



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 793 OF 2001

DOMINIC CHARLES MUTHUURI PLAINTIFF

VERSUS

NATIONAL INDUSTRIAL CREDIT BANK LTD.....DEFENDANT

JUDGMENT

In a plaint filed in court on 30.05.01, Dominic Charles Muthuuri, alleges as follows. On or about 4th December, 1998, he entered into a written contract of employment with National Industrial Credit Bank Ltd, the defendant herein (the Bank) by which the Bank engaged his services as a bank manager at one of its branches in Nairobi on a three year renewable contract. He agreed to take up the appointment and dutifully, diligently and ably discharged his duties as bank manager in compliance with the said contract. Due to his skill and industry in executing his duties, the Bank from time to time indicated that he had regularly met its expectations of him as a manager and issued a written commendation to him. Prior to joining the Bank, the plaintiff had been in continuous employment of Barclays Bank of Kenya Limited in which he served in several branches and in various capacities for a period of 28 years fifteen of which were served in various managerial positions. At all material times the Bank was aware that immediately prior to entering into the contract of service with it, the plaintiff was employed as the Advances Manager of Barclays Bank, NIC house branch and it was largely due to the enticement and assurance on the part of the defendant that his aforesaid contract would run for its full term that the plaintiff agreed to leave his former employer to join the Bank. On or about 25th August 2000, the Bank unilaterally, without assigning any reason therefor and in breach of the said contract purported to terminate the plaintiff's employment before its due date.

The particulars of breach of contract are termination of the contract before due date, without assigning any reason therefor, in flagrant disregard of the rules of natural justice, without affording the plaintiff an opportunity of being heard, without any or any lawful notice; acting unlawfully, oppressively and high handedly; and terminating the contract even when it was evident that the plaintiff's performance was exemplary. In further breach of the contract and without just cause and reason the Bank also immediately recalled all pending loans then enjoyed by him and purported to charge interest thereon at commercial rates instead of the concessionary staff rates that ought to have been applied during the pendency of the contract. The Bank terminated the plaintiff's contract as aforesaid knowing very well that a premature and/or forced termination of employment in the banking industry would and did effectively bring to an end the plaintiff's career as other potential employers would and did receive and view the plaintiff's subsequent applications for employment with suspicions as a result of which he has todate remained unemployed. The Bank has despite his demand failed and refused to issue him with a favourable recommendation which would enhance his chances of obtaining alternative employment in the banking industry as a result of which the plaintiff has todate remained unemployed and suffered immense financial

deprivation, embarrassment, dejection and psychological trauma for which he seeks damages.

The reliefs which the plaintiff seeks in consequence of the aforesaid matters are an order that the Bank pays his full salary and emoluments for the contractual period of three years; an order that the Bank do charge interest on all loans held by him from the date of termination of his contract at the staff rates; general damages, costs of the suit and interest; and such further relief as the court may deem just and expedient .

In a statement of defence file on 2.7.01, the defendant Bank has responded to those allegations as follows. The plaintiff's contract was to commence on 1.1.99 but the same was not renewable as alleged or at all. The plaintiff did not perform his duties as diligently or skillfully or to the satisfaction of the Bank as claimed and his conduct did not regularly meet the Bank's expectations as claimed. The Bank denies that it made any written indications or recommendations in favour of the plaintiff. The Bank knew the plaintiff was in the employment of Barclays Bank prior to employing him but it has no knowledge of his performance there. It also denies that it enticed or induced him into its employment or that it made any assurances or representation to him that it would not terminate the contract before expiry of its full term. The allegations by the plaintiff about his job security for the entire contractual period contradict the express terms of the contract freely entered into by him. The termination of contract is conceded but it is denied that such termination was in breach of contract or that the Bank was bound to assign any reasons for its decision to terminate the plaintiff's employment. It is contended that the termination of the plaintiff's employment was lawful and in accordance with the contract. The Bank's act was not unilateral or otherwise unfair, wrongful or in breach of contract or the principles of natural justice. The Bank discharged its duty under the contract and paid the requisite amount in lieu of the notice together with all sums due and payable to the plaintiff on termination of his contract of service. All the particulars of the alleged breach of contract are denied.

The concessionary rate of interest charged on loans previously advanced to the plaintiff applied only to members of staff and the plaintiff could not benefit therefrom after he ceased to be a member of staff. The Bank did not recall the plaintiff's loans but sought their repayment on mutually agreed terms as to rates of interest and mode of repayment as subsequently agreed upon by the parties. The Bank brought the plaintiff's contract to an end lawfully and its act did not by any means end or prejudice the plaintiff's career or otherwise influence third parties view of the plaintiff or of his applications for employment as alleged. Accordingly, the Bank is not in any way responsible for the plaintiff's unemployment. The defendant was not bound or obliged at law or in equity to issue the plaintiff with a testimonial or recommendation to enhance the plaintiff's chance to secure alternative employment. It discharged its statutory obligation by issuing him with the mandatory certificate of service upon termination of his employment. Accordingly, the defendant is not liable for the plaintiff's alleged unemployment, financial deprivation or embarrassment, dejection or physical trauma (if any) suffered by him. Furthermore, the alleged financial and emotional injury are too remote and bear no relation to the exercise by the defendant of its rights properly and lawfully to terminate the contract. In those premises, the plaintiff is not entitled to the damages or compensation claimed or to any relief sought in the plaint.

The parties filed separate issues for trial. However on 2.10.02, the advocates agreed that the issues filed by the defendant's advocate be treated as the agreed issues for trial. Those issues are:

1. Whether the contract of service made on 4th December, 1998 between the plaintiff and the defendant commenced on the 4th day of December, 1998 or on the 1st day of January, 1999 and whether the same was renewable as alleged or at all.
2. Whether the plaintiff discharged his duties under the subject agreement skillfully, diligently and to the defendant's satisfaction or to the satisfaction of the defendant's managers and directors as alleged in the plaint or at all.
3. Whether the manner in which the plaintiff discharged his duties to his previous employers, namely, Barclays Bank of Kenya Limited, has any relevance to the subject contract of service between the parties hereto and whether the defendant enticed or induced the plaintiff into its employment or that it made any

assurances or misrepresentation whatsoever to the effect that the defendant would at no time determine the subject agreement before expiry of its terms of three years as alleged in the plaint or at all.

4. Whether the defendant did assure the plaintiff of job security for the entire contractual term of service as alleged or at all.

5. Whether in terminating the plaintiff's employment on 25th August, 2000 the defendant acted in breach of contract in so doing and whether the defendant was bound to assign any reasons for its decision to terminate the plaintiff's employment aforesaid.

6. Whether termination of the plaintiff's employment was lawful and in conformity with and pursuant to the defendant's rights under the said agreement as contended in Paragraph 6 the defence or at all.

7. Whether the defendant discharged its duty under the contract and paid the requisite amount in lieu of notice together with all sums due and payable to the plaintiff on termination of his contract of service as pleaded in paragraph 6 of the defence or at all.

8. Whether the plaintiff is entitled to enjoy loan facilities at concessionary rates of interest available to the defendant's employees after termination of the plaintiff's employment and whether the defendant recalled all loans outstanding upon termination of the subject contract of service as claimed in the plaint or at all.

9. Whether termination by the defendant of the plaintiff's contract of service ended or prejudiced the plaintiff's career or, otherwise, influenced third parties' view of the plaintiff or of his applications for employment as alleged in the plaint or at all and whether the defendant is responsible for the plaintiff's alleged unemployment.

10. Whether the defendant is obliged at law or in equity to issue the plaintiff with a testimonial or recommendation to enhance the plaintiff's chance to secure alternative employment in the banking industry or elsewhere as alleged in paragraph 12 of the plaint or at all and whether it duly discharged its statutory obligation in issuing the plaintiff with the mandatory certificate of service upon termination of his employment.

11. Whether the defendant is liable for the plaintiff's alleged unemployment, financial deprivation or embarrassment, dejection or physical trauma as alleged or at all.

12. Whether the plaintiff is entitled to relief against the defendant as prayed in the plaint.

The case was heard before me on 14.1.03 and 19.2.03. The plaintiff himself gave evidence and called no witnesses. The defendant on its part called Reuben Nyangaga, the Manager of its legal affairs, as its only witness. The parties also made detailed submissions.

Without reproducing the detailed evidence and submissions herein, I think the issues agreed for trial may be dealt with as follows. Issue number 1 relates to the nature of and the commencement date of the plaintiff's contract of employment. The letter of appointment was produced in evidence as P Exh 1. It was dated 4.12.98. It was addressed to the plaintiff by Mr M N Davidson, the Managing Director of the defendant Bank. The plaintiff accepted the offer and indicated that he was ready to commence employment with the Bank on 21.12.98. The Bank acknowledged receipt of the plaintiff's acceptance letter but indicated that in view of the many holidays in the month of December, it would want the plaintiff to commence employment of 4.1.99 even though he would be in the payroll from the beginning of January. Pexh 2 confirms that. The letter of appointment in pertinent parts reads as follows –

“National Industrial Credit Bank Limited

Nic House,

Masaba Road,

PO Box 445999, Nairobi, Kenya

Phone: 718200

Fax: 718232

Private & Confidential

Mr Dominic Charles Muthuri, 4th December, 1998

Po Box 30120,

Nairobi

Dear Mr Muthuri,

Letter of Appointment

I refer to our recent discussions on your employment with this Bank and I am pleased to offer you employment to manage one of our branches or departments on a three year contract, the commencement date to be agreed mutually

5. (a) Your employment with the Bank may be terminated by either party at the expiration of one (1) month's notice in writing given by the party seeking to terminate to the other. If such notice is given by you, it shall be addressed to the Managing Director through the Manager of your branch/division (in the Head Office) and such notice shall run from the date of receipt. (b) Notwithstanding anything herein contained, the Bank may terminate your employment forthwith without assigning any reason therefor on payment of one month's salary (net of any taxes) in lieu of notice."

There was no renewal clause in the said letter of appointment. In the above premises, the issue may be answered this way: The contract of service made on 4th December, 1998 between the plaintiff and the defendant commenced on the 1st day of January, 1999 and the same was for a three year term, non renewable. Issue No 2, relates to the plaintiff's performance at work. The performance of employees was categorized as either A,B,C,D, or E. A indicated excellence and applied to situations where contracts had been exceptionally over achieved; B indicated over achievement and applied in situations where contracts had been surpassed in some areas, and all areas had been met; C indicated the contract had been met and applied in situations where all parts of the contract had been achieved; D indicated under achievement and applied to situations where some parts of the contract had not been met; and E indicated poor performance. The plaintiff's assessment during various stages up to July 2000 stood at grade "C". One can therefore say the plaintiff was an average performer. However he concedes that on

17.8.00 he was called by the Executive Committee which comprised of the Managing Director, the Executive Director and the Head of Human Resources and Operations and informed that his branch audit was not very good and they desired to terminate his contract within a week as the matter was beyond their control. In the plaintiff's own opinion, the audit was not all that bad and he felt the decision to fire him had not been taken by the Executive Committee members but elsewhere. From all the foregoing, I can only answer issue No 2 by stating that although the plaintiff was an average performer, the Bank was not entirely happy or satisfied with his performance as a branch manager. Issues no 3 and 4 relate to the circumstances in which the plaintiff joined the defendant Bank and whether he had received any assurances that he would have job security for the entire contractual term. From the plaintiff's evidence, there can be no doubt that the plaintiff had a satisfactory banking career with Barclays Bank for 28 years before he was head hunted for a position with the defendant Bank. He rose from the level of a clerk in 1970 to the rank of a manager. And there can be no doubt that he was head hunted because of his good performance in Barclays Bank. He testified that he was enticed by Mr Davidson, the Managing Director of the defendant Bank, to join the Bank. He further testified that before accepting the defendant's offer of employment he had received a verbal assurance from the Company Secretary and the Managing Director

that Clause 5 (b) of the contract was a formal one for all staff and he need not worry about the contents. He also testified that he did not think the clause would be used against him. In cross examination, he testified that he knew nothing could be done against him without a warning. The Bank did not call either Mr Davidson or the Company Secretary to testified that he knew nothing could be done against him without a warning. The Bank did not call either Mr Davidson or the Company Secretary to testify on the circumstances under which the plaintiff joined the Bank. Mr Reuben Nyangaga, the Legal Relations Manager, the only person who testified on behalf of the Bank did not know about the plaintiff's performance and how he came to join the Bank or what assurances he had received. In the premises, the plaintiff's evidence on those matters remains unchallenged and accordingly I find that he was enticed to join the Bank and that he had received assurances from the Managing Director and the Company Secretary that he need not unduly worry about the contents of clause 5 of the contract.

Issues number 5 and 6 are the key ones in this case. They may be compressed thus: Was the termination of the plaintiff's employment lawful or unlawful? On 23.8.00, the plaintiff received a letter from the Executive Director of the defendant Bank terminating his employment. It was in the following terms –

“Mr Dominic Muthuri

C/o Nic Bank Ltd

Po Box 44599

Nairobi

Dear Sir,

Termination of Contract

In accordance to Clause 5 (b) of your letter of appointment dated 4th December 1998, your employment contract with Nic Bank has been terminated with effect from Friday 25th August 2000. Please hand over to the Head of HR & Operations all bank securities in your possession together with the Bank's ID Card and Name tag.

Your August salary will be paid pro-rata upto 25th August 2000. As per provisions of Clause 5 (b), you shall also be paid one month's salary in lieu of notice.

The proceeds from your provident fund will also be computed in accordance with the income tax rules and regulations.

Prior to payment of your terminal dues, we shall expect a proposal on how you intend to settle your staff loans whose outstanding balance is Kshs 1,442,851.40: Personal Loan Kshs 1,196,585.20 expiry – May 2002

Car Loan Kshs 24,266.20.20 expiry – Jan 2002

Total Kshs 1,442,851.40

Any facilities still outstanding as at 1st September 2000 will be converted to customer loans and shall attract commercial interest rates.

Yours faithfully,

National Industrial Credit Bank Limited

M N Githaiga

Executive Director”

It will be recalled that clause 5 (b) enabled the Bank to terminate the plaintiff’s employment without assigning any reason on payment of one months salary in lieu of notice.

Before answering the question whether the termination of the plaintiff’s employment in those circumstances was lawful or not, two matters need to be considered. The first is the effect, if any, of the fact that the plaintiff had a distinguished career with Barclays Bank and/or that he was enticed to join the defendant Bank and had received assurances that Clause (5) of the contract was a formality. The second matter is whether a court should go outside the four corners of a contract in determining whether the termination of a contract is lawful or not.

With regard to the first matter, I can only say that it has long been the law that the history preceding the execution of a contract and any discussions or assurances in that regard are superseded by the subsequent written contract which becomes the exclusive memorial of the parties agreement and that no extrinsic evidence is admissible to contradict vary, add to, or subtract from the terms of the document. Accordingly the history of the plaintiff’s previous employment and the assurances and enticements he received are irrelevant in the construction of the contract of employment.

As regards the second matter, I confess that I have always understood the law to be that in determining the lawfulness or otherwise of termination of employment whose terms and conditions have been reduced to a written contract, the only test was whether the said termination was in accordance with the contract itself and that one could not go outside the four corners of the contract. That conviction remained until the plaintiff’s advocate attempted to shake it by invoking the Court of Appeal decision in *CPC Industrial Products (K) Limited v Omweria Ngima* [CA No 197 of 1992] (unreported). I have read the case. As I understand it (and I must confess

I find a lot of internal contradictions and somewhat contrived reasoning in the individual judgments supplied) the Court of Appeal does not impugn the principle that dismissal in accordance with the letter of the contract is not unlawful. That would appear to be so from the following passages. At

P 14, Kwach JA wrote:

“The complaint in the first ground of appeal is that the findings in favour of the respondent for wrongful dismissal were contrary to the evidence adduced at the trial. In the letter of dismissal to which I have already alluded, the respondent was dismissed and paid one month’s salary in lieu of notice. That was not the notice to which he was entitled under his terms of appointment. This ground of appeal accordingly fails.” (Underlining mine).

Counsel for the plaintiff did not furnish me with the judgment of Gicheru JA. Who was the other member of the Court and accordingly, I am unable to know his thoughts on the matter. Be that as it may be, I think both Kwach and Muli JJA found the respondent’s dismissal to have been unlawful because he was not dismissed in accordance with the terms of his contract of service. In the result, my conviction that a termination of employment in accordance with the letter of the contract itself cannot be unlawful remains unshaken. That being so and seeing that the plaintiff’s employment herein was terminated strictly in accordance with Clause 5(b) of the Contract of Service, I must find and hold that the answer to issues number 5 and 6 is that the plaintiff was lawfully dismissed. Whether the action was fair is another matter altogether. Though I think the defendant’s action was unfair, I cannot hold it to be unlawful on that account. The common law does not know of unfair dismissal. In England, it took legislative intervention to recognize unfair dismissal as a wrong.

Until there is similar legislation in Kenya, the Courts must continue to decide termination cases on the basis of lawfulness or unlawfulness and not fairness or unfairness. There is no remedy for unfair dismissal, I am afraid.

Issue No 7 is whether the defendant discharged its duty to the plaintiff under the contract of service and

paid him the requisite amount in lieu of notice together with all sums due and payable to him on termination of the contract. On a consideration of the evidence, the answer is yes, the defendant has honoured all its contractual obligations to the plaintiff. The plaintiff himself said as much and affirmed he had no claim against the defendant with regard to his contractual entitlements upon termination of the contract. He testified that his claim was for compensation for other losses arising from unlawful dismissal.

As regards issues number 8, 9, 10, 11 and 12, I think issue number 12 captures them all. The question is whether the plaintiff is entitled to the reliefs prayed for in the plaint. The first relief sought is that the defendant do pay to the plaintiff full salary and emoluments for the contractual period of three years. The short answer to this prayer is that it having been found that the termination of the plaintiff's employment was lawful, there can be no question of the plaintiff being paid emoluments and salary for three years or any part thereof. Be that as it may be, I think this is the appropriate moment to deal with the plaintiff's expressed justification for thinking his employment was terminated unlawfully and the measure of damages if indeed such was the case. On the evidence on record, I find the plaintiff had not been cautioned, reprimanded or warned before his employment was terminated. However his contract of employment did not envisage such procedures as conditions precedent to the termination of contract.

That he sincerely believed he would have to be warned, cautioned or reprimanded before the drastic step of termination was taken I have no doubt. Equally, I have no doubt that he was sincerely wrong. Any expectations of a party which have not been expressed in the contract of employment could only be relevant if they were deemed to be implied terms. And terms cannot be implied if they are manifestly inconsistent with the express ones. In the instant matter, Clause 5 (b) allowed termination without assigning any reason. That is what happened and accordingly the plaintiff's expectations of warnings, reprimands or even a hearing were misplaced. As regards the right to a hearing, the law is well settled that in a case of pure master and servant, the servant is not entitled to a hearing before dismissal. In *Ridge v Baldwin* [1964] AC 40, (a decision I concede none of the advocates referred to), Lord Reid, that great oracle of the law put the matter thus at page 65:

"I shall deal first with cases of dismissal. These appear to fall into three classes: dismissal of a servant by his master, dismissal from an office held during pleasure, and dismissal from an office where there must be something against a man to warrant his dismissal.

The laws regarding master and servant is not in doubt. There cannot be specific performance of a contract of service and the master can terminate the contract with his servant at any time and for any reason or for none. But if he does so in a manner not warranted by the contract he must pay damages for breach of contract. So the question in a pure case of master and servant does not at all depend on whether the master has heard the servant in his own defence: it depends on whether the facts emerging at the trial prove breach of contract."

The plaintiff herein belongs to category one. He was not entitled to be heard and cannot be heard to say his dismissal was unlawful for want of a hearing. What if the plaintiff's dismissal had been unlawful? What would have been the measure of damages? Subject to the principle of mitigation of loss, the measure of damages for unlawful dismissal is the amount which the employee would have earned during the period of notice if the employment was terminable by notice or from the period of dismissal upto the time the contract would have ended if the employment was on a fixed term basis. As regards the length of the notice the same is that which is agreed by the parties and if none is agreed, a reasonable period. (See *Addis v Gramophone Co Ltd* [1909] AC 488; *Ombanya v Gailey & Roberts Ltd* [1974] EA 522; and *Rift Valley Textiles Ltd v Edward Onyango Oganda* [CA No 27 of 1992] (unreported). In that regard I must with the greatest of respect say that certain passages in the judgments of the Court of Appeal in the *CPC Industrial Products (K) Ltd (supra)* are, in my opinion, *per incuriam* in two respects and, accordingly, this Court is not bound to follow them. First, at page 16, Kwach JA opines –

"First, the principle that damages will be limited to the period of notice agreed between the parties will and should only apply if in exercising its right to terminate the appointment, the employer is not prompted by ulterior motives and acts without malice and in good faith. If the employer acts maliciously or

oppressively or even callously the Court should take this into account in assessing the damages which the victim should be awarded.”

This dicta for which no authority is cited runs contrary to the authoritative exposition of the common law by the House of Lords in *Addis v Gramophone Co Ltd (supra)* where it was held that:-

“In an action for wrongful dismissal, the jury in assessing the damages, are debarred from awarding exemplary damages because of circumstances of harshness and oppression accompanying the dismissal and injuring the feelings of the servant and also from taking into consideration the fact that the dismissal will make it more difficult for him to obtain fresh employment.”

Interestingly, at page 19 and 20, the learned Judge of Appeal himself adverted to the above enunciation of the law by the House of Lords and proceeded on the basis thereof to reverse the award of Kshs 50,000/= for mental anguish made by the High Court. Secondly in assessing what is a reasonable period of notice, the Court of Appeal’s attention does not appear to have been drawn to the provisions of section 14 of the Employment Act, Cap 226 of the Laws of Kenya which provides in subsection 5 as follows:-

“(5) Every contract of service not being a contract to perform some specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be –

(i)

(ii)

(iii) 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:

Provided that this subsection shall not apply in the case of a contract of service whose terms provide for the giving of a period of notice of termination in writing greater than the period required by the provision of this subsection which would otherwise be applicable thereto.”

In short, if the plaintiff’s dismissal had been unlawful, all he would have been entitled to would have been loss of salary for one month only and not for the entire contractual period or the balance thereof. In the premises, prayer (i) was for rejection and it is hereby rejected.

Prayer (ii) seeks an order that the defendant do charge interest on all loans held by the plaintiff from the date of termination of the contract at the then staff rates. I am afraid the benefit of staff loans scheme was one of the contractual privileges of the plaintiff during the subsistence of the employment. On termination of the contract of employment, the plaintiff ceased to be a member of staff and became disentitled from staff rights and privileges. He is therefore not entitled to this relief.

In prayer, (iii), general damages are sought. Well, it is trite law that general damages are not available for breach of contract of employment. Here there is no breach of contract in the first place and even if there had been, the plaintiff’s prayer would not have been granted. Prayer (iv) would have been consequential to prayers (i), (ii) and (iii). It is not available in view of the rejection of the others.

The upshot of this trial is that the plaintiff’s suit must be and is dismissed with costs to the defendant.

Dated and delivered at Nairobi this 18th day of March, 2003

A. G. RINGERA

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JUDGE