

COURT AFFIRMS EMPLOYER'S RIGHT TO TERMINATE DURING PROBATION BASED ON BACKGROUND SCREENING

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CM Advocates LLP draws the attention of employers, HR professionals, and corporate executives to a landmark decision issued by the *Employment and Labour Relations Court (ELRC) in Benard Okoth Ambasa v. Equity Bank (K) Limited & another (Petition No. E060 of 2025) [2025] KEELRC 2113 (KLR)*, which offers critical judicial guidance on the lawfulness of background screening during the probation period and its use as a basis for termination.

KEY JUDGMENT HIGHLIGHTS: -

The Petitioner had been appointed as General Manager – Employee Relations by Equity Bank Kenya (the Respondent). The letter of appointment dated 30th January 2025 clearly stated as follows:

> "This is a permanent position tenable as soon as you take it up, ***subject to satisfactory background screening results***, probationary and termination conditions stated herein."

The Respondent conducted background checks, which revealed undisclosed directorships in several businesses, including high-risk industries and while relying on the non-disclosure, the Petitioner's employment was terminated during his probation.

The Court held that:

- Background checks form part of the recruitment and onboarding process—not disciplinary proceedings;
- The employer's decision to terminate an employee's employment during probation did not require a disciplinary hearing under Section 41 of the Employment Act, 2007;
- As the employment was conditional upon satisfactory background screening, termination based on adverse vetting outcomes was lawful, provided notice or payment in lieu (as per the contract) was given to the employee;
- The contractual terms and company HR Manual provisions prevailed, and the employer acted within both legal and contractual bounds.

The Court's decision essentially affirms that a condition precedent set out in a probationary contract, such as the requirement for a satisfactory background check, can constitute a valid ground for termination if not met, as it renders the contract unenforceable.

A condition precedent is an event or action that ***must occur before a party's contractual duties become binding or enforceable*** or before the contract fully takes effect. In the employment context, it is a prerequisite that must be satisfied before the employment relationship is deemed to have formally commenced.

DEPARTING FROM PREVIOUS PRECEDENTS

A three-judge bench (Mbaru J, Abuodha J and Ndolo J) of the Employment and Labour Relations Court (ELRC) in ***Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party) (Petition 94 of 2016) [2021] KEELRC 2310 (KLR) (30 July 2021)***, held that all employees, regardless of probationary status, are entitled to fair administrative process before termination. The Court held that, to the extent that Section 42(1) of the Employment Act, 2007 excludes employees having probationary contracts from the provisions of Section 41, it is inconsistent with Articles 24, 41 and 47 of the Constitution, 2010.

This position was clarified and affirmed by the Court of Appeal in ***Red Lands Roses Ltd v Rosemary Wambui Mugo (Civil Appeal 68 of 2016) [2025] KECA 96 (KLR)***, where the appellate court held that an employer cannot purport to rely on a statutory provision that has been declared unconstitutional by a competent court. In that case, Red Lands Roses Ltd had terminated the Respondent's employment during her probation period. The ELRC had found that the termination was unlawful, noting that the employer failed to accord the Respondent procedural and substantive fairness. Dissatisfied with the decision, the employer appealed. The Court of Appeal dismissed the appeal and upheld the ELRC's findings, affirming that reliance on the invalidated Section 42(1) of the Employment Act, 2007 was improper, and that employees on probation are entitled to the safeguards of fair hearing under Section 41 of the Employment Act, 2007.

CONCLUSION

The decision in *Benard Okoth Ambasa v Equity Bank (K) Ltd & another* introduces an important nuance to the legal framework on probationary employment. While earlier precedents, particularly, *Kibuchi* and the Court of Appeal's judgment in *Red Lands Roses Ltd v Mugo* firmly established that probationary employees are entitled to procedural safeguards under Section 41 of the Employment Act, the Ambasa case distinguishes scenarios where termination arises not from misconduct, poor performance, or physical incapacity, but from pre-employment conditions such as adverse background screening.

The Court's finding that such termination does not constitute a disciplinary process and therefore does not attract protection under Section 41 of the Employment Act marks a practical shift in how employers may navigate the probation period, particularly where the employment contract expressly makes the appointment conditional. However, the Court's reasoning introduces a clear tension with existing precedent, especially on the question of whether all probationary contract terminations must adhere to constitutional and statutory standards of fairness.

We will closely monitor further judicial developments on the termination of probationary contracts following this decision, including whether the matter proceeds on appeal.

HOW CM ADVOCATES LLP CAN HELP:

Our Employment & Labour Solutions Practice supports employers across the entire employment lifecycle, from hiring to exit. Specifically, we assist with:

a) Drafting and reviewing employment contracts that lawfully include probation, vetting conditions, and material breach provisions;
b) Updating and localizing HR Policies, Employee Handbooks, and Codes of Conduct to reflect best practice and judicial trends;
c) Conducting compliance audits to identify risks in onboarding, fiduciary declarations, and post-employment disclosures;
d) Defending employers in employment disputes and vetting-related litigation;
e) Offering training and advisory to HR and compliance teams on lawful hiring, performance management, and exit protocols.

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