



**Gikonyo v Co-operative Bank of Kenya Limited (Civil Case 208 of 2001)  
[2025] KEHC 100 (KLR) (Civ) (16 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 100 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL  
CIVIL CASE 208 OF 2001**

**CW MEOLI, J  
JANUARY 16, 2025**

**BETWEEN**

**ANNE WANGU GICHURU GIKONYO ..... PLAINTIFF**

**AND**

**THE CO-OPERATIVE BANK OF KENYA LIMITED ..... DEFENDANT**

**JUDGMENT**

1. The claim by Anne Wangu Gichuru Gikonyo (hereafter the Plaintiff) against The Co-Operative Bank of Kenya Limited (hereafter the Defendant) was instituted via the plaint dated February 8, 2001 seeking general damages and the sum of Kshs. 4,347,082.80 inter alia, for alleged unlawful termination of employment. The Plaintiff averred that at all material times, she employed by the Defendant as a Customer Services Officer with effect from 22.04.1996, and subsequently confirmed as a permanent and pensionable employee on 4.12.1996.
2. The Plaintiff pleaded further that sometime on or about August 13, 1999 the Defendant unlawfully and unjustifiably summarily dismissed her from employment on allegations of alleged misappropriation of card holders' funds, in contravention of the *Employment Act* and Appendix 14 of the Defendant's Staff Termination Manual, the latter which stipulates under Clause 5 that in order for summary dismissal to be effected, the alleged misappropriation ought to have been established and the subject employee found guilty. However, she continued to assert, in her case there was no evidence that any investigations were carried out in establishing the alleged misappropriation of card holders' funds by the Plaintiff. The Plaintiff therefore averred that her dismissal was actuated by malice and ill-will, particularized as follows:

Particulars Of Ill-will And Malice



- i. She was the only person out of the three persons who were custodians to the safe which held the cards who was summarily dismissed.
  - ii. She was called upon to show cause why she should not be dismissed but there is no evidence that her “show cause” letter was ever considered.
3. Moreover, the Plaintiff pleaded, the Plaintiff’s Performance Appraisal Report ending November 1998 rated her as an efficient and effective employee, resulting in her promotion sometime on or about 26.01.1999. That however, following the actions by the Defendant, she lost her livelihood and was therefore unable to continue servicing an outstanding house loan previously advanced to her by the Defendant, resulting in the sale of her house being LR No. Nairobi/Block 93/26 (hereafter the subject property) by way of a public auction on 16.01.2001. Consequently, the Plaintiff sought compensation by way of general damages for her unlawful termination and specific damages equivalent to the value of the lost subject property.
4. Upon entering appearance, the Defendant filed a statement of defence dated 15.03.2001 and amended on 4.10.2001 to include a counterclaim. In its defence, the Defendant denied the key averments in the plaint and liability. The Defendant also denied that its decision to terminate the Plaintiff’s employment was driven by malice and ill-will, averring that prior to effecting the said termination, it conducted investigations which revealed that the Plaintiff had been involved in the misappropriation of customer funds which act constituted gross misconduct warranting the Plaintiff’s termination from employment with the Defendant.
5. By way of counterclaim, the Defendant sought judgment against the Plaintiff, for the sum of Kshs. 2,112,121.70 plus interest at the rate of 24% p.a. with effect from 19.04.2001 until payment in full, being the outstanding loan sum owing from the Plaintiff after the sale of the subject property pursuant to a charge in favor of the Defendant. Further elaborating that upon conducting a sale of the subject property on 16.01.2001 by way of a public auction, the Defendant received proceeds in the sum of Kshs. 3,050,000/- which sum was applied towards reducing the Plaintiff’s loan sum, leaving an outstanding balance of Kshs. 2,112,121.70 together with interest at the stated rate.
6. The Plaintiff rejoined with a reply to the amended defence and counterclaim and a defence to the counterclaim dated 18.10.2001 wherein she denied the key averments in the counterclaim and joined issue with the amended defence. In the defence to the counterclaim, the Plaintiff further pleaded that she has never been provided with any documentation or accounts relating to the sale of the subject property.
7. The suit proceeded for full hearing with the Plaintiff’s testimony, while the Defendant relied on the testimonies of three (3) witnesses.
8. During her testimony as PW1, the Plaintiff adopted her signed witness statement as part of her evidence-in-chief and produced her list and bundle of documents dated 8.07.2010 as P. Exh. 1 to 27. She proceeded to state that she works as a Deputy Director of Marketing in the Agriculture and Food Authority. Concerning employment with the Defendant, she stated that she was appointed as a Customer Service Officer by the Defendant on 22.04.1996 and that her duties entailed data capture of new records; the embossing of new and replacement of cards; the generation of renewal cards; the generation of PIN mailers for the aforesaid cards; the dispatch of embossed cards to the respective card holders; attending to all correspondence on active customer issues; the destruction of undesired or uncollected cards; acting in the capacity of one of three (3) custodians of the safes containing the embossed and blank cards; the generation of monthly reports; among others.



9. Further that following the approval of an application for a card or renewal thereof, she would generate the card. That she worked in the department together with two (2) other persons namely Doris Ndambuki (who held the key to the safe) and June Miano (who operated both the duplicate key and the combination to the safe). That she left the employment of the Defendant on 13.08.1999 under the circumstances described in the plaint and in her written witness statement. The Plaintiff averred that whilst in the Defendant's employment, she took out a loan facility for the sum of Kshs. 3,900,000/- for purposes of purchasing a house and in that regard executed a charge in favour of the Defendant, in respect of the subject property.
10. And further that at the time of her departure from the Defendant's employment, the loan had not been repaid in full and thereafter, she was unable to service the said loan as she remained unemployed for some time. That the alleged reason for her dismissal from the Defendant's employment was that she had embezzled a total sum of Kshs. 140,000/- from four (4) card holders who had then raised complaints with the Defendant regarding various irregular transactions on their cards.
11. The Plaintiff further averred that following the said complaints, the Defendant suspended her from employment on 1.07.1999 and thereafter handed her over to the Banking Fraud Investigation Department (BFID) for further investigations. That following its investigations, BFID recommended that she returns to work and did not charge her in relation to the irregular transactions. That, nevertheless, she was ultimately dismissed from employment. That prior to the BFID investigation report which constitutes one of the documents being relied upon by the Defendant, she did not receive any communication regarding internal or external investigations. That the aforesaid report cites the name "Anne Wanjiku Gichuru Gikonyo" which was not hers. That prior to the report, Inspector of Police (IP) Anunda conducted investigations against the Plaintiff, but that nothing incriminating was discovered, and notwithstanding, she received a show cause letter from the Defendant on 22.07.1999 to which she responded to on 29.07.1999, but the Defendant without ever giving her a chance to be heard proceeded to dismiss her from employment.
12. It is her testimony that following her dismissal from employment, the Defendant furnished her with loan balances to the tune of Kshs. 3,461,252/- which sum was to accrue interest at prevailing rates, though the exact percentage of interest rate was not indicated. That subsequently, the subject property was sold by way of a public auction on 16.01.2001 for the sum of Kshs. 3,050,000/- though she never received information regarding the account to which the proceeds were credited. It is equally her testimony that the amount sought in the Defendant's counterclaim has not been proved. She asserted that the Defendant acted maliciously and out of ill-will, in terminating her employment in the manner it did and in varying the interest rate relating to the loan sum to the prevailing commercial rates, having been made the scapegoat of the irregular transactions.
13. During cross-examination, the Plaintiff confirmed her duties as earlier set out and stated that she had access to the safe. That, nevertheless, she suspected Doris Ndambuki in relation to the irregular transactions, since she too performed similar functions to the Plaintiff. Explaining that upon the safe combination being opened in the morning hours, anyone could access the safe. Admitting further that according to the Defendant's Staff Manual embezzlement of funds constituted gross misconduct which could result in summary dismissal. She stated that the BFID report which was filed by the Defendant contained blanks and differs from the copy in her possession.
14. She confirmed that upon her dismissal from the Defendant's employment, she did not make any additional payments towards offsetting the outstanding loan amounts, having previously paid three (3) to four (4) instalments in the sum of Kshs. 12,000/- per month. And that she did not comply with the Defendant's request for a proposal for repayment of the outstanding amounts, and subsequently



received the 90-day statutory notice demanding repayment of the loan, prior to the sale of the subject property as well as the notification of the sale by way of a public auction, from Garam Auctioneers. That at the time of her dismissal from employment, the loan balance stood at over Kshs. 3,400,000/-, and while the proceeds of the sale had been credited into an account, she has never received a statement in that regard.

15. In re-examination, the Plaintiff reiterated her earlier evidence, save to add that if the sale of the subject property raised the sum of Kshs. 3,050,000/- the balance outstanding should have been a sum of about 350,000/- and that the terminal benefits which remained unpaid to her would also have been utilized in settling the outstanding loan sums. This marked the close of the Plaintiff's case.
16. For the defence, Beatrice Kathure Muthuri (DW1) adopted her signed witness statement dated 25.08.2021 as part of her evidence-in-chief and produced the Defendant's list and bundle of documents filed on 5.10.2017 as D. Exh. 1 to 7 as well as its supplementary list and bundle of documents dated 29.10.2021 as D. Exhibits 1 to 8. The witness then testified that she is the Relations Officer in the Defendant, having joined the Bank in September 2006 and that though she did not work with the Plaintiff, she was able to appraise herself with the relevant documentation relating to the case and further testified that the Plaintiff's suit ought to be dismissed as the Defendant's counterclaim is allowed.
17. In cross-examination, the witness testified that following the complaints surrounding the alleged misappropriation of customer funds by the Plaintiff, BFID and the Security Unit of the Defendant carried out investigations during which time the subject staff were suspended from work, in accordance with the Defendant's Manual procedure. That upon conclusion of the investigations, the Defendant in accordance with proper procedures and policy summarily dismissed the Plaintiff for gross misconduct. The witness stated that she did not know whether any report was made by the Defendant prior to the matter being referred to BFID for investigation purposes. The witness further stated that following the investigations, the Plaintiff was issued with a show cause letter which admittedly did not state the specific charges as stipulated in the Staff Manual.
18. DW1 also stated that upon perusing the documentation left behind by her predecessor, she came across an appeal letter dated 27.09.1999 by the Plaintiff, challenging her dismissal. In addition to a separate letter dated 25.08.1999 (P. Exh. 8) which her predecessor in the Defendant Bank had not referred to previously, and hence it is apparent that the said letter was not received by the Defendant. It was her further testimony that following her summary dismissal from the Defendant's employment, the Plaintiff was not entitled to receive any benefits but during the course of her suspension, had continued to receive her monthly salary. That final dues owing to the Plaintiff were however computed and released to her, a task ordinarily undertaken by the staff dealing with pension matters. That.
19. She stated that the investigations carried out by BFID, implicated two (2) staff members, namely June Miano and Doris Ndambuki, and that BFID recommended a full hearing in respect of the former, who was eventually reinstated into the Defendant's employment. While the latter staff member was exonerated and reinstated on the basis that she was a staff member subordinate to the Plaintiff.
20. During re-examination, DW1 stated that the dismissal of the Plaintiff from the Defendant's employment was founded on the report prepared by BFID coupled with the Plaintiff's response. She also stated that the charges resulting in the Plaintiff's summary dismissal relate to the misappropriation of customer funds, which amounts to gross misconduct, according to the Staff Manual. That the dismissal letter set out the reasons therefor. She confirmed that the Plaintiff fell within the category of employees liable for suspension and could be dismissed without referral of her matter to the Defendant's disciplinary committee. Regarding the Plaintiff's appeal letter earlier referred to, DW1



stated it did not constitute new evidence and could not therefore succeed in any event. She further restated her earlier evidence that upon dismissal of a staff member of the Defendant, all benefits relating to the respective position are lost.

21. Lillian Omanji testified as DW2. Having adopted her executed witness statement dated 15.10.2020 as her evidence-in-chief, she produced the Defendant's remaining list and bundle of documents dated 15.10.2017 as D. Exh. 9 to 14.
22. During cross-examination, she stated that the Plaintiff obtained a loan in the sum of Kshs. 3,500,000/- from the Defendant in the year 1998 and that she was subsequently dismissed from the Defendant's employment in 1999 when a sum of Kshs. 40,000/- was repaid through the Plaintiff's salary deductions. Upon being referred to D. Exh. 5, DW2 stated that the document reflected the outstanding loan sums owed by the Plaintiff, amounting to Kshs. 3,461,252/- plus interest. The witness however stated that she had no documentation to show the amounts owing since the time of the Plaintiff's dismissal from employment. Nevertheless, stating that the Plaintiff in addition to owing the said sum, also owed the Defendant a sum of Kshs. 373,114.45 on account of an overdrawn current account. However, she could not comment on the statement in the charge document (D. Exh. 10) indicating that that the legal charge executed by the Plaintiff covered both the loan amount and the overdrawn account.
23. It is the further testimony of DW2 that by the public auction, the Defendant was able to recover a sum of Kshs. 3,050,000/- from the sale of the subject property to one Caleb Olenje, who however, did not pay the full purchase price upfront but paid a deposit thereon in the sum of Kshs. 762,500/- and was to settle the remaining balance later. That in the intervening period, the interest continued to accrue, at the rate set at the Bank's discretion, and eventually, the subject property was transferred to Caleb Olenje, on a date she could not confirm. And that from available records, as of 17.10.2001 the subject property was still in the Plaintiff's name, and it was unclear when the Defendant ceased charging interest on the said property.
24. In re-examination, DW2 testified that the interest on the loan amount charged on the Plaintiff's current account included liabilities such as service provider fees, auctioneer fees and valuation fees.
25. Chief Inspector of Police (CIP) Nicholas Manyaka was DW3. He stated that he works as a fraud investigator at BFID, a department mandated to investigate reports and allegations of bank fraud. That he joined BFID in June 2014 and has worked there since. The witness proceeded to produce the BFID report dated 2.08.1999 as D. Exh. 15 and duly signed by his former Officer-in-charge.
26. Under cross-examination, the witness stated that the BFID report was in BFID's investigation files but was uncertain regarding the number of investigators who undertook the investigations pertaining to the present matter. However, stated that it is more likely than not that a majority of the officers who were involved in the said investigations had since left BFID. He confirmed that from the contents of the report, the first suspect listed in relation to the allegations of misappropriation of customer funds is Anne Wangui Gichuru Gikonyo, while one James Nyoro was the complainant. Who recorded statements, which were however not before the court at the time of his testimony.
27. Further DW3 testified that a card used in committing a fraudulent transaction prior to issuance could not be issued to the customer, and that the role of the Plaintiff entailed the renewal of customer bank cards, and embossment thereof which process renders a card ready for use. And that according to the report, the Plaintiff generated the in the name of one Mary Gatehi relevant card but that one Doris was involved in part of the process; and that the card in question was generated fraudulently, as no request had previously been made on the said card. Further that, another customer named Grace Wamuyu also raised a complaint regarding an unauthorized transaction on her card in April 1999 prior to its



- expiry, and whilst the card was in her possession. He stated that June Wanjiru Miano was named as an accomplice together with the Plaintiff with regard to the subject card which was generated by the Plaintiff and later used to withdraw monies on 9.06.1999 in Westlands, when June was shopping at Uchumi Supermarket in Westlands. However, Doris Ndambuki was exonerated since she was on leave at the material time, and her level of responsibility in the Defendant Bank was lower than that assigned to the Plaintiff. Asserting further that the customer cards were kept in safe custody and with restricted access, at all material times.
28. According to DW3, the Plaintiff together with June and Doris, would ordinarily open the safe in the morning hours, thereby giving other employees an opportunity to access the customer cards; and that the safe would subsequently be locked at the end of work hours. Adding that the cards which were involved in the fraudulent transactions were embossed by the Plaintiff.
  29. Under re-examination, DW3 restated his earlier evidence that the main suspect listed in the report was Anne Wangui Gichuru Gikonyo and that the complaint was made by the Defendant, in relation to alleged card fraud. He then stated that upon receiving a complaint, ordinarily BFID assigns an investigator to carry out investigations into the matter, initiated by the opening of an inquiry file. That thereafter, both witnesses and suspects are interviewed whereupon a report is compiled and thereafter sent to the Officer-in-charge for review and presentation to the Director of Prosecutions for further directions. He further restated his earlier testimony that in the present case, the Plaintiff was found to have embossed the cards which were linked to the fraudulent transactions, and even going to the extent of typing the Personal Identification Number (PIN) which ought to have remained confidential, to the customer. That the customer Mary Gatehi, denied having put in a request for a new card and that her then current card had not expired at the time the Plaintiff generated a new one. This marked the close of the defence case.
  30. At the close of the hearing, the parties were directed to file and exchange written submissions.
  31. The Plaintiff's counsel on the one part submitted that the Plaintiff from the onset denied the allegations, of misappropriation of customer funds leveled against her in respect of the following accounts:
    - a. Grace Wamuyu Maina-Card Holder No. 4407-81111-0000-2014
    - b. Jane Ruguru Waweru-Card Holder No. 4797-4040-0100-4830
    - c. Mary Gatei-Card Holder No. 4797-4040-01000-0804
    - d. James Nyoro-Card Holder No. 4797-4040-0000-7859
  32. Counsel submitted that despite the Plaintiff's denials regarding the fraudulent transactions in respect of the aforesaid accounts, the Defendant refused to believe her and proceeded to conduct internal investigations into the matter before handing over to the BFID for further investigations. That during the said investigations, it was established that the Plaintiff's colleagues namely June Miano and Doris Ndambuki, also had access to the safe containing the respective customer cards and that once the Plaintiff opened the safe combination in the morning hours, all employees could access the safe throughout the day. That as a result, the Plaintiff was exonerated by the BFID.
  33. Counsel argued that the Defendant therefore acted unreasonably in summarily dismissing the Plaintiff from employment, in the absence of any proper disciplinary procedure being followed, and in the absence of an internal investigation being undertaken by the Internal Audit Department of the Defendant and a report being presented in that regard. Furthermore, the Defendant failed to consider the positive performance appraisals on the part of the Plaintiff. In counsel's view, the production of



the BFID report by DW3 constituted an afterthought and its maker did not appear to testify. Hence, it is clear that the Plaintiff's dismissal from employment by the Defendant was actuated by malice and ill-will and was unlawful.

34. On the reliefs sought in the plaint, counsel made reference to the principle of Restitutio in Integrum which states that the proper measure of damages awardable for breach of contract should cover the loss suffered but that would otherwise not have been suffered if the contract was lawfully terminated. Counsel cited inter alia, the decisions in *Amin Mughal v Lakmer Techs Ltd* [2002] KEHC 1153 (KLR) and *Kenya Breweries Limited v Natex Distributors Limited* [2004] KEHC 2737 (KLR) where the said principle was applied. Counsel therefore urged the court to award damages for unlawful termination of employment, based on the Plaintiff's salary at the time, equivalent to three (3) months' notice.
35. In addition, counsel cited inter alia, the decision in *Kenya Ports Authority v Silas Obengele* [2009] KECA 464 (KLR) where the court awarded damages to the plaintiff for unlawful termination of employment. Additionally stating that the Plaintiff herein is in entitled to payment of her pension as well as earned/accrued leave and salary plus allowances until the date of dismissal. Counsel asserted that the Plaintiff was also entitled to receive compensation equivalent to the value of the subject property as of 2001; being Kshs. 4,347,082.80.
36. Counsel highlighted pieces of evidence concerning the loan balances, stating that following the Plaintiff's dismissal from employment, the Defendant demanded the sum of Kshs. 3,461,252/- being the outstanding balance on the loan amount in respect of the subject property, vide a letter dated 13.08.1999. That subsequently, the Defendant by its letter dated 20.04.2000 demanded a sum of Kshs. 3,834,366.45 being the purported outstanding liabilities, further purporting that the second letter constituted a notice of sale pursuant to Section 74 of the Registered Land Act, failing which the Defendant would exercise such statutory power of sale over the subject property.
37. According to the Plaintiff's counsel, the above letter did not constitute a valid notice of sale. Besides, the Defendant did not tender any material to justify the sum of Kshs. 3,834,366.45 as demanded. That thereafter, the Plaintiff was yet again served with a notice dated 2.11.2000 requiring her to pay a sum of Kshs. 4,347,082/- to enable her to redeem the subject property, which sum differs from the sums earlier sought. Counsel argued that the sum owed in respect of the outstanding loan is Kshs. 3,461,252/- being the sum first sought by the Defendant.
38. Regarding the counterclaim therefore, it is the submission by counsel that the Defendant has not tendered any evidence to support its claim for the sum of Kshs. 2,112,121.70 sought therein. Counsel submitted that the Plaintiff does not owe any monies to the Defendant and that the sum sought is unjustified, adding that the Defendant did not avail any bank statements or other material to the Plaintiff to support the above amount.
39. The Defendant's counsel on his part anchored his submissions on the decisions in *Kenya Revenue Authority v Menginya Salim Murgani* [2010] KECA 508 (KLR) and *Major Wilfred Kyallo Kangulyu v. Tetrapak Limited* [2014] eKLR. In support of the proposition that prior to enactment of the Employment Act, 2007, an employer's duty to incorporate the rules of natural justice could only be imposed by the employment contract and hence employers were not obligated to apply the principles of natural justice in the termination of contracts, where not stipulated in the respective contracts.
40. Counsel proceeded to argue that pursuant to Appendix 14(3) of the Defendant's Staff Manual, the allegations brought against the Plaintiff were grievous in nature and therefore warranted her suspension at the first instance, pending investigations. He further argued that pursuant to Appendix 14(4), the Defendant was obligated to serve a notice to show cause letter upon the Plaintiff, specifying the charges levelled against her and to which the Plaintiff was required to respond. That



in addition, the investigations undertaken by BFID established a nexus between the Plaintiff's actions and the fraudulent transactions. That the said report demonstrated that the Plaintiff was guilty of gross misconduct, and that Appendix 14(5) of the Staff Manual as read with Section 17(g) of the *Employment Act* Cap. 226 provide that acts amounting to gross misconduct would warrant summary dismissal of an employee. That in the circumstances, the Defendant acted reasonably in summarily dismissing the Plaintiff from its employment.

41. Counsel similarly argued that the Defendant considered the appeal lodged by the Plaintiff and rendered its decision thereby dismissing the appeal, in accordance with Appendix 14 of the Staff Manual. He added that the allegations of malice and ill-will have not been proved by way of evidence. Consequently, counsel urged that the Plaintiff's suit be dismissed with costs.
42. It is also counsel's contention that the issue raised in the Plaintiff's submissions regarding whether the Defendant properly exercised its statutory power of sale was never pleaded in the plaint and could not be raised at the submission stage. In that regard, counsel relied on the decision in *Independent Electoral and Boundaries Commission & another v Mule & 3 others* [2014] KECA 890 (KLR) where the Court of Appeal held that parties are bound by their pleadings and cannot depart therefrom.
43. That notwithstanding, counsel contended that it was undisputed that the Plaintiff took out a loan with the Defendant for the purchase of the subject property, in the sum of Kshs. 3,500,000/- and secured by a legal charge on the said property. That upon termination of her employment, the Plaintiff was indebted to the Defendant in the sum of Kshs. 3,461,252/- of at 11.08.1999. That the Plaintiff did not service the loan and was therefore in breach of the terms of the charge, thereby entitling the Defendant to exercise its statutory power of sale. Hence, as of 20.04.2020 the amount outstanding stood at Kshs. 3,495,396.45 plus accrued interests. Counsel cited the case of *Nyangilo Ochieng & Obel Omuom v Fanuel B. Ochieng, Gladys Oluoch & Kenya Commercial Bank Ltd*, Civil Appeal 148 of 1995 where it was held that for a chargee to exercise its statutory power of sale, it must first serve upon the chargor the relevant statutory notice in compliance with Section 74(1) of the Registered *Land Act*, Cap 300 Laws of Kenya, three (3) months before the power of sale takes effect.
44. Counsel contended that the Plaintiff having failed to prove her case against the Defendant, was not entitled to the reliefs sought in the plaint. That if the court were inclined to find otherwise, then the Plaintiff would only be entitled to receive damages equivalent to the salary she would have earned during the subsistence of the notice, amounting to one (1) month's salary in lieu of notice. Regarding the terminal benefits sought, it is counsel's submission that the Plaintiff would not be entitled, the same having been introduced at the submission stage and that in any case, Clause 7 of Appendix 14 of the Staff Manual stipulates that upon summary dismissal, an employee loses his or her entitlement to all benefits. On the reliefs sought in respect of the value of the subject property, counsel urged the court to reject the same in the absence of proof of entitlement.
45. Counsel for the Defendant urged the court to allow the Defendant's counterclaim as prayed, the same having been proved by way of the demand letter dated 13.04.1999 for the sum of Kshs. 3,461,252/- and which amount continued to accrue interest. Referring to the testimony of DW2, counsel asserted that the Defendant had proved that the Plaintiff was indebted to the Defendant, to the tune of Kshs. 2,112,121.70. Finally, he prayed for the costs of the counterclaim, citing *Republic v Rosemary Wairimu Munene, Ex-Parte Applicant v Ihururu Dairy Farmers Co-operative Society Ltd* Judicial Review Application No.6 of 2014 regarding the principle costs are awarded at the court's discretion.
46. The court has considered the pleadings, the evidence on record and the parties' respective submissions. Before addressing the merits of the suit, the court notes that the Plaintiff purported to challenge the validity of the notice of sale giving rise to the exercise of the statutory power of sale by the Defendant



and in respect of the subject property. However, this issue did not arise in the Plaintiff's pleadings and was only raised at the submissions stage by her counsel. It is trite that submissions are not a substitute for evidence, as held by the Court of Appeal in the case of Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR.

47. Equally, parties in a suit are bound by their pleadings, and bear their respective onus of proof. The Court of Appeal in Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91, pronounced itself as follows in this regard: -

“We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.”

See also; - Galaxy Paints Company Ltd V. Falcon Guards Ltd (2000) eKLR; Gandy Vs. Caspair [1956] EACA 139 and Associated Electrical Industries Ltd V. William Okoth (2004)eKLR.

48. Thus, the court is of the view that the Plaintiff cannot be heard to challenge, through her submissions, the validity of the notification of sale in respect of the Defendant's exercise of its statutory power of sale over the subject property. In any event and going by the averments made by the parties, the subject property was sold to a third party years ago and hence the question regarding the validity of the statutory notice of sale has long been overtaken by events.
49. Upon reviewing the pleadings, evidence and submissions before it, the court identified the following as constituting the key issues falling for determination:
- a. Whether the Plaintiff has established her claim of unlawful termination of employment against the Defendant;
  - b. Whether the Plaintiff is therefore entitled to the reliefs sought in the plaint; and
  - c. Whether the Defendant has established its counterclaim against the Plaintiff.
50. Regarding the foremost issue, the legal principle is that the burden lay with the Plaintiff to prove her claim against the Defendant to the required standard. In that regard, the applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. The Court of Appeal in Mumbi M'Nabea v David M.Wachira [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:



“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” The above provision provides for the legal burden of proof.

However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M’airanyi & Others v. Blue Shield Insurance Company Limited* -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

51. Further, the same court in *Karugi & Another v Kabiya & 3 others* [1987] KLR 347 observed that:

“[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof....The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.”

52. The latter statement alludes to the position that the legal burden of proof, unlike the evidentiary burden of proof does not shift. In reiterating the standard of proof, the Court of Appeal in *Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another* [2015] eKLR held that:

“Denning J, in *Miller –vs- Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say;-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

53. From the pleadings and material on record, it is not disputed that the Plaintiff was at all material times an employee of the Defendant, pursuant to the letter of employment dated 22.04.1996 and tendered by the parties as P. Exh. 1 and D. Exh. 1, respectively. According to the said letter, the Plaintiff was employed as a Customer Service Officer-Card Centre, Job Grade II Basic Notch, and was to earn a salary of Kshs. 448,188 per annum (p.a.) together with other benefits stipulated in the contract. The



letter of employment further stated that the Plaintiff would be subjected to six (6) months' probation and upon confirmation, be placed on permanent employment.

54. It is equally not disputed that in the course of her employment the Plaintiff successfully applied for a financial facility in the form of a house loan in the sum of Kshs. 3,500,000/- repayable in monthly instalments of Kshs. 12,916/- and at an interest rate of 6.5% p.a. as per terms in the letter of offer dated 15.10.1998 (P. Exh. 2) issued to her by the Defendant. The said letter also had a condition requiring that security for the loan facility, in the form of a legal charge registered in favour of the Defendant and in respect of the subject property, be furnished. A further term in the letter stated that in the event that the Plaintiff left the Defendant's employment for reasons other than retirement, then the commercial rate of interest would henceforth apply and further that, should the Plaintiff leave employment for whatever reason, the house loan would become repayable on demand, at the Defendant's sole discretion. Subsequently, the Defendant issued the Plaintiff with a letter dated 25.04.1999 (P. Exh. 3) indicating that the interest rate on the house loan had been revised from 6.5% p.a. to 2.5% p.a. Following which, a legal charge dated 15.03.1999 was registered (D. Exh. 9) over the subject property.
55. There was no dispute that prior to her dismissal, the Defendant raised allegations that the Plaintiff was suspected of involvement in the misappropriation of card funds through suspicious and fraudulent withdrawal transactions on the accounts belonging to the following persons:
- a. Grace Wamuyu Maina-Card Holder No. 4407-81111-0000-2014
  - b. Jane Ruguru Waweru-Card Holder No. 4797-4040-0100-4830
  - c. Mary Gatei-Card Holder No. 4797-4040-01000-0804
  - d. James Nyoro-Card Holder No. 4797-4040-0000-7859
56. That resultantly, the Plaintiff was suspended from her duties, by the Defendant, vide the suspension letter dated 1.07.1999 (P. Exh. 4 and D. Exh. 2 respectively), followed by a show cause letter dated 22.07.1999 (P. Exh. 5 and D. Exh. 3 respectively) detailing the particulars of the alleged fraudulent transactions and requiring the Plaintiff to show cause as to why disciplinary action should not be taken against her. The record shows that the Plaintiff responded to the above letters via her letter dated 27.07.1999 (tendered as P. Exh. 6 and D. Exh. 4) where she essentially stated that she had no knowledge of the person who affected the suspicious transactions and further stating that she was one of three (3) people who handled the safe in which customer ATM cards were stored, at all material times.
57. Subsequently, the Defendant through its agents, referred the matter to BFID for further investigations following which the Defendant summarily dismissed the Plaintiff from its employment vide the letter dated 13.08.1999 (tendered as P. Exh. 7 and D. Exh. 5 respectively) and further demanded full repayment of the house loan in the sum of Kshs. 3,461,252/-. That thereafter, the Plaintiff sought to challenge the dismissal by way of an appeal letter dated 26.08.1999 (P. Exh. 8) followed by a review dated 17.09.1999 (P. Exh. 9). Following the appeal letter, the Defendant by its letter dated 27.09.1999 reaffirmed its earlier decision, dismissing the Plaintiff from its employment. Thereafter, the Defendant sought to realize the security on the Plaintiff's house loan, leading to the eventual sale of the subject property by way of a public auction.
58. That being said, the Plaintiff's case on the one part is that she was wrongfully dismissed from employment by the Defendant, in the absence of any internal investigations and despite her explanation that she had not been involved in the alleged fraudulent transactions. In contrast, the Defendant on the other hand maintained that it followed the proper procedure in dismissing the Plaintiff from its employment and that the said dismissal was based on the outcome of the



investigations undertaken, which established the Plaintiff's likely involvement in and knowledge of the said transactions.

59. In that regard, the court considered Appendix 14 of the Defendant's Staff Manual (D. Exh. 6) which sets out among others, the disciplinary policy and procedure for employees. Clause 3 thereof stipulates under paragraph v) that where an employee commits an offence which is deemed serious in nature and which requires further investigations, the officer-in-charge is obligated to suspend such employee immediately and inform the Human Resources (HR) department immediately. Clause 4 sets out the procedure for suspension, which entails requiring the employee in question to show cause as to why disciplinary action should not be taken against him or her. The Clause further stipulates that in suspensions involving employees of the level of CMG 6 and above, the Managing Director shall report the matter to the Staff Committee of the Board of Directors, who shall then institute an inquiry to investigate the matter, and that recommendations shall be submitted to the Staff Committee for rendering of its decision.
60. Clause 5 on its part provides for instances where summary dismissal applies, including where it is established or determined that an employee is guilty of misappropriation of funds or property belonging either to the Bank or to any party engaged in business with the Bank or its subsidiaries (paragraph ii). The Clause further provides that the listed acts shall constitute gross misconduct and shall justify instant dismissal from employment. Clause 7 further provides that where an employee is summarily dismissed from employment, he or she becomes disentitled to receive any benefits which would have otherwise been payable under normal circumstances. Clause 8b on its part provides that the Management of the Defendant has discretion to deal with all disciplinary cases involving Managers of MG7 and below, in accordance with preceding provisions in the Appendix, without necessarily referring the matter to the Bank's disciplinary committees. Clause 9 provides for the various disciplinary committees.
61. In the present instance, it was not in dispute that following the complaints by the abovementioned card holders, the Defendant's agents referred the matter to the Officer-in-charge, BFID, for further investigations. Upon conclusion of the investigations, the record shows that the Officer-in-charge, Joseph M. Kamau, prepared an Inquiry report dated 2.08.1999 tendered as D. Exh. 15 and forwarded it to the Defendant. The court has noted submissions made by the Plaintiff taking issue with the production of the exhibit by DW3 whom the Plaintiff's counsel cross-examined thereon. No such objection was raised at production during the trial. Additionally, DW 3 was an officer working in the BFID and even though not part of the investigations was a competent witness and qualified, in the absence of objection, to produce the exhibit under Section 33(b) of the *Evidence Act*.
62. That said, the persons listed as suspects in relation to the fraudulent withdrawal of the total sum of Kshs. 140,000/- using the various customers' ATM cards are Anne Wanjiru Gichuru Gikonyo (the 1<sup>st</sup> suspect), June Wanjiru Miano (the 2<sup>nd</sup> suspect) and Doris Ndambuki (3<sup>rd</sup> suspect). It was noted that the 1<sup>st</sup> suspect was the in-charge of the Customer Service Department of the Defendant's Card Centre. From a reading of the report, it is apparent that the complainants as well as the respective suspects were each questioned in relation to the incident.
63. The outcome of investigations was the conclusion that a strong circumstantial case of theft had been established against the 1<sup>st</sup> suspect since all the respective cards, essentially without due authorization by the respective card holders had been generated by herself. And that her explanations to the contrary were unsupported. The investigators therefore recommended that she be prosecuted in relation to the theft. As concerns the 2<sup>nd</sup> suspect, it was concluded that she worked quite closely with the 1<sup>st</sup> suspect, and it was therefore recommended that disciplinary action be taken against her and that she



- be transferred from the Card Centre. However, as regards the 3<sup>rd</sup> suspect, investigations established that she was on leave at all material times and there was no evidence indicating her involvement in the fraudulent activities. The Officer-in-charge ultimately recommended that proper security measures be put in place to safeguard the safes storing the cards and PIN numbers.
64. The Plaintiff in her oral testimony and submissions, purported that the 1<sup>st</sup> suspect is a person different from her, given the listed names. However, upon considering the contents thereof, and all the surrounding evidence the court is of the view that any variance in names may have been the result of error inadvertent. The court is satisfied that the person referenced as the 1<sup>st</sup> suspect is one and the same person as the Plaintiff herein. The Inquiry report demonstrates the role of the 1<sup>st</sup> and 2<sup>nd</sup> suspect in the fraudulent transactions, and for the Plaintiff, she was responsible for generating and embossing the suspect cards used in the fraud, setting her apart as a key suspect. The Plaintiff's submission that the investigation was an afterthought appeared unconvincing in the proven circumstances of the case. Besides, the BFID was a specialized investigative arm of the police not shown to have conducted their investigations at the direction of the Defendant.
65. The fact that two other suspects survived dismissal did not in any way diminish the Plaintiff's own culpability and based on the reasons given for the Defendant's decision, cannot without more, be said to be evidence of ill will and malice on the part of the Defendant. Equally, the onus was on the Plaintiff to prove the particulars in the plaint that there was no proof that her response to the show-cause letter was considered. It is worth noting that the Defendant upon receipt of the said letter referred the matter to the BFID for investigations which yielded the report that shed light on the culpability or otherwise of the suspects. The report findings concerning the Plaintiff, after interviewing her linked her with the alleged fraud and indeed recommended her prosecution.
66. From the foregoing, it is apparent that prior to the Defendant's decision to summarily dismiss the Plaintiff from employment, the Defendant not only served a notice to show cause upon the Plaintiff, to which she responded, but also had the matter investigated by a specialized arm of the police, namely, the BFID who interviewed the complainants and the suspects before compiling their report indicating the culpability or otherwise of the suspects. Evidently, the Inquiry report led to the decision ultimately taken by the Defendant to dismiss the Plaintiff summarily for gross misconduct involving fraudulent card transactions. Upon considering undisputed pertinent events alongside the contents of the said report, the policy and procedures set out in the Staff Manual, the court cannot see any proof that the actions taken by the Defendant were a departure from the procedure set out in the Staff Manual. In the court's view therefore, the Plaintiff did not tender any credible evidence to demonstrate to the required standard the manner in which the Defendant contravened its policy and procedure and or to demonstrate that the Defendant's actions were actuated by malice and ill will towards her, and hence constituted unlawful or unfair dismissal from employment.
67. In view of all the foregoing findings, the court is of the view that the Plaintiff has failed to establish the allegations of unlawful or unfair summary dismissal, against the Defendant. Her suit must fail, and no purpose would be served by the further consideration of the second issue pertaining to the reliefs sought in the plaint. The Plaintiff would not be entitled to any of the said reliefs.
68. This leaves the third and final issue being whether the Defendant has succeeded on its counterclaim against the Plaintiff. As earlier mentioned, the Defendant seeks a sum of Kshs. 2,112,121.70 purportedly being the outstanding balance on the sums owed by the Plaintiff, in respect of the house loan. In that regard, it was not in dispute that the Defendant advanced a loan sum of Kshs. 3,050,000/- to the Plaintiff for purchase of the subject property, the key terms of which have already been set out. It was also the testimony by the Plaintiff that following her dismissal from the Defendant's employment,



- she was unable to continue servicing the loan, resulting in the Defendant's exercise of its statutory power of sale, pursuant to a notice of sale dated 20.04.2000 (D. Exh. 10).
69. The subject property was eventually sold by way of a public auction which was held on 16.01.2000 pursuant to a newspaper advertisement in the Daily Nation Newspaper and dated 2.01.2001 (P. Exh. 17), and the conditions of sale of like date (D. Exh. 12). The record shows that the subject property was sold at a consideration of Kshs. 3,050,000/- to one Caleb Olenje.
70. However, from the material on the record, it is difficult to establish the sums recovered by the Defendant directly from the Plaintiff in respect of the house loan prior to the sale. Equally, neither DW1 nor DW2 disclosed the specific sum still owing after the sale, or state when the sale and transfer to the purchaser Caleb Olenje was completed, the specific applicable interest rate applied and allegedly accruing in the interim period and how the alleged debt accumulated to the figures counterclaimed for, even after the sale of the subject property. The letters marked P. Exh. 10 dated 28.03.2000 (seeking the sum of Kshs. 3,834,366.45); P. Exh. 11 dated 20.04.2000 (also seeking the sum of Kshs. 3,834,366.45); P.Exh. 20 being two claims dated 1.02.2001 (seeking the sum of Kshs. 3,422,681.80 and Kshs. 697,838.05 on the loan and current accounts respectively); and P.Exh. 23 dated 21.03.2003 (seeking the sum of Kshs. 2,623,603/-) respectively, do not shed light on how the purported outstanding liabilities were arrived at.
71. Despite the production of the above documents as well as the statement of accounts relating to the loan and credit accounts belonging to the Plaintiff, the Defendant's witnesses appeared unable to answer with exactitude the question of the extent of arrears owing on the part of the Plaintiff. It was not enough in the circumstances of the case, for the Defendant to merely present various statement of accounts when its witnesses did not attempt to explain or could not explain the contents thereof, or satisfactorily answer questions pertinent thereto. A party cannot literally throw a multiplicity of documents such as account records at the head of the court and leave it to the court to make sense of them.
72. The claims having been denied by the Plaintiff, the onus was on the Defendant to prove on a balance, that indeed the monies claimed were rightfully owing from the Plaintiff. As matters stand, the court is unable to ascertain the extent of the debt if any, that is owing from the Plaintiff to the Defendant. As was held in *Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank* [2004] 2 KLR 91 where "the evidence does not support the facts pleaded, the party with the burden of proof should fail." Thus, the Defendant's counterclaim must equally fail.
73. In the result, the Plaintiff's suit is hereby dismissed. Similarly, the Defendant's counterclaim is dismissed. In the circumstances, each party shall bear their respective costs in the suit and counterclaim, respectively.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 16<sup>TH</sup> DAY OF JANUARY 2025.**

**C. MEOLI**

**JUDGE**

In the presence of:

For the Plaintiff:

For the Defendant:

C/A: Erick

