to seek remedies in court. She received three warning letters in one day and made an application in court to prevent being dismissed. The court considered the fact that the applicant was about to retire and made a ruling in favor of the applicant.

As a comparison to the case above, in another case *Pamela Nelima Lutta v Mumias Sugar Company Limited*¹⁶⁹, the court refused to provide such injunctions for the sake that there is no evidence to show the termination to be taken might be an unlawful termination. The court confirms the company shall be entitled to conduct lawful

¹⁶⁷ Stephen Kiri Ringera v David Mwiraria & 2 others [2016] eKLR

¹⁶⁸ Abigail Ayako v Kenyatta International Convention Centre [2018] eKLR

¹⁶⁹ Pamela Nelima Lutta v Mumias Sugar Company Limited [2016] eKLR

dismissal procedure as “the Employment Act does not intend that courts take away the management prerogative of employers and that the Act is a shield and not a sword.”¹⁷⁰

3.5.3 Claim for Damage to Reputation or General Damage

Each business industry is specific, the story of a CEO in one industry’s giant company being dismissed might produce rumor among different companies’ top management in this industry. Even a simple dismissal may cause problems that the CEO has to face if the CEO wants to find a similar job. The problem will be more severe if the CEO is dismissed for misconduct or incapacity and such reason was disclosed to the public. The story of a CEO dismissed for misconduct will be widely known by the companies in the same industry, and such dismissal might cause damage to the CEO’s reputation, especially when the company leaks to the public the details of misconduct or incapacity. Three CEO dismissal cases are given in this paper as examples of how and why the damage of reputation to a CEO were caused. More details of that can be found in Chapter 4.6.4.

3.5.4 Termination Notice Period and Unfinished Period for a Fixed Term Employment

A fixed-term employment contract may be terminated several months or even more than one year before the term ends. On such condition, if the company is only willing to pay one month’s salary in lieu of notice in accordance with section 41 of Kenya Employment Act, it may not be easy to get the agreement between the CEO and the company on the compensation for the unfinished period. This chapter¹⁷¹ can be divided into two parts: the first part is the notice period for CEO dismissal, which focuses on the notice duration/period of a CEO in a CEO dismissal contract; the second part

¹⁷⁰ Pamela Nelima Lutta v Mumias Sugar Company Limited [2016] eKLR

¹⁷¹ Chapter 3.5.4.

concerns the unfinished period for a fixed term CEO employment contract, and how to make the calculation of CEO termination dues.

3.5.4.1 The Minimum Termination Notice Period for Dismissing a CEO

As a general practice, the termination notice period of an employee is based on section 35(1)(c)¹⁷² and section 40(1)(f)¹⁷³ of *Kenya Employment Act*, which requests a twenty-eighty-day termination notice for termination notice of a contract of service not being a contract to perform specific work¹⁷⁴, or one month's notice or one month's in lieu of notice for termination on account of redundancy¹⁷⁵. To waive the conflict between the above twenty-eighty days termination notice and one month's notice, section 35(2) of *Kenya Employment Act* further provides that the Employment Contract can provide terms "for giving a period of notice of termination in writing greater" than the period required by section 35(1)¹⁷⁶. Instead of a one-month termination notice as per section 40(1)(f)¹⁷⁷ of *Kenya Employment Act*, several CEO employment contracts mentioned in this study provide a three-month termination notice as in Chapter 5.2.3.1. Therefore, when a CEO claims for termination notice, the minimum termination notice period is possible to be greater than one month.

3.5.4.2 The Unfinished Period for a Fixed Term CEO Employment Contract

¹⁷² Section 35(1)(c), *Kenya Employment Act*: A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be - where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.

¹⁷³ Section 40(1)(f), *Kenya Employment Act*: An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions - the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice.

¹⁷⁴ Section 35(1)(c), *Kenya Employment Act*.

¹⁷⁵ Section 40(1)(f), *Kenya Employment Act*.

¹⁷⁶ Section 35(2), *Kenya Employment Act*.

¹⁷⁷ Section 40(1)(f), *Kenya Employment Act*.

Claiming the remaining salary for the unfinished period of a fixed term CEO employment contract can be one of the reasons for a CEO to commence a lawsuit against the company. In the case *Munir Sheikh Ahmed v National Bank of Kenya*, the claimant wished to continue in employment for the remainder of 15 months and about 8 days which was beyond the statutory capping of 12 months¹⁷⁸. The unfinished period might be longer than the termination notice period, or might be even greater than 12 months, and it may result in the CEO's claim for the remaining salary for the unfinished period after CEO dismissal.

3.5.5 Request for Unpaid Termination Benefits

A company may promise to provide its CEO with various types of allowance, and the company may also define the allowance as only applicable when the CEO is on duty. For example, since overtime pay is not applicable to the CEO, the company may calculate management allowance instead, and the company may claim that overtime premiums are included in base pay or that payment of a "management allowance" eliminates the need to pay overtime allowances.¹⁷⁹

For example, the claimant in the case *Munir Sheikh Ahmed v National Bank of Kenya* requested unpaid utilities (electricity, water & security), domestic servant allowance and entertainment allowance in the application in court¹⁸⁰. In the meanwhile, for the purpose of incentive to the CEOs, companies may provide short-term annual bonus incentive plans, long-term stock-related incentive plans, benefit-related devices such as vehicles and electrical devices.¹⁸¹ These policies may be useful to motivate the CEO to work as a member of the company, but it can also lead to a dispute when the CEO

¹⁷⁸ *Munir Sheikh Ahmed v National Bank of Kenya* [2020] eKLR

¹⁷⁹ Charles Weathers and Scott North: Overtime Activists Take on Corporate Titans: Toyota, McDonald's and Japan's Work Hour, *Pacific Affairs*, University of British Columbia, Vol. 82, No. 4 (Winter, 2009/2010),

¹⁸⁰ *Munir Sheikh Ahmed v National Bank of Kenya* [2020] eKLR

¹⁸¹ American Bar Association: Executive Compensation: A 1987 Road Map for the Corporate Advisor, *The Business Lawyer*, Vol. 43, No. 1 (November 1987).

believes he or she is entitled to get the incentive bonus while the company says otherwise. The conflict may arise when there is confusion on the definition of key sentences of the CEO employment contract or CEO performance evaluation guidelines. These documentations should be very carefully written when preparing it to avoid potential conflicts on understandings. If according to the CEO, the performance evaluation standards are achieved as per performance evaluation guidelines while according to the company it is not, how should the estimation be done; or, if the shareholders and directors failed to provide investments or support as promised, the company may tend to request the CEO achieve another target that is not in written. In this condition, it will be hard to make the evaluation.

A company may also give CEOs fake promises, in which case the CEO may be promised to get “information-sharing, knowledge development, autonomy and rewards”¹⁸², but by the time he or she is dismissed, none of such promise is fulfilled. It may also result in the CEO’s promised benefits never been granted, and the CEO finally filed the lawsuit in court.

3.5.6 Request for Being Back to the CEO Position

Request for reinstatement is not a reason for dismissal, but it’s one of the proposals of the CEOs in my research on CEO dismissal practices. Three cases in this study mentioned reinstatement, including the case of *Pamela Nelima Lutta v Mumias Sugar Company Limited*, *Alex Wainaina Mbugua v Kenya Airways Limited*, and *Angela Ndambuki v Kenya National Chamber of Commerce & Industry*.

In the case of *Pamela Nelima Lutta v Mumias Sugar Company Limited*, the claimant alleged in court that the “servants and/or agents be restrained from declaring the Claimant redundant or otherwise termination her employment ... until this claim is heard and determined”, however, “the applicant had actually been served with a letter

¹⁸² Anuva Choudhury and D.V. Giri: Employee Empowerment: The Rourkela Steel Plant Experience, Indian Journal of Industrial Relations, Vol. 48, No. 4 (April 2013).

of dismissal at the time of hearing the application.”, since the claimant did not apply for reinstatement in the pray, the respondent replied in court that “there is very little likelihood of the court ordering reinstatement upon hearing the main suit.” The court supported the Respondent’s reply and the court confirmed that “the Claimant’s employment had by then been terminated and she had not sought orders for reinstatement”¹⁸³, and found that “the Claimant has not demonstrated that she is entitled to the orders of temporary injunction restraining the Respondent from declaring her redundant or in any other way terminating her employment without following due process in accordance with the Employment Act”¹⁸⁴.

In the case of *Alex Wainaina Mbugua v Kenya Airways Limited*, the key problem lies in whether it is unfair termination and reinstatement. “The claimant is seeking reinstatement with all attendant benefits. The claim for reinstatement is premised on facts that the claimant was working on on-going projects key to his work performance particularly the forensic audit to which he had information not addressed by the auditors”¹⁸⁵. “The respondent has lost trust and confidence in the claimant and an order for reinstatement would not be practical in the circumstances.”

The claimant in the case of *Angela Ndambuki v Kenya National Chamber of Commerce & Industry* “sought reinstatement and in the alternative, award of damages”¹⁸⁶. The court did not get any conclusion of this part, as section 7(1) of Kenya Arbitration Act, 1995 provides that “any Party who is subject to an Arbitration Agreement may request the High Court for some interim measures of protection pending the process of arbitration”¹⁸⁷. Therefore, the court “direct that the Parties should proceed with the Arbitral process as provided for in the Articles of Association of the Respondent.”

¹⁸³ Pamela Nelima Lutta v Mumias Sugar Company Limited [2016] eKLR

¹⁸⁴ Pamela Nelima Lutta v Mumias Sugar Company Limited [2016] eKLR

¹⁸⁵ Alex Wainaina Mbugua v Kenya Airways Limited [2017] eKLR

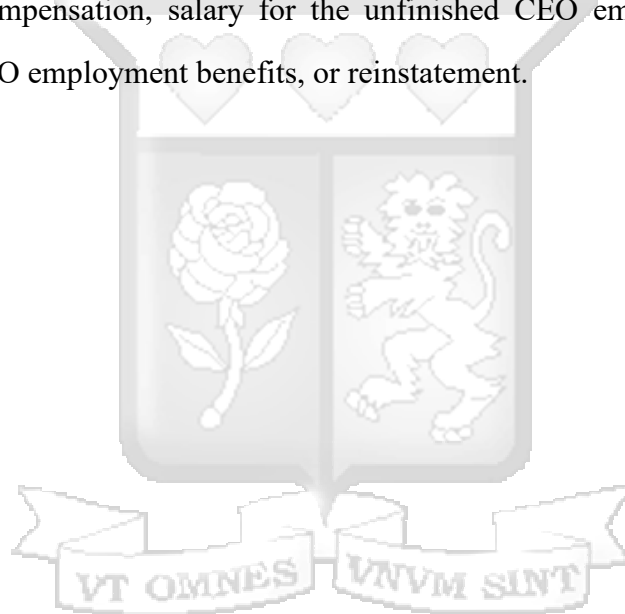
¹⁸⁶ Angela Ndambuki v Kenya National Chamber of Commerce & Industry [2018] eKLR

¹⁸⁷ Section 7(1), Kenya Arbitration Act.

All the above three cases mentioned reinstatement, but only the case *Alex Wainaina Mbugua v Kenya Airways Limited* got the judgment of approving the claimant's application as analyzed in Chapter 4.6.6.

3.6 Conclusion

The reasons why CEOs file lawsuits against their companies in Kenyan courts might be unlawful termination caused by improper termination procedures such as no cause be given, no notice be given, or hearing has been organized. In addition, CEOs might also claim for compensation, salary for the unfinished CEO employment contract period, unpaid CEO employment benefits, or reinstatement.



Chapter 4: Kenyan Court's Perspective on CEO Dismissal Disputes

4.1 Introduction

This chapter focuses on how Kenyan courts evaluate, analyze, and get conclusions regarding CEO dismissal cases. In order to find out the main perspectives of Kenyan courts, this chapter focuses on why Kenyan courts dismiss the applications, and how Kenyan courts support or dismiss cases based on the evaluation of unlawful termination and other conditions.

4.2 M&AA or CEO Employment Contract which Specified that Dispute Should Be Resolved Through Arbitration

The claimant in the case *Angela Ndambuki v Kenya National Chamber of Commerce & Industry* “sought reinstatement and in the alternative, award of damages”¹⁸⁸. The court did not get any conclusion of this part, as section 7(1) of Kenya Arbitration Act, 1995 provides that “any Party who is subject to an Arbitration Agreement may request the High Court for some interim measures of protection pending the process of arbitration”¹⁸⁹. Therefore, the court “directed that the Parties should proceed with the Arbitral process as provided for in the Articles of Association of the Respondent.”

In the case *Richard Boro Ndungu v KPMG East Africa Association & 3 others*¹⁹⁰ and *Angela Ndambuki v Kenya National Chamber of Commerce & Industry*¹⁹¹ cited in the thesis, the claims were both dismissed by the court based on the reason that the two cases shall be resolved through arbitration.

The analysis and conclusion of the two cases are “The arbitral tribunal will also be in a position to preserve the state of affairs if so satisfied that it ought to be preserved should it turn out then that the status quo is set to be disturbed. I find no merit in the

¹⁸⁸ *Angela Ndambuki v Kenya National Chamber of Commerce & Industry* [2018] eKLR

¹⁸⁹ Section 7(1), Kenya Arbitration Act.

¹⁹⁰ *Richard Boro Ndungu v KPMG East Africa Association & 3 others* [2017] eKLR

¹⁹¹ *Angela Ndambuki v Kenya National Chamber of Commerce & Industry* [2018] eKLR

application”¹⁹²,

The arbitration clause can be written in the CEO employment contract, and the court also accepts if the arbitration process is specified in the company’s Articles of Association like the case *Angela Ndambuki v Kenya National Chamber of Commerce & Industry*¹⁹³, the judge “direct that the Parties should proceed with the Arbitral process as provided for in the Articles of Association of the Respondent”¹⁹⁴. Despite the arbitration clause, the parties of a CEO dismissal disputes may also enter into a special arbitration agreement on settle the dispute through arbitration. A special arbitration agreement can be commonly seen in business practices, the parties may prefer to settle disputes through mediation or arbitration so that the dispute can be dealt with faster, and won’t stop the parties to have further cooperation.

However, what if the M&AA guides the parties to resolve disputes through a specific arbitration center while the CEO employment contract provides through the court or another arbitration center? That’s a very interesting research area and that’s why civil procedures or arbitration procedures are some important legal practice.

4.3 How Do Courts Estimate Unlawful Termination - Without Cause, No Valid Reason and No Justifiable Reason

The court made the judgment in favor of the claimant in the case *Alex Wainaina Mbugua v Kenya Airways Limited*¹⁹⁵, *Teresa Carlo Omondi v Transparency International- Kenya*¹⁹⁶, and *Munir Sheikh Ahmed v National Bank of Kenya*¹⁹⁷ because of no cause provided, no valid reason and no justifiable reason.

The claimant in the case *Alex Wainaina Mbugua v Kenya Airways Limited*¹⁹⁸ was a

¹⁹² Richard Boro Ndungu v KPMG East Africa Association & 3 others [2017] eKLR

¹⁹³ Angela Ndambuki v Kenya National Chamber of Commerce & Industry [2018] eKLR

¹⁹⁴ Angela Ndambuki v Kenya National Chamber of Commerce & Industry [2018] eKLR

¹⁹⁵ Alex Wainaina Mbugua v Kenya Airways Limited [2017] eKLR

¹⁹⁶ Teresa Carlo Omondi v Transparency International-Kenya [2017] eKLR

¹⁹⁷ Munir Sheikh Ahmed v National Bank of Kenya [2020] eKLR

¹⁹⁸ Alex Wainaina Mbugua v Kenya Airways Limited [2017] eKLR

Group Finance Director (GFD) since 25th June 2008, with the potential to take over as Managing Director as well as the CEO of the company, and his performance was appraised by the board's staff committee. After he missed the chance to be appointed the CEO of the respondent in 2014, he got his last performance appraisal with a rating of having met expectations in October, 2015, but failed to get a performance appraisal in January 2016 when he was informed the employment will be terminated. The respondent in this case argued that the claimant failed to meet agreed standards from July to September 2015 but failed to provide sufficient supporting evidence. The court declared the termination was unfair in 2017, and made the judgment in favor of the claimant.

In this case, the claimant stated that no reason was given for his termination, and even if it's for poor performance, the claimant should be entitled to a chance to improve on his alleged poor performance based on clause 16 of his contract of employment. The claimant also filed an appeal against the termination decision but failed to get a reply. The respondent failed to reply to these claims stated by the claimant, and the judgment hereby declared the dismissal to be unfair.

In the case *Teresa Carlo Omondi v Transparency International- Kenya*¹⁹⁹, the claimant was the Deputy Executive Director and the Head of Programmes of the respondent. She received no reason and no hearing when she was informed that her contract would not be renewed. On the termination letter dated 31st July 2012, the respondent directed her to clear from her office and hand over any property belonging to the respondent by 5.00 pm the same day. At that time, the claimant was about to retire but not yet retired. The judgment of this case was in favor of the claimant as the respondent failed to provide sufficient evidence to support there was any lawful reason with lawful notice and sufficient hearing procedure.

The greater affront to dignity arises from dismissal without cause²⁰⁰, and the works for

¹⁹⁹ *Teresa Carlo Omondi v Transparency International-Kenya* [2017] eKLR

²⁰⁰ Lorrie Marie Adams, *Distinguishing Employees and Independent Contractors for the Purposes of Employment Standards Legislation*, University of Alberta, LLM, 2013.

the company “is not merely a ‘product’”²⁰¹. The shareholders and board of directors may dismiss a CEO because some of them simply dislike him or her, and then commence a CEO dismissal without cause.

The main types of lawful reasons for a company to dismiss an employee under Kenya employment practice can be summarized as poor performance, misconduct and incapacity²⁰². Each of these three practical reasons requests corresponding procedures to ensure the lawful reason is followed by lawful termination procedure and lawful termination notice (termination notice in writing with at least one month notice period²⁰³).

4.4 How Do Courts Estimate Unlawful Termination - Summary Dismissal Without Notice in Advance

In common law system, Canadian courts turn to the ‘Bardal factors’ to decide how much notice constitutes ‘reasonable’ notice.²⁰⁴ Notice in advance is essential for a lawful termination procedure.

The claimant averred that no further action was taken until 27th July, 2015 when she received a Show Cause Notice requiring her to show cause within 48 hours why disciplinary action including summary dismissal should not be taken against her.²⁰⁵ The general discipline procedure requests the company to provide the reason for a disciplinary hearing. In the case *Paul Wanyangah v Market Development Trust t/a Kenya Markets Trust*²⁰⁶, the claimant - CEO of the respondent, claimed that he faced

²⁰¹ Guy Davidov, “A Purposive Interpretation of the National Minimum Wage Act” (2009) 72:4 Mod. L.Rev. 581.

²⁰² Chambers & Partners: 2019 CHAMBERS GLOBAL PRACTICE GUIDE Kenya Chapter-Employment.

²⁰³ Section 40(1)(f), Kenya Employment Act: An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions - the employer has paid an employee declared redundant not less than one month’s notice or one month’s wages in lieu of notice.

²⁰⁴ *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.) [Bardal], CA.

²⁰⁵ *Pamela Nelima Lutta v Mumias Sugar Company Limited* [2016] eKLR

²⁰⁶ *Paul Wanyangah v Market Development Trust t/a Kenya Markets Trust* [2017] eKLR

summary dismissal with no notice, no due process, and he was not paid the terminal dues for Oct 2016. However, based on the notice agreed by both parties, the termination notice was made after a discipline hearing. The claimant claimed it was an unfair meeting, because he received two different notices with different date to organize the discipline hearing. The court dismissed the case as there existed a discipline hearing, and the claimant failed to attend, which resulted in the termination. The claim was dismissed as the court analyzed that there was a hearing, and the termination decision was made at the hearing.

4.4.1 The Lawful Commencement Time to Refuse a CEO to Enter into the Office

In several cases of this paper, some of the CEOs or other senior executives argued in court that they were refused to enter into their office immediately after they were informed to be dismissed. Such as in the case *Teresa Carlo Omondi v Transparency International- Kenya*, the claimant was issued Notification of the End of Fixed Term Contract on 31st July 2012. On the same day, the claimant was asked to clear from office at 1 pm, and hand over her job before 5 pm. In this case, the claimant still had 2 months left to the end of the contract, and on the claimant's employment contract, there exists the option to terminate the contract under clause 13 through a notice of 3 months or payment of 3 months' salary in lieu of such notice. Considering the requirement of 3 month's termination notice in the employment contract specified a clear period on termination notice, and the claimant's termination in this case was abrupt and insensitive.²⁰⁷ If a senior executive is given an immediate notice forbidding him/her to enter into his/her office, it will be impossible for parties to have further necessary negotiation.

4.4.2 The Lawful Notice Period in CEO Dismissal

²⁰⁷ *Teresa Carlo Omondi v Transparency International- Kenya* [2017] eKLR

Before analyzing the Kenyan courts' perspective regarding what constitutes a lawful CEO dismissal notice period, we need to have a brief look at the small conflict between the definition of the lawful notice period in section 35(1)(c) and section 40(1)(f) of Kenya Employment Act.

Section 35(1)(c) of *Kenya Employment Act* generally regulates if a contract of service “it to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing”²⁰⁸. Section 40(1)(f) of *Kenya Employment Act* gives the company access to terminate a contract of service with a one-month notice²⁰⁹, but the reason is also limited to a specific one, this clause is specially for termination on account of redundancy. The conflict between section 35(1)(c) and section 40(1)(f) of *Kenya Employment Act* never became an issue in Kenyan court judgments as no claimant of any cases ever argued about it, and it has become a general practice that a one-month notice is enough to terminate an employment contract.

Despite the conflict of whether the notice period should be twenty-eight days or one month, and whether the one-month notice requirement specially for redundancy can also be applicable to dismissal for misconduct or other reasons, the courts also consider whether there exists a cap for the notice period. As the case details of *Munir Sheikh Ahmed v National Bank of Kenya*²¹⁰ mentioned in Chapter 3.5.4.2, a fixed-term CEO employment contract might be terminated 15 months before it expires, and if under such condition, the maximum remedies shall be 12 months.

²⁰⁸ Section 35(1)(c), Kenya Employment Act: A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be - where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.

²⁰⁹ Section 40(1)(f), Kenya Employment Act: An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions - the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice.

²¹⁰ *Munir Sheikh Ahmed v National Bank of Kenya* [2020] eKLR

4.5 How Do Court Estimate Unlawful Termination - Without Negotiation or Necessary Hearing Procedure

Two types of hearings may result in CEO dismissal: the first type is performance appraisal hearing, the second type is discipline hearing. Both of the two types are mainly based on company's internal procedures, such as MM&A and Human Resource Manual (HR Manual). Even though a company's hearing procedure may look reasonable, if the procedure did not follow its MM&A or HR Manual or even against the MM&A or HR Manual, then it might also result in unlawful termination.

4.5.1 How Do Court Estimate Performance Appraisal Hearing

The procedure of a performance appraisal hearing can be provided in the Human Resource Manual, and it can be held quarterly, every half year or every year. Usually, a performance appraisal with the conclusion of poor performance will result in less bonus, lower possibilities to get promotion or increase salary, and under some extreme conditions, it may become an advance procedure for dismissal. The performance appraisal hearing can be named in various ways, such as performance evaluation meeting, performance review meeting, etc. It might be followed by different procedures, but as long as there will be a performance appraisal result, it can be defined as a performance appraisal hearing.

Poor performance shall not be defined as a direct reason for dismissal, but it might be defined as incapacity with a conditional requirement that a certain employee shall not be defined as poor performance in the next hearing. As the judge analyzed in the case *Alex Wainaina Mbugua v Kenya Airways Limited*, the process and motions of section 41 of the Employment Act, 2007 are not meant to be mechanical. The employee who is of poor performance should be given a fair and reasonable chance to address their work performance with a view to improve.²¹¹

²¹¹ Alex Wainaina Mbugua v Kenya Airways Limited [2017] eKLR

4.5.2 How Do Court Estimate Discipline Hearing

The courts tend to follow up the company's internal procedure in estimating whether a CEO dismissal procedure is lawful. In the case *Paul Wanyangah v Market Development Trust t/a Kenya Markets Trust*, the claimant received two different discipline hearing notices, the claimant attended the disciplinary hearing venue as directed but was informed that there was no scheduled meeting of the respondent at the hotel. The claimant went to the respondent office to enquire if there was a meeting but the security officer at the door informed him there was no meeting scheduled for the day. Following two conflicting notices and different dates for the disciplinary meetings he felt this was a ploy by the respondent to confuse him so as to deny him a fair hearing, the claimant claimed he was confused, frustrated and desperate that he did not attempt to verify whether the disciplinary meeting was on this day. The claimant's claim in this case was dismissed for the sake that the discipline was there but he did not attend.

Based on the discipline hearing discussed above, and other cases discussed in this thesis, we can summarize that the Kenyan courts mainly estimate whether a discipline hearing is lawful from the following aspects:

- a. The exact causes resulting the commencement of a discipline hearing, and whether it is the actual reason to commence the discipline hearing;
- b. The method to notify (in writing, phone call, text message, or through email) the CEO or other senior executives of the time and place of the hearing, whether the person to be notified is well aware of the existence of the discipline hearing;
- c. Get the conclusion after the hearing finishes. There is no point in commencing a discipline hearing if the decision was already made before the hearing.

To ensure a CEO discipline hearing procedure meets the court's requirements, it is vital to ensure the existence of a hearing procedure, the reason to start the procedure, the form of the procedure, and more importantly, the result of the hearing shall be made

after the hearing finishes. Otherwise the ex-CEO might claim in court that the company is “unfairly targeting him” as in the case *Richard Boro Ndungu v KPMG East Africa Association & 3 others*²¹².

4.5.3 How do Courts Define the Differences Between Different Types of Hearing

The procedures for handling poor performance are completely different from the ones for handling misconduct. The decision of poor performance or incapacity shall be made through a performance appraisal hearing, and the decision of misconduct shall be made through a discipline hearing. In the case *Alex Wainaina Mbugua v Kenya Airways Limited*²¹³, the respondent has its own performance evaluation procedure, but failed to provide corresponding evidence to prove the claimant - the GFD’s behaviour belonged to poor performance while the claimant insisted that there was no poor performance evaluation. In this case, there was also confusion on whether the respondent tried to dismiss the claimant. Performance is all about how the CEO/senior executive does the job. Misconduct is all about behaviour or conduct of the CEO/senior executive in relation to company rules, policies and procedures.²¹⁴ However, since Kenya Employment Act does not provide any specific requirement for the performance appraisals procedure and the hearing procedure, each company is entitled to define and set up its own hearing procedure as long as the two procedures are not mixed. The court’s main concern is whether the company followed its internal procedure in organizing such hearings.

4.6 Other Conditions

There are also some cases cited in this thesis belonging to other conditions, such as whether the court can support that the board of directors is entitled to remove the

²¹² *Richard Boro Ndungu v KPMG East Africa Association & 3 others* [2017] eKLR

²¹³ *Kenya Airways Limited v Alex Wainaina Mbugua* [2019] eKLR

²¹⁴ *Alex Wainaina Mbugua v Kenya Airways Limited* [2017] eKLR

company's founder from its CEO position, how can the court provide special remedies when the CEO is faced with the threat of dismissal, what's the maximum termination notice period the court can support, whether the court can support damage to CEO's reputation during dismissal, and how to make the estimation.

4.6.1 The Board of Directors Are Entitled to Remove Company Founder from CEO Position

Usually, a company's M&AA will specify the procedure of recruiting and dismissing senior executives, especially CEOs. It can be either through the shareholders meeting or the board meeting. The Kenya *Sample Articles of Association (The Companies Act, Cap 486 Laws of Kenya, Company Limited by Shares)* did not specify the process to recruit or dismiss senior executives, so companies need to specify the details with its own format in the M&AA.

But in the case *Stephen Kirimi Ringera v David Mwiraria & 2 others*, the applicant is a shareholder, the managing director and was the CEO of the company. The applicant's argument in court is that if he was removed from the CEO position, he would lose his vast investment. Such argument cannot be supported as the procedure of dismissing a company's CEO was already defined in the company's M&AA, hence, the court supported that the minutes of the board meeting is entitled to dismiss the company's founder from the CEO position, and drew the conclusion that "there is absolutely nothing which would impel the court to hold that the Applicant should be the only person who can be the CEO of the company or the guarantee towards preservation of the company."²¹⁵

4.6.2 Special Remedies When CEOs Face the Threat of Dismissal

²¹⁵ Stephen Kirimi Ringera v David Mwiraria & 2 others [2016] eKLR

The court made the judgment in favor of the claimant in the case *Abigail Ayako v Kenyatta International Convention Centre*²¹⁶, as introduced in Chapter 3.5.2, was mainly because the claimant was about to retire, the conclusion might be different if the claimant's condition is different.

A company may prepare warning letters for different issues, and send them to an employee in one day, but it doesn't mean the final dismissal will come immediately. But this case shows a good phenomenon that when an employee faces threat of dismissal, the court may provide some kind of support.

4.6.3 The Termination Notice Period and Unfinished Fixed Term Employment Contract from the Perspective of Kenyan courts

There are two types of termination period in my research, the first type of termination period belongs to the termination notice, and it mainly depends on the termination notice period defined in the CEO employment contract; the second type of termination period belongs to the unfinished period in a fixed-term employment contract.

4.6.3.1 The Termination Notice Period for CEO Dismissal Under the Perspective of Kenyan Courts

Kenyan courts mainly follow Section 40(1)(f)²¹⁷ of Kenya Employment Act and the CEO employment contract in order to decide the termination notice period. The notice period for CEO dismissal might be slightly different from other employees, especially as analyzed in the judgments, one month is indeed not enough for people in senior positions to find similar jobs with similar payment. This factor is a concern in designing

²¹⁶ *Abigail Ayako v Kenyatta International Convention Centre* [2018] eKLR

²¹⁷ Section 40(1)(f), Kenya Employment Act: An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions - the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice.

the clauses of the CEO employment contract, the notice period for CEO dismissal might be slightly longer than that for other employees, and a three-month termination notice period can be commonly seen in the CEO employment contracts in my research.

4.6.3.2 Unfinished Fixed Term Employment Contract Under Kenyan Court's Perspective

In the cases where the CEO dismissal happens before the fixed-term CEO employment contract expires, the CEOs may claim for the salaries for the whole unfinished term.

As discussed in Chapter 4.7, the salaries for such an unfinished period of the CEO employment contract can be claimed, and there exists a cap of the maximum compensation.

4.6.4 Court's Perspective Towards Damage to Reputation and General Damage

Three cases in this research mentioned damage to CEO's reputation, but none of the three cases got compensation from the court judgments. For instance, in the case *Munir Sheikh Ahmed v National Bank of Kenya*²¹⁸, the petitioner claimed that the respondent disclosed the petitioner's compulsory leave (suspension) in the print media citing governance issues as the reason for suspension effectively brought into question his professional reputation without holding a fair hearing beforehand.

Besides damage to reputation, some cases may also mention the concept of general damage, but such concept is not accepted by Kenyan courts in employment cases. I hereby listed two types of cases with different Kenyan court judgments. The claimant's application of general damage in the first type of cases was dismissed by the court,

²¹⁸ *Munir Sheikh Ahmed v National Bank of Kenya* [2020] eKLR

while the second type of cases revealed that the employee faced with unlawful dismissal was entitled to get compensation, indemnity, general damages.

For the first types of cases the claimants claimed for general damages after dismissal, in the case *Kenya Ports Authority v Edward Otieno*, the court dismissed the application of general damage by reasoning “there can be no general damages in respect of suits based on termination of employment contract since the relation of the parties to such contract is contractual and thus terminable only under the terms of the same contract.”²¹⁹ In another case *Rift valley Textiles Ltd v Edward Onyango Oganda*, the court also finds that “it is established that where a person is employed and one of his terms of employment include a period of termination of that employment, the damages suffered are the wages for the period during which his normal notice would have been current”²²⁰

The second type of cases supports the concept of general damage. In the case *C.P.C. Industrial Products v Angima*, the court analyzed “the terminated employee is entitled to compensation, indemnity, general damages, call them what you may, for the loss he suffers had he been allowed to serve for the period of the termination clause.”²²¹ But this might be limited to the losses for the service period.

4.6.5 Court’s Perspective Towards Unpaid Benefits and Performance Bonus

Despite the compulsory employment benefits supported by legislations, there may also some other employment benefits and performance bonus mutually agreed in the CEO employment contract and benefits applicable to all the employees specified in the HR Manual. There may also some other benefits in some other company documents, it may or may not in a written format, and it can be a quite wide range of scope, such as utilities (electricity, water & security), domestic servant allowance and entertainment allowance

²¹⁹ Kenya Ports Authority v Edward Otieno, Civil Appeal No. 120 of 1997, Kenya

²²⁰ Rift valley Textiles Ltd v Edward Onyango Oganda, Civil Appeal No. 2 of 1992, Kenya

²²¹ C.P.C. Industrial Products v Angima, Civil Appeal No. 197 of 1992, Kenya

in the application in court²²².

4.6.6 Court's Perspective Regarding Reinstatement

Reinstatement is one of the remedies options for wrongful and unfair termination under section 49(3) of Kenya Employment Act²²³. As per a court judgment and the conclusion for the cases in Chapter 3.5.6²²⁴, the application of reinstatement can be supported as long as the reinstatement is applied in the application, and there exists the possibility for reinstatement.

First of all, the reinstatement shall be applied and the claimant shall raise the application in the initial procedure, otherwise it's not possible for the court to make a judgment to support the reinstatement as such application was not in the initial procedure. As in the case *Pamela Nelima Lutta v Mumias Sugar Company Limited*, the claimant did not apply for reinstatement initially, but the claimant replied in court that restrained from declaring the claimant redundant” The court supported the respondent’s reply and confirmed that “the claimant's employment had by then been terminated and she had not sought orders for reinstatement²²⁵.

4.6.7 The Balance Between Public Interest and Private Rights

Despite the above reasons, public interest might also be one of the typical reasons for the court to dismiss the claim. Currently, only one case *Shem Andrew Gichimu v Higher Education Loans Board* is found on Kenya Law Report website regarding this topic.

²²² Munir Sheikh Ahmed v National Bank of Kenya [2020] eKLR

²²³ Section 49(3), Kenya Employment Act: Where in the opinion of a labour officer an employee’s summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to - (a) reinstate the employee and treat the employee in all respects as if the employee’s employment had not been terminated; or (b) re-engage the employee in work comparable to that in which the employee was employed prior to his dismissal, or other reasonably suitable work, at the same wage.

²²⁴ Chapter 3.5.6 Request for Being Back to the CEO Position After Dismissal

²²⁵ Pamela Nelima Lutta v Mumias Sugar Company Limited [2016] eKLR

There may exist some other cases with completely different analysis, but such cases couldn't be found by the time this thesis is finished.

In the case *Shem Andrew Gichimu v Higher Education Loans Board*, the court considered the public obligations of the respondent, and reached the conclusion that if the court grant such injunction order, the respondent is more likely to suffer while the respondent is expected to continue discharging its mandate to the public²²⁶. Comparing with the CEO in a company or a non-profit institution, the CEO (or senior executives) of a public institution may take on more social responsibilities, and the public interest may be considered in analyzing the CEO's employment rights. Hence, the court rendered the judgment with the conclusion that "Rejected. This balance tilts more in favour of public interest as opposed to the Applicant's private rights in respect of his employment."²²⁷

4.7 The Compensation Cap of Unlawful Termination

Having discussed all the perspectives of the courts above, there is also a concept of maximum compensation or compensation cap that the courts may refer to. The compensation cap in the case of unlawful termination is introduced in section 49(1)(c) of the Kenya Employment Act, and the cap for employment remedies shall be "equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal."²²⁸ As the judge's conclusion in the case *Munir Sheikh Ahmed v National Bank of Kenya*, taking into account all the cited factors under section 49²²⁹ of Kenya Employment Act as impacting on the summary dismissal, the court found that the petitioner had established a case for an award of 12 months' gross salaries for the unlawful, unfair and

²²⁶ *Shem Andrew Gichimu v Higher Education Loans Board* [2020] eKLR

²²⁷ *Shem Andrew Gichimu v Higher Education Loans Board* [2020] eKLR

²²⁸ Section 49(1)(c), Kenya Employment Act.

²²⁹ Section 49, Kenya Employment Act: Remedies for wrongful dismissal and unfair termination.

unconstitutional summary dismissal.²³⁰

4.8 Conclusion

This chapter herein summarizes the components for a lawful CEO dismissal procedure from the perspective of Kenyan courts as follows:

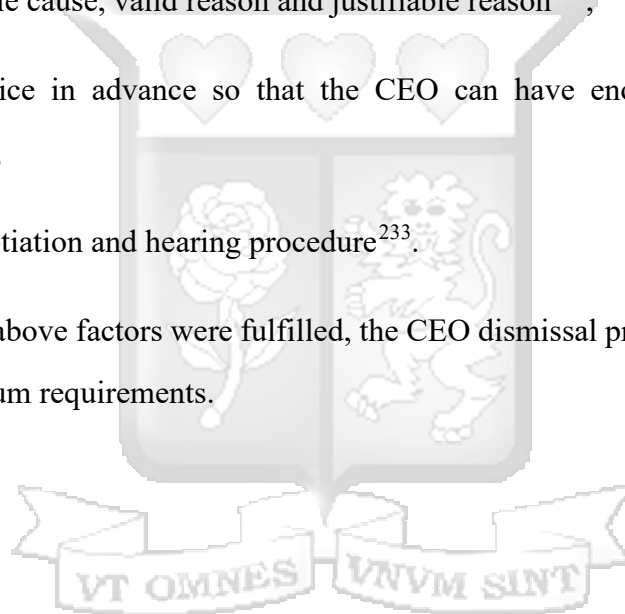
a. the CEO dismissal disputes shall be resolved in court unless there exists an arbitration clause or special arbitration agreement.

b. a reasonable cause, valid reason and justifiable reason²³¹;

c. proper notice in advance so that the CEO can have enough time to seek alternative jobs²³²;

d. Basic negotiation and hearing procedure²³³.

As long as all the above factors were fulfilled, the CEO dismissal procedure shall meet the court's minimum requirements.



230 *Munir Sheikh Ahmed v National Bank of Kenya* [2020] eKLR

²³¹ See Chapter 4.3.

²³² See Chapter 4.4.

²³³ See Chapter 4.5.

Chapter 5: Proper CEO Dismissal Procedure

5.1 Introduction

With the actual reasons for CEO dismissal discussed in Chapter 2, Chapter 5 will focus on the lawful grounds for CEO dismissal, and what results in a CEO dismissal procedure to be considered as a lawful CEO dismissal procedure. According to *2019 CHAMBERS GLOBAL PRACTICE GUIDE Kenya Chapter-Employment*, the permitted grounds for dismissal in Kenya are poor performance, misconduct and incapacity.²³⁴ To ensure the CEO dismissal procedure is lawful, it is suggested that the CEO dismissal shall comply with specified procedures to be discussed in this chapter. This chapter also discusses a company's internal documentations that provide CEO dismissal procedure guidelines, three lawful grounds for CEO dismissals under Kenya Employment Act, and what constitutes a lawful CEO dismissal procedure under Kenya Employment legislation.

5.2 The Basic Company Documentation to Guide CEO Dismissal Procedure

The reason for a company to have the basic company documentation and keep the record of them can be “where it was emphasized that termination is unfair if the Employer fails to prove valid and fair reason, related to Employee's conduct, capacity or compatibility.”²³⁵ Companies need internal documentation to guide the CEO dismissal procedure, and keep the record of these documents and procedures, so that in the event of CEO dismissal disputes, the company can have sufficient evidence to support its arguments.

In view of all the 14 typical cases, CEO dismissal procedures require a company to follow the Employment Act, the CEO's Employment Contract, the Memorandum and

²³⁴ Chambers & Partners: 2019 CHAMBERS GLOBAL PRACTICE GUIDE Kenya Chapter-Employment.

²³⁵ E&LRC Cause No. 593 of 2015, Nursing Council of Kenya v. County Government of Nairobi & 5 Others

Articles of Association, the Human Resource Manual, and The Executives Team Performance Evaluation Guide or Standard. Warning letter and internal hearing procedures are important to confirm whether there is a proper procedure to notify the CEO and give him or her proper procedure to defend himself or herself and explain. All proper procedures request the company to have existing procedures to follow when releasing senior executives. And the company actually follows the procedures when dismissing its CEO.

5.2.1 Memorandum and Articles of Association

There are many internal documents regulating CEO's dismissal process, because of CEO's special position, the company constitution - Memorandum and Articles of Association (M&AA) could have a special clause for the dismissal or resignation of CEO and directors.

Since one of the principles held by the judge when dealing with dismissal disputes is to follow the internal documents of the company. Besides the dismissal procedure, the dispute resolution approach can also be written in M&AA. In the M&AA, the dispute resolution approach to releasing senior executives' team can be specified, which would be a guide for the parties to follow when there occurs a dispute of the dismissal procedure. As in the case *Angela Ndambuki v Kenya National Chamber of Commerce & Industry*, the judge put out "I direct that the Parties should proceed with the Arbitral process as provided for in the Articles of Association of the Respondent"²³⁶, which means that even if the M&AA and the Human Resource Manual (HR Manual) of a company do not indicate any dismissal process, arbitration clauses in the CEO Employment Contract could guide the parties to resort to arbitration for disputes resolution.

Seen from that case, if a company's Memorandum and Articles of Association and HR

²³⁶ *Angela Ndambuki v Kenya National Chamber of Commerce & Industry* [2018] eKLR

Manual do not indicate procedures of settling dismissal issues, the Employment Contract shall prevail.

5.2.1.1 The Importance of the Memorandum and Articles of Association

The M&AA is a core document to guide all the company's activities, and the exact internal management arrangement may not be written in it in detail, but it will guide all the activities of the company to operate smoothly.

There are two questions concerning the connection between M&AA and CEO dismissal procedure. The first question is how will the M&AA guide CEO dismissal procedure, the other one can be how to examine the validity of the M&AA, since any update version of the M&AA shall come with a special resolution²³⁷, and be lodged with the Registrar of companies for a copy²³⁸.

As for the connection between M&AA and CEO dismissal procedure, usually, the M&AA will specify how to

5.2.1.2 The Arbitration Clause in the Memorandum and Articles of Association

There are also some court judgments mentioning that M&AA can be the guide for the parties in an employment dispute to seek remedies through arbitration, the case *Angela Ndambuki v Kenya National Chamber of Commerce & Industry*²³⁹ also gave the conclusion that the parties should settle their CEO dismissal dispute through arbitration as requested by the company's M&AA. For the connection between dispute resolution

²³⁷ Section 22, Kenya Companies Act: Amendment of articles - A company may amend its articles only by special resolution.

²³⁸ Section 24(1), Kenya Companies Act: If a company amends its articles, the company shall lodge with the Registrar for registration a copy of the articles as amended not later than fourteen days after the resolution containing the amendment is passed.

²³⁹ *Angela Ndambuki v Kenya National Chamber of Commerce & Industry* [2018] eKLR

and M&AA, we can also have a look at the respondent's reply in the case *Alex Wainaina Mbugua v Kenya Airways Limited*, in this case, the respondent argued that "The CEO and Group Finance Director being members of the respondent board of directors are also subject to the Articles of Association."²⁴⁰

As for the connection between M&AA and CEO dismissal procedure, usually, the M&AA will specify how to recruit and dismiss employees in senior management positions, in the part of the power of the company's board of directors, and the power of the shareholders meeting.

5.2.2 HR Manual and Specified Policies

HR Manual is a general guide to all employees of a company. As a supporting document to HR Manual, it may include a job description, special discipline policies (discipline guidelines that need to update from time to time, these documents may be attached as an appendix of the HR Manual, or an independent document that supports the enforcement of HR Manual), performance evaluating policies, attendance policies (Senior Executives may be faced with a minimum attendance requirement, or in the SMEs, CEOs may be also required to follow the attendance policies), sexual harassment policy as required by section 6(2) of Kenya Employment Act²⁴¹ for any company with more than 20 employees.

Besides the above basic policies, there may also be specified policies such as recruitment procedures, advertising and selection criteria, appointments and the appointment process, job classification and grading, remuneration, employment benefits and terms and conditions of employment, job assignments, the working environment and facilities, training and development, promotion, transfer, demotion,

²⁴⁰ Alex Wainaina Mbugua v Kenya Airways Limited [2017] eKLR

²⁴¹ Section 6(2), Kenya Employment Act: An employer who employs twenty or more employees shall, after consulting with the employees or their representatives if any, issue a policy statement on sexual harassment.

and termination of employment policies.²⁴²

5.2.2.1 HR Manual

HR Manual is a guide to all employees of a company, which includes performance appraisal, work attendance requirements, drug and alcohol abuse policy, harassment policy, conflict of interest, confidential information, disciplinary procedures, and a list of gross misconduct, etc.

In the case of McDonald's CEO dismissal, the company provided that the reason for his dismissal was he dated a lady under his management, which belonged to behavior that disobeyed the company's management rules.

The CEOs can either update the HR Manual to provide a higher termination compensation for himself or herself, or make/update some other internal management rule that applies to all employees (inclusive of CEO), and benefit from it when the CEOs face dismissal. A research conducted based on 60 NSE listed companies' CEOs²⁴³ concludes that "the more powerful CEOs are successful in controlling the process and outcome of compensation determination"²⁴⁴.

Firm performance evaluation might be another key issue in the HR Manual regarding CEO dismissal. However, a study among insurance companies in Kenya finds out that there is a non-significant relationship between executive compensation and financial performance. This result might be caused by the fact that its sources are limited to agency theory and review of relevant literature. Some other studies conducted on NSE

²⁴² Section 5(8)(c), Kenya Employment Act: an "employment policy or practice" includes any policy or practice relating to recruitment procedures, advertising and selection criteria, appointments and the appointment process, job classification and grading, remuneration, employment benefits and terms and conditions of employment, job assignments, the working environment and facilities, training and development, performance evaluation systems, promotion, transfer, demotion, termination of employment and disciplinary measures.

²⁴³ Omamo Anne, Peter K'obonyo, Florence Muindi, Influence of CEOs Power on Their Compensation, *European Business & Management*, Volume 6, Issue 6, November 2020, Pages: 136-142.

²⁴⁴ Elhagrasy, G., Harrison, R. and Buchholz R. (1999). Power and Pay. The politics of CEO compensation, *Journal of Management and Governance*. Vol. 3: 213-251.

listed companies' CEOs also find out that those CEOs with longer tenure have a higher influence on the board, especially for the independent directors, "board composition has important implications on capital structure decisions. Specifically, director independence is positively related to leverage, whereas CEO duality and tenure have negative and significant effects on leverage. In addition, the interaction effect of CEO tenure indicates that when CEOs have long tenure, the power of independent directors to influence capital structure decisions diminishes."²⁴⁵ And the joint effect of board structure, CEO tenure and firms' characteristics was significant.²⁴⁶

5.2.2.2 CEO Job Description and Performance Evaluation Policies

The CEO job description might be a supporting document to the work scopes and the performance evaluation policy. As the cases discussed in case *Alex Wainaina Mbugua v Kenya Airways Limited*²⁴⁷ Chapter 4.3, when it comes to the performance evaluation, the employees "should be entitled to a chance to improve on his alleged poor performance", and this case suggests companies to have specified performance evaluation policy, as well as the policies to give the employees a chance to improve their performance.

5.2.2.3 Discipline Policies and Discipline Hearing Procedure

Discipline policies can be a part of the HR Manual, a separate clause in the CEO employment contract, or independent discipline documents that applies to all the employees of a company. For example, in the case *Alex Wainaina Mbugua v Kenya Airways Limited*²⁴⁸, the claimant states that the hearing was taken as a "performance

²⁴⁵ Daniel Kipkirong Tarus; Ezekiel Ayabei, Board composition and capital structure: evidence from Kenya, [J]Management Research News Volume 39, Issue 9. 2016. pp. 1056-1079.

²⁴⁶ Mandala Nebert; Kaijage Erasmus; Aduda Josiah; Iraya Cyrus, Board Structure, CEO Tenure, Firms' Characteristics and Performance of Financial Institutions in Kenya, [J]European Scientific Journal, Volume 13, Issue 31. 2017. pp. 39-39.

²⁴⁷ *Alex Wainaina Mbugua v Kenya Airways Limited* [2017] eKLR

²⁴⁸ *Alex Wainaina Mbugua v Kenya Airways Limited* [2017] eKLR

review contemplated under chapter 5 of the Manual and not a disciplinary hearing as under chapter 17.” This defense was accepted by the court, and became one of the reasons for the respondent to lose the case.

5.2.2.4 Difference Between Performance Evaluation Procedure and Discipline Procedure

There may be some confusion between performance evaluation hearing and discipline hearing, it should be clear that the performance evaluation procedure and discipline procedure are two different procedures, and regulate on different issues.

Discipline procedure may make decisions that have a direct influence on CEO dismissal, but even the performance evaluation hearing gets the conclusion of the CEO’s incapacity, the CEO is entitled to get the chance to improve his or her performance. Hence, the procedures to dismiss a senior executive for poor performance through a discipline as in the case *Alex Wainaina Mbugua v Kenya Airways Limited*²⁴⁹ is not a legal reason under the practice of Kenyan employment laws.

5.2.2.5 Whether CEO Need to Follow HR Policies

The purposes for companies to set up HR policies are for the sake of all the employee’s performance, behaviour or conduct. The CEO is just a job title, and shall be deemed as an employee, but the practice might not be that easy as the HR manager is a position under the CEO, in the case *Kenfreight (E.A.) Limited v Benson K. Nguti*²⁵⁰, “the appellant’s Human Resource and Administration Manager was not helpful in this aspect of the dispute. He admitted that he did not deal with matters involving the high echelons of the appellant company and did not know what senior managers were paid on termination or retirement.” That might be a practical problem, the application of HR

²⁴⁹ *Alex Wainaina Mbugua v Kenya Airways Limited* [2017] eKLR

²⁵⁰ *Kenfreight (E.A.) Limited v Benson K. Nguti* [2016] eKLR

policies to a CEO cannot be conducted by the HR manager, and even if the HR policies made it very clear in writing that CEO shall follow the HR policies, the HR manager is not entitled to request the CEO to follow the HR policies.

The board of directors may make an evaluation of a CEO through HR policies (inclusive of performance evaluation policies and discipline policies), but what conclusion can the board of directors get without the HR manager - the one in charge of a company's HR policies to provide suggestions. And how can the board of directors ensure their decision-making is not against the HR policies of the company? That management gap might also be a reason why CEOs are more likely to skip some of the key procedures under the HR Manual, and deeply depends on how the M&AA, CEO employment contract is written, and the conclusion of the discussion between the board of directors and the CEO.

5.2.3 CEO Employment Contract

In some companies, the CEO might not have signed any contract with the company, i.e. the CEO employment contract may not exist, especially where the founding shareholder of the company works as its CEO and all he or she expects is to get share dividends, and he or she never claims for salary as a CEO. But anyone who works for any company with a specified job title is entitled to get corresponding salaries, i.e. legal profession or specialists may be invited to work as independent directors for some companies, and may not need to appear in the company on daily basis, but he or she needs to attend the board meetings and vote in the meeting, and get salaries as a director from the company.

5.2.3.1 Contract Period of a CEO Employment Contract

For the purpose of keeping a stable management team, the CEO employment contract may agree on a relatively long period. The period of CEO employment contracts in my research ranges from 1 year to 5 years, the termination notice period in the case *Paul*

*Wanyangah v Market Development Trust t/a Kenya Markets Trust*²⁵¹ is two years; in the case *Eunice Mbogo v Kenya Reinsurance Corporation Ltd*²⁵² and *Angela Ndambuki v Kenya National Chamber of Commerce & Industry*²⁵³, the duration is three years; and in the case *Rose Aoko Ogwang Odhiambo v National Gender & Equality Commission*²⁵⁴, the period is 5 years.

Three years of CEO employment can also be a very common contract period in practice, in the case *Paul Wanyangah v Market Development Trust t/a Kenya Markets Trust*, the claimant, as the CEO of the respondent, was “employed by the respondent via contract of service for a period of 2 years commencing 2nd February, 2015 at a gross monthly salary of kshs.1,080,000.00. On 2nd August, 2015 the employment contract was revised to be a 3-year contract with effect from 13th October, 2015 at a gross monthly salary of Kshs.1, 350,000.00. From January, 2016 the claimant was effectively earning Kshs.1, 472,285.00 per month.”²⁵⁵ In the case *Angela Ndambuki v Kenya National Chamber of Commerce & Industry*, “On 1st October 2017, the Respondent employed the Applicant as its Chief Executive Officer (CEO) for a fixed term of 3 years renewable and subject to a probation period of an initial 6 months.”²⁵⁶ Similarly, in the case *Kenya Reinsurance Corporation Ltd v Eunice Mbogo*, the ex-CEO “worked for British American Insurance Company Limited as the General Manager until her appointment as the Managing Director of the appellant on 12th April, 2007. The appointment was for three years from 12th April, 2007.”²⁵⁷

For the 5-year CEO employment contract in my research, in the case *Rose Aoko Ogwang Odhiambo v National Gender & Equality Commission*, “Professor Rose Aoko Odhiambo was the Chief Executive Officer of the National Gender and Equality

²⁵¹ Paul Wanyangah v Market Development Trust t/a Kenya Markets Trust [2017] eKLR

²⁵² Kenya Reinsurance Corporation Ltd v Eunice Mbogo [2019] eKLR

²⁵³ Angela Ndambuki v Kenya National Chamber of Commerce & Industry [2018] eKLR

²⁵⁴ Rose Aoko Ogwang Odhiambo v National Gender & Equality Commission [2018] eKLR

²⁵⁵ Paul Wanyangah v Market Development Trust t/a Kenya Markets Trust [2017] eKLR

²⁵⁶ Angela Ndambuki v Kenya National Chamber of Commerce & Industry [2018] eKLR

²⁵⁷ Kenya Reinsurance Corporation Ltd v Eunice Mbogo [2019] eKLR

Commission from 1st October 2012 for a fixed term contract of 5 years.”²⁵⁸

5.2.3.2 Key Issues of the Termination Notice Period Clause

It may be an attractive clause for the company to set a greater termination notice period in the CEO employment contract, which will increase the certainty for the company to enforce the CEO employment contract. It takes further researches on whether it's a valid clause if a company requests the CEO to provide the same period if the CEO expects to resign from the company, as all the basis and assumptions under Kenya Employment Act are designed for “Either Party had the option to terminate the contract under clause 13 of the contract, through notice of 3 months, or payment of 3 months' salary in lieu of such notice.”²⁵⁹

5.2.4 Which Document Shall Prevail When There is a Conflict Between M&AA, HR Manual and CEO Employment Contract

Another conflict would be the calculation of CEO employment benefits, such conflict might happen between M&AA, HR Manual, CEO Employment Contract, and maybe also involves performance evaluation policies and other policies. Each of the above documents is entitled to define certain types of benefits, M&AA and HR Manual can provide a general guideline of employment benefits for all the employees, It seems M&AA shall be always in a higher position comparing with a company's HR Manual, but what if a company's CEO alleges in court that he or she had signed the CEO employment contract, but not signed M&AA of the company. As analyzed in chapter 5.2.3, M&AA can be in the highest position (as the company constitution) among all the company documents. The judgment of the case *Angela Ndambuki v Kenya National Chamber of Commerce & Industry*²⁶⁰ also guides that Articles of Association of the

²⁵⁸ Rose Aoko Ogwang Odhiambo v National Gender & Equality Commission [2018] eKLR

²⁵⁹ Teresa Carlo Omondi v Transparency International- Kenya [2017] eKLR

²⁶⁰ Angela Ndambuki v Kenya National Chamber of Commerce & Industry [2018] eKLR

company shall prevail in dealing with CEO employment disputes.

5.3 Three Lawful Reasons of CEO Dismissal Under Kenya Employment Act

According to Kenya Employment Act, the termination of a contract of service shall provide “twenty-eight days ... notice in writing”²⁶¹ or make “payment in lieu of notice”²⁶², pay the “service pay for every year worked”²⁶³, and provide “proof of reason for termination”²⁶⁴.

Despite the above requirements, there are three reasons among the reasons specified in the Kenya Employment Act for termination: termination on account of redundancy, termination on account of misconduct and summary dismissal under certain conditions. The Chambers and Partner’s report also summarizes three lawful reasons with permitted grounds for dismissal, i.e. poor performance, misconduct and incapacity²⁶⁵.

In most cases, CEO dismissal is initiated and decided by the Board of directors.²⁶⁶ In most companies, the CEO is the most important position who gets the highest salary from the company. Thus, companies should be more careful to take proper procedures when terminating the CEO’s contract of service.

Before the dismissal, the company may need a better understanding of how this CEO evaluates his concerns. In a survey conducted by the National Association of Corporate Directors of US, the five main issues that public companies’ CEOs were concerned about were: 1. Corporate performance (28%); 2. CEO succession (25%); 3. Strategic planning (15%); 4. Corporate governance (10%); and 5. Board - CEO relation (6%)²⁶⁷.

²⁶¹ Section 35(1)(c), Employment Act, No. 11 of 2007.

²⁶² Section 36, Employment Act, No. 11 of 2007.

²⁶³ Section 35(5), Employment Act, No. 11 of 2007.

²⁶⁴ Section 43, Employment Act, No. 11 of 2007.

²⁶⁵ Chambers & Partners: 2019 CHAMBERS GLOBAL PRACTICE GUIDE Kenya Chapter-Employment.

²⁶⁶ Satu Koshinen, The process of CEO Dismissal: An Exploratory study, Business Ethics and Organization Studies. Vol 23, No. 2 (2018).

²⁶⁷ Errol L. Biggs: CEO Succession Planning: An Emerging Challenge for Boards of Directors, The Academy of Management Executive (1993-2005).

According to another survey conducted by Chhaochharia and Grinstein, for those companies which were not compliant with the recent New York Stock Exchange (NYSE)/ National Association of Securities Deal Automated Quotations (NASDAQ) board independence requirement, CEOs' pay were 17% less than in firms that were compliant.²⁶⁸

5.3.1 Termination on Account of Summary Dismissal Under Certain Conditions

Some of the CEO termination cases in this thesis can be defined as summary dismissal without proper procedure, and finally result in the court defining the termination as unprocedural, unfair, unlawful or wrongful termination.

A lawful summary dismissal procedure is strictly limited to seven (7) certain conditions. *Kenya Employment Act* limits that “no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.”²⁶⁹ A summary dismissal is only lawful under the condition that the termination is made within the following scope of the content that the employee “without leave or other lawful cause, ... absents ... from ... work”²⁷⁰, “during working hours, by becoming or being intoxicated ...”²⁷¹, “... willfully neglects to perform any work ...”²⁷², “uses abusive or insulting language, or behaves in a manner insulting ...”²⁷³, “fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey”²⁷⁴, “arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty”²⁷⁵ and “commits ...

²⁶⁸ Guthrie, K.; J. Sokolowsky; and K. M. Wan. "CEO Compensation and Board Structure Revisited." *Journal of Finance*, 67 (2012), 1149-1168.

²⁶⁹ Section 44(2), Employment Act, No. 11 of 2007.

²⁷⁰ Section 44(4)(a), Employment Act, No. 11 of 2007.

²⁷¹ Section 44(4)(b), Employment Act, No. 11 of 2007.

²⁷² Section 44(4)(c), Employment Act, No. 11 of 2007.

²⁷³ Section 44(4)(d), Employment Act, No. 11 of 2007.

²⁷⁴ Section 44(4)(e), Employment Act, No. 11 of 2007.

²⁷⁵ Section 44(4)(f), Employment Act, No. 11 of 2007.

criminal offence”²⁷⁶. However, the actual CEO termination procedure sometimes can be complicated, Hence, even a minor ignorance can result in a judgment that the dismissal is unlawful or unfair. In many cases, the decision of dismissing a CEO is made by the board of directors and the shareholders of the company. However, the company does not follow the expected administrative termination/dismissal procedures. For example, the hearing might be missed and there is no access for a CEO to make an explanation and to defend himself or herself.

5.3.2 Termination on Account of Misconduct

Termination on account of misconduct requires an explanation of “the reason for which the employer is considering termination”²⁷⁷. The company shall ensure the one to be terminated get the procedure to make an “explanation”²⁷⁸, and there should be a procedure for the company to “hear and consider any representations”²⁷⁹.

In the case *Rose Aoko Ogwang Odhiambo v National Gender & Equality Commission* ²⁸⁰, the defendant dismissed the claimant for misconduct in the procurement procedure. Then, the claimant filed the lawsuit to seek the termination being illegal, null and void ‘abinitio’. Because of lacking internal evaluating and discipline procedure, the court rendered the judgment in favor of the claimant after evaluating the evidence and the grounds of the parties. The claimant claimed the so-called misconduct in procurement procedure did not exist, and the respondent failed to submit sufficient evidence against it.

The procedure of termination with the reason of misconduct also applies the termination with the reason of “poor performance or physical incapacity”²⁸¹. Poor performance may

²⁷⁶ Section 44(4)(g), Employment Act, No. 11 of 2007.

²⁷⁷ Section 41(1), Employment Act, No. 11 of 2007.

²⁷⁸ Section 41(1), Employment Act, No. 11 of 2007.

²⁷⁹ Section 41(2), Employment Act, No. 11 of 2007.

²⁸⁰ *Rose Aoko Ogwang Odhiambo v National Gender & Equality Commission* [2018] eKLR

²⁸¹ Section 41(1), Employment Act, No. 11 of 2007.

be a reason for terminating CEO's employment contract. Similarly, it requests the company to show how the company evaluates the CEO's performance, and why the CEO's performance shall be defined as poor performance.

In the case *Alex Wainaina Mbugua v Kenya Airways Limited*, the plaintiff was the Group Finance Director (GFD) of the defendant, the defendant terminated the claimant's employment contract on account of poor performance, but the claimant submitted the evidence to prove that he had never been issued with any poor performance evaluation report, and used this evidence to against the company's claim, and apply it in the court to show the termination is unlawful termination. The court made the decision in favor of the plaintiff and declared that the termination of employment was unfair.

5.3.3 Termination on Account of Redundancy

One of the lawful reasons to terminate employment is redundancy, and it requests companies to follow the relevant procedures. Termination on account of redundancy requires the company to notify the trade union (if the employee is a member of a trade union)²⁸² or the employee personally²⁸³ in writing, as well as the labour officer in charge of the area²⁸⁴.

In the research of this thesis, no CEO dismissal case on account of redundancy was cited, but this reason can be easily found in terminating other senior executives, such as in the case *748 Air Services Limited v Theuri Munyi*²⁸⁵. Mr. Theuri Munyi was the Finance Director and was terminated given by the reason of redundancy. In that case, Mr. Theuri Munyi was faced with a heavy salary deduction together with all the other executives of the company (the appellant) after the appellant faced challenges to survive the market. However, his employment contract was still terminated by the appellant

²⁸² Section 40(1)(a), Employment Act, No. 11 of 2007.

²⁸³ Section 40(1)(b), Employment Act, No. 11 of 2007.

²⁸⁴ Section 40(1)(a) and 40(1)(b), Employment Act, No. 11 of 2007.

²⁸⁵ *748 Air Services Limited v Theuri Munyi* [2017] eKLR

several months later. Mr. Theuri Munyi claimed for salary deduction amounting to Kenya Shillings 1,160,919.61, the Industrial Court / Employment and Labour Relations Court (ELRC) made the ruling in favor of Mr. Theuri Munyi. The Court of Appeal set aside ELRC's judgment, and made the judgment in favor of the appellant by analyzing that "the parties were at liberty to make a new contract varying the original conduct by an oral agreement or by conduct".

5.4 Proper CEO Dismissal Procedure Under Kenya Employment Act

No matter which reason is given in terminating a CEO's employment contract, whether it is summary dismissal, termination on account of misconduct or redundancy, it is better to follow all the applicable procedures in this chapter.

5.4.1 CEO Dismissal with Lawful Reasons

There are many internal documents regulating a CEO's dismissal process. Because of a CEO's special position, the company constitution – Memorandum and Articles of Association could have a special clause for the dismissal or resignation of CEO and directors.

Since one of the principles held by the judge when dealing with dismissal disputes is to follow the internal documents, these documents would be followed as the core guideline as Kenyan Employment Laws are to regulate common conditions, and CEO's termination procedure might be slightly different from other employees.

5.4.2 Notice and Payment in Lieu of Notice

Section 35(1)(c) of Kenya Employment Act generally regulates if a contract of service "it to pay wages or salary periodically at intervals of or exceeding one month, a contract

terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing”²⁸⁶. Section 40(1)(f) of Kenya Employment Act gives company access to terminate a contract of service with one-month notice²⁸⁷, but the reason is also limited to a specific one, which is termination on account of redundancy.

5.4.2.1 Notice Period of a CEO Employment Contract

There is also a further question, under section 36 and section 40(1)(f) of the Kenya Employment Act, a company can terminate an employee’s employment contract giving either one-month notice, or one month pay in lieu of notice. But, rationally, it’s not easy for a CEO to accept, even with a one-month payment in lieu of notice being granted, when a CEO finished one day’s work, and was called by the board of directors, being informed that a board of directors meeting was held, and he or she (the CEO) was dismissed with effect from tomorrow. Several cases in my research mention a termination notice period more than one month. For example, the termination notice of the employment contract in the case *Alex Wainaina Mbugua v Kenya Airways Limited* defines that, “Under the contract of employment the respondent could terminate employment by giving 3 months’ notice or payment in lieu thereof.”²⁸⁸

5.4.2.2 CEO Resignation Notice

Some Kenyan CEO employment contracts actually provide more than one month notice, but this will bring another issue, if the company agrees to pay more than one month

²⁸⁶ Section 35(1)(c), Kenya Employment Act: A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be - where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.

²⁸⁷ Section 40(1)(f), Kenya Employment Act: An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions - the employer has paid an employee declared redundant not less than one month’s notice or one month’s wages in lieu of notice.

²⁸⁸ *Alex Wainaina Mbugua v Kenya Airways Limited* [2017] eKLR

salary in lieu of notice to the CEO, whether the CEO is also entitled to take on the obligation of providing more than one month notice when the CEO expects to resign from the position? Instead of one month notice by the employer to terminate the contract of service on account of redundancy as in section 40(1)(f) of Kenya Employment Act, based on the conclusion of this research, the CEO's termination notice obligation shall follow section 35(1)(f) of Kenya Employment Act, i.e. twenty-eight days (not one month). Under special conditions, the CEO's termination obligation can be longer. By analyzing the judgment of the case *Munir Sheikh Ahmed v National Bank of Kenya* below, we can find that if it's a long-term employment contract, such clause in the CEO employment contract shall be valid and the clause shall also be applicable to the CEO. *"The Court has also considered that under clause 18 of the agreement either party was entitled to 3 months' notice or 3 months' pay in lieu of the notice if the contract was to be voluntarily terminated prior to the lapsing of the agreed term of 5 years."*²⁸⁹

5.4.3 Proper Hearing Procedure

The hearing procedure may not be necessary if the CEO signed the termination clearance form to show the CEO accepts the reason for dismissal and the notice or payment in lieu of notice. But if the termination clearance form were not signed by the CEO, even if the company provided a lawful reason, notice and payment in lieu of notice, there is still a necessity to arrange an internal hearing to get the idea from the outgoing CEO, whether he or she has any complain against the arrangement, find a way to settle the complaint, satisfy the outgoing CEO's core concern, then arrange how to hand over the outgoing CEO's work to the new incoming CEO.

The hearing can be a discipline meeting, where most of the directors of the company may attend, and the final decision after the hearing procedure shall be in the format of a Minutes of Board of Directors Meeting, together with an official termination notice

²⁸⁹ *Munir Sheikh Ahmed v National Bank of Kenya* [2020] eKLR

signed by the outgoing CEO. A proper hearing procedure can avoid misunderstanding between the company and the CEO, and if everything goes well, the outgoing CEO may also accept to stay in the company as a consultant to guide the new incoming CEO in the starting period.

A proper hearing procedure provides an option between outgoing CEO and the company to have proper arrangement of CEO dismissal without conflict, and help parties understand each parties' core concern. It may also be a chance for the outgoing CEO to try to propose to retain the position.

5.4.4 The Structure of Kenya Employment Legislations

The legislation structure consists of laws and subsidiaries, both of the laws and legislations are of vital importance. Basically, Kenya employment legislations consist of Kenya Employment Act, 2007; Kenya Labour Relations Act, 2007; Kenya Labour Institutions Act, 2007. Additionally, there were some subsidiary legislations, such as Kenya Employment and Labour Relations Court Bill, 2011; Kenya Employment and Labour Relations Court (Procedure) Rules, 2016; Kenya Employment (General) Rules, 2014; Kenya Trade Union Regulations, 1975; Kenya Labour Relations (General) Regulations, 2014; Regulation of Wages (General) Order, 2019.

5.5 Conclusion

According to the Kenyan Employment Act, the basic part of employment termination benefits is one month notice, service pay, and unpaid leaves. But these termination benefits are normally too little compared with the obligations that a CEO bears for the company.

CEO power is a significant driver of executive compensation.²⁹⁰ In

the US, CEOs receive much higher cash payment for their chairman duality but also suffer bigger decreases for every additional executive director joining their board compared to their UK counterparts.²⁹¹ CEO compensation is higher in the US when the CEO also serves as the chairman of the board and when the board is large.²⁹²

Despite the termination benefits of common employees, CEOs may also request a higher termination benefit, longer workload hand over period. Those companies which given more time for outgoing CEO and incoming CEO to hand over work tends to run more smoothly in the operation of the company.

As analyzed in this Chapter, CEO Power is defined as the ability of one individual to impress authority upon other persons²⁹³, and CEO power is a resource that leaders in organizations including CEOs use to exert social influence.²⁹⁴

The board of directors plays a more important role compare to CEOs, for example, a research conducted on all manufacturing firms which were consistently listed at the Nairobi Securities Exchange from 2008-2014 finds out that “the board size has a statistical significant impact on dividend payout, while board composition, CEO tenure and managerial equity holding were found to have no statistical significant impact on the dividend payout”²⁹⁵.

²⁹⁰ Bebchuk, L. A., Arye, L. and Fried, J. M., ‘Pay without performance: the unfulfilled promise of executive compensation’, Working Paper (Harvard University Press, 2004).

²⁹¹ Jerry Coakley & Stavra Kopoulou, 2006. "Bidder CEO and Other Executive Compensation in UK M&As," *European Financial Management*, European Financial Management Association, vol. 12(4), pages 609-631, September.

²⁹² Core, J. E., Holthausen, R. W., and Larcker, D. F., ‘Corporate governance, chief executive officer compensation, and firm performance’, *Journal of Financial Economics*, Vol. 51, 1999, pp. 371– 406.

²⁹³ Fong, E. A. (2004). ‘Chief Executive Officer (CEO) Responses to CEO Compensation Equity.’ University of Florida.

²⁹⁴ Omamo Anne, Peter K’obonyo, Florence Muindi, Influence of CEOs Power on Their Compensation, *European Business & Management*, Volume 6, Issue 6, November 2020, Pages: 136-142.

²⁹⁵ Caroline Ikunda; Monica Muiru; Simon M Kamau, The Impact of Corporate Governance on Dividend Payout of Manufacturing Firms Listed at the Nairobi Securities Exchange, [J]*Journal of Finance and Accounting* Volume 4, Issue 5. 2016. PP 254-254.

Chapter 6: Findings, Conclusions and Recommendations

6.1 Introduction

This chapter reflects on the findings of the study developed and broken down in Chapter 1 to Chapter 5. The Chapter will give conclusions and recommendations for the research questions, and provides recommendations and the possible approach for further research.

The topic of this thesis focuses on CEO Dismissal and CEO Employment Rights, the outcome of this thesis is based on a scholarly perspective, with references of many analyses in different articles while analyzing Kenya employment legislation and court judgments. Nevertheless, all the research materials and resources were collected before the submission date, and this may limit the outcome of this thesis to a result and simple analysis, which could be different from a specific employment practice legal report. This thesis may not be able to be referred as a practical procedure guide for a specific company's CEO employment practice. Even there are some topics and cases listed in the paper, they may also come along with some specific (business) conditions that make the judgment not perfectly applicable for other cases. As we know that even with similar conditions, the basis may be quite different because no two cases can be exactly the same, especially in the CEO dismissal conditions where the CEO's capacity, the size of a company, CEO employment contract, HR Manual and many other factors could influence the outcome.

Back to the Kenyan court judgments discussed in this thesis, due to the limited quantities of the cases, there are only 5 existing cases where the claimants' job title was exactly called "CEO". Some other similar positions were also attached such as managing director, general manager, etc. Other senior executives' job titles include CFO, GFD, marketing director, HR manager, etc.

6.2 Findings

When conducting research on this thesis, it is found that many companies in Kenya do not give a lawful reason, reasonable notice period, and sufficient hearing procedure when they are about to arrange CEO dismissal. Actually, people in the CEO position of a company tend to have more communications with the board of directors and the shareholders, and show more devotion to the company than most of the other employees. The very first conclusion is that a CEO is an employee, but all of the CEO's identity is different from other employees, ranging from the importance to a company, and employment benefits. CEO enjoys a much better employment condition, with a requirement of extremely high personal capacities and competence.

6.2.1 The Main Reasons for CEO Dismissal in Kenya

The main reasons for CEO dismissal in Kenya include misconduct, poor performance, redundancy, poor relationship with others, statutory illegality, epidemic, business collapses, job changes, and other reasons. Some of the reasons may not be a lawful reason, and these actual reasons for dismissal may be hidden under the coverage of a lawful one. This can be proved unlawful in court.

6.2.2 The Reasons for CEO to Sue the Company

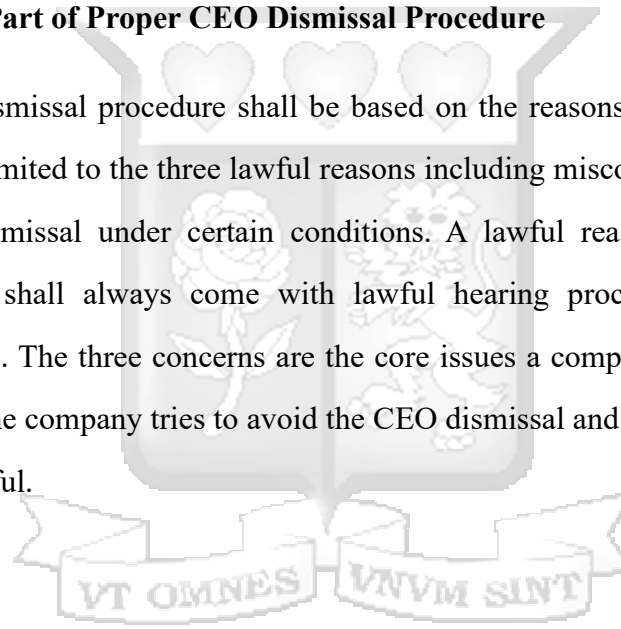
The main grounds for the CEOs to sue the companies are unlawfulness, without hearing, or without notice in advance. For common employees, the dismissal procedures were taken by the HR department following the employment legislation and internal procedure. But CEO dismissal is decided by the board of directors, and the HR department may also be informed about the termination arrangement only after the board of directors gives the CEO the termination notice. Hence, some necessary procedures may be missed.

6.2.3 The Standards Kenyan Courts Applied in Evaluating Unlawful CEO Dismissal

The Kenyan courts evaluate unlawful termination mainly based on three reasons, including “without cause, valid reason, or justifiable reason”; “without notice”; and “without negotiation or necessary hearing procedure”. Hence, from the court’s perspective, any proper reason for dismissal also needs to be followed by proper hearing procedures and at least one-month notice.

6.2.4 The Basic Part of Proper CEO Dismissal Procedure

A proper CEO dismissal procedure shall be based on the reasons for dismissal. The reasons shall be limited to the three lawful reasons including misconduct, redundancy, and summary dismissal under certain conditions. A lawful reason to dismiss the company’s CEO shall always come with lawful hearing procedures and lawful termination notice. The three concerns are the core issues a company needs to attach importance to if the company tries to avoid the CEO dismissal and its procedure being considered unlawful.



6.3 Recommendations

Following these findings, it is recommended that companies should set up structural corporate governance framework and follow the internal management procedure in dealing with the issue of CEO dismissal or other senior executives.

6.3.1 Structural Corporate Governance Framework

In some companies, the fact that the CEO has full control of its company may result in a high level of CEO compensation because powerful managers often set their own pay.

In other cases, CEOs are only someone in that profession, and the board of directors may not regard senior executive dismissal as an issue compared to other employees. CEOs are in management position, and they are the ones to set up or update the whole operating system of the company, including how the dismissal procedure operates.

The executives' team is in charge of daily operation and prepares most of the internal documents of the company. These internal documents prepared by the executives' team will be submitted to the board of directors, but the board of directors may not go through it carefully. Therefore, when a senior executive, especially the CEO faces summary dismissal, the outgoing CEO can easily find the problem with the dismissal procedure while the board of directors or shareholders may not even realize the decision to remove the CEO violated the company's own procedures on CEO dismissal.

6.3.2 Internal Management Procedure

As analyzed above, internal management procedures can make a difference when a company deals with the issue of CEO dismissal or other senior executive's dismissal. However, the practice is that, even a well-structured procedure is there, the board of directors fails to follow it when it makes the decision before it has a look at the company's Memorandum and Articles of Association and Human Resource Manual.

If a company does not have a well-structured internal management procedure, it is necessary to set up one. But if such structure is there already, for the purpose of meeting procedural requirements, the board of directors needs to read it carefully before it tries to dismiss the CEO of the company.

6.4 Further Research

This study recommends further research on the development of CEO dispute resolutions in Kenya, and how will these dispute resolution cases assist the development

of Kenya Employment Act. The cases and theories in this study have listed most of the conditions, but are not enough to show all the situations. For example, how to resolve the concerns to CEO dismissal procedures, and avoid the arising of unnecessary disputes. However, limited by the research resources and the scope of this thesis, some of the topics discussed in this thesis have only one supporting Kenyan court judgment. Despite the topics already discussed in the main chapters, with the research of this thesis developing in depth, I find some other topics may also be of relevance to the study, and it might even be able to become an independent thesis or a very important chapter in this paper. I hereby list some of these other topics which is also worth to make further research as a reference for the readers and interested researchers to make further research in the future.

6.4.1 Gender Reasons in CEO Dismissal

Kenya Employment Act regulates “No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee—(a) on grounds of ... sex ...,”²⁹⁶ and “No employee should be discriminated in his employment on account of his ... sex ...”²⁹⁷ female CEOs are significantly more likely to be dismissed than male CEOs. Perhaps even more importantly, we find a CEO gender by firm performance interaction such that male CEOs are less likely to be dismissed when firm performance is high (compared to when it is low), whereas female CEOs have a similar level of dismissal likelihood regardless of firm performance.²⁹⁸

6.4.2 Non-Competition Arrangement in CEO Dismissal

CEOs hold quantities of core business secrets of a company. When firing the CEO, a

²⁹⁶ Section 5, Kenya Employment Act

²⁹⁷ Section 2, Second Schedule of Kenya Employment (General) Rules

²⁹⁸ Vishal K. Gupta, Sandra C. Mortal, Sabatino Silveri, Minxing Sun, Daniel B. Turban. You’re Fired! Gender Disparities in CEO Dismissal[J]. *Journal of Management*,2020,46(4).

company may also need to avoid the ex-CEO working for a competitor company directly and severely influence the company's business. This can also be a very interesting thesis topic, as most CEOs are entitled to access to all the core business information of their companies, working for a competitive company immediately after dismissal should also be a core issue for a company to consider before dismissing the CEO.

6.4.3 Summary of CEO Dismissal Benefits

Among this research, many of CEO's employment conditions are quite different from those of other employees and the clauses in the Kenya Employment Act (e.g., companies tends to write 3 months termination period in the long-term fixed CEO Employment Contract, while section 35(1)(c)²⁹⁹ and section 40(1)(f)³⁰⁰ of Kenya Employment Act provide that the termination notice shall be twenty-eight days or month). As a result of such differences, I cannot get direct content or formula to calculate the CEO dismissal benefits.

To attract competitive professional CEOs, companies may provide various employment benefits to make the CEO position in the company looks appealing, such as the utilities (electricity, water & security), domestic servant allowance and entertainment allowance in the case *Munir Sheikh Ahmed v National Bank of Kenya*³⁰¹. These benefits and conditions to enjoy benefits can be quite different between different companies.

Since these benefits are not the core issue of this thesis, and actual definitions may be

²⁹⁹ Section 35(1)(c), Kenya Employment Act: A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be - where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.

³⁰⁰ Section 40(1)(f), Kenya Employment Act: An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions - the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice.

³⁰¹ *Munir Sheikh Ahmed v National Bank of Kenya* [2020] eKLR

quite different between different companies' CEO employment contracts, this thesis did not research in depth regarding CEO dismissal benefits.

6.4.4 The Role of CEO Under the Regulation of Nairobi Securities Exchange

Compared with conducting the research mainly based on Kenyan court judgments, analyzing the employment right of CEOs working for the listed companies of NSE might be a better research direction. This thesis also benefited a lot from the article *The Impact of Corporate Governance on Dividend Payout of Manufacturing Firms Listed at the Nairobi Securities Exchange*³⁰², *Debt Capital, Firm Performance and Change of CEO in Firms Listed on the Nairobi Securities Exchange*³⁰³ and other relevant studies on CEOs working for NSE listed companies. However, due to the limitation and structure of this thesis, all the research materials on this topic were from second-hand data.

The CEO employment rights under NSE listed companies might also be a good topic that worth further research. The NSE regulations and policies may also mention the CEO employment rights to some extent. The capital markets and securities legislations might also be mentioned/referred to. With less time limit, I would also prefer to make some further research regarding the practice of CEO employment rights among NSE listed companies.

6.5 Conclusion

The Conclusion herein is based on the research of this thesis. In recent years, an

³⁰² Caroline Ikunda; Monica Muiru; Simon M Kamau, *The Impact of Corporate Governance on Dividend Payout of Manufacturing Firms Listed at the Nairobi Securities Exchange*, [J]Journal of Finance and Accounting Volume 4, Issue 5. 2016. PP 254-254.

³⁰³ Odhiambo Luther Otieno, Sam Ngwenya, *Debt Capital, Firm Performance and Change of CEO in Firms Listed on the Nairobi Securities Exchange*, *Corporate Ownership & Control* / Volume 13, Issue 1, Autumn 2015, Continued-6.

increasing number of CEO dismissal cases brought before a court are ruled as unlawful termination – unprocedural. Thus such unprocedural CEO dismissals are of great risk of being easily defined as unlawful termination. Companies need to follow the statutory and internal procedures, and CEOs also need to pay more attention to his or her own employment rights. The concrete suggestions specified in Chapter 5 will guide both companies and CEOs to find the appropriate procedure.



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Appendices











Appendix A: Similarity Report
















Document Information

Analyzed document	20210730-1902 Wu Pengfei - CEO Dismissal and CEO Employment Rights under the Employment Act.docx (D110874629)
Submitted	7/30/2021 2:20:00 PM
Submitted by	
Submitter email	Wu.Pengfei@strathmore.edu
Similarity	8%
Analysis address	library.strath@analysis.arkund.com

Sources included in the report

W	URL: http://erepository.uonbi.ac.ke/bitstream/handle/11295/71381/Kamau_Corporate%20governance%20in%20Kenya%E2%80%99s%20state%20corporations%253A%20a%20critique%20on%20the%20appointment%20and%20dismissal%20of%20directors%20of%20boards%20of%20state%20corporations.pdf?sequence=4&isAllowed=y Fetched: 7/30/2021 2:21:00 PM	 1
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Appendix B: Ethical Clearance Confirmation



13th August 2021

Mr Wu Pengfei,
wu.pengfei@strathmore.edu

Dear Mr Wu,

**RE: CEO Dismissal and CEO Employment Rights Under the Employment Act-
An Analysis of Typical Kenya Court Judgments**


This is to inform you that SU-IERC has reviewed and approved your above SU- master's research proposal. Your application reference number is SU-IERC1091/21. The approval period is 13th August 2021 to 12th August 2022.

This approval is subject to compliance with the following requirements:

- i. Only approved documents including (informed consents, study instruments, MTA) will be used
- ii. All changes including (amendments, deviations, and violations) are submitted for review and approval by SU-IERC.
- iii. Death and life-threatening problems and serious adverse events or unexpected adverse events whether related or unrelated to the study must be reported to SU-IERC within 48 hours of notification
- iv. Any changes, anticipated or otherwise that may increase the risks or affected safety or welfare of study participants and others or affect the integrity of the research must be reported to SU-IERC within 48 hours
- v. Clearance for export of biological specimens must be obtained from relevant institutions.
- vi. Submission of a request for renewal of approval at least 60 days prior to expiry of the approval period. Attach a comprehensive progress report to support the renewal.
- vii. Submission of an executive summary report within 90 days upon completion of the study to SU-IERC.

Prior to commencing your study, you will be expected to obtain a research license from National Commission for Science, Technology, and Innovation (NACOSTI) <https://research-portal.nacosti.go.ke/> and obtain other clearances needed.

Yours sincerely,


for: Dr Virginia Gichuru,
Secretary; SU-IERC



Cc: Prof Fred Were, Chairperson; SU-IERC

Ole Sangale Rd, Madaraka Estate. PO Box 59857-00200, Nairobi, Kenya. Tel +254 (0)703 034000
Email admissions@strathmore.edu www.strathmore.edu