



**Kunga v Remu Microfinance Bank Limited (Cause 185 of 2016)
[2024] KEELRC 1046 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1046 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 185 OF 2016**

**L NDOLO, J
MAY 9, 2024**

BETWEEN

BERYL KUNGA CLAIMANT

AND

REMU MICROFINANCE BANK LIMITED RESPONDENT

JUDGMENT

1. Beryl Kunga, the Claimant in this case, was employed by the Respondent in the position of Head of Business Development, for a short stint running from 1st July 2015 until 11th February 2016.
2. In her Memorandum of Claim dated 11th February 2016 and amended on 8th September 2016, the Claimant lays a claim of breach of her contract of service. The Respondent filed a Response and Counterclaim dated 30th October 2016.
3. At the trial, the Claimant testified on her own behalf and the Respondent called its Chief Executive Officer, Gregory Siro. Both parties also filed written submissions.

The Claimant's Case

4. By an employment contract dated 29th June 2015, the Claimant was employed by the Respondent as Head of Business Development, effective 1st July 2015. Her monthly salary was Kshs. 350,000. The Claimant claims to have been headhunted from Chase Bank Limited.
5. The Claimant states that in October 2015, she requested the Respondent's Internal Audit Department to conduct a review on two non performing LPO financing loans held at the Finance House Branch. She adds that the audit report revealed major anomalies, pointing to collusion among the Respondent's officers, in obtaining loans in the names of customers.



6. The Claimant avers that her probation period lapsed on 31st December 2015 and on 22nd January 2016, the Respondent's acting Chief Executive Officer unilaterally extended the probation period by a letter backdated to 31st December 2015. The Claimant declined to sign the letter and communicated her reservations by her email dated 22nd January 2016.
7. On 4th February 2016, the Claimant was issued with a notice of intention to terminate her employment with effect from 11th February 2016. Referring to the reason given in the Respondent's letter, the Claimant states that the Respondent was aware that she was pursuing her Masters Degree in Business Administration at the University of Nairobi. The Claimant adds that her named referees had given reference letters to the Respondent.
8. The Claimant objected to the notice and demanded its rescission through a letter by her Advocate, but the Respondent declined. She claims that the real reason for her dismissal on 11th February 2016, had to do with her discovery of irregularities in loan disbursements in which the Respondent's senior officers were implicated. She avers that her dismissal, which she terms as wrongful, was part of an elaborate cover up by the Respondent's senior employees.
9. The Claimant accuses the Respondent of breach of her employment contract and therefore claims the following:
 - a. Kshs. 10,033,333.33 as damages for wrongful dismissal being the salary for the unexpired term of the Claimant's employment contract;
 - b. A declaration that the Claimant was not on probation at the time of dismissal;
 - c. A declaration that the Respondent is in breach of the terms of the employment contract and the law;
 - d. Costs of the suit.

The Respondent's Case

10. In its Response and Counterclaim dated 30th October 2016 and filed in court on 1st November 2016, the Respondent admits having employed the Claimant on 29th June 2015.
11. The Respondent points out that it was a material term of the employment contract that the Claimant would serve on probation for a period of six months, upon which she would be confirmed, subject to a successful completion of probation, to be determined by a performance review. The Respondent states that the Claimant was not confirmed in her appointment and that she left employment on 11th February 2016.
12. The Respondent states that the Claimant was employed pursuant to competitive interviews and claims that the Claimant got the job upon her misrepresentation that she had a Masters of Business Administration (MBA) degree from a recognised university in Kenya. The Respondent denies the Claimant's averment that she was headhunted from Chase Bank.
13. The Respondent avers that the Claimant was not confirmed because of her misrepresentation regarding her MBA and her referees. Further, the Claimant is said to have failed to meet the key objectives of her job, as revealed in her performance review as at 31st December 2015.
14. The Respondent asserts that the Claimant's confirmation was not only tied to time but was also subject to her performance, approval by the Central Bank of Kenya (CBK) and provision of her academic certificates. In this regard, the Respondent states that the Claimant failed to provide her MBA degree



- certificate and to instruct her referees to write to the CBK, leading to a failed vetting and lack of clearance as required. The Respondent adds that in a show of courtesy and in order to allow the Claimant an opportunity to regularise her position with the CBK, her probation was extended.
15. The Respondent denies any nexus between the issues raised in an audit by its Internal Audit Department and the termination of the Claimant's employment. The Respondent accuses the Claimant of breaching the confidentiality clause of her employment contract, by divulging sensitive information to third parties, contrary to Clause 9 of the Human Resource Policy.
 16. The Respondent states that it convened a management meeting on 3rd February 2016 at which the Claimant was invited; she was informed of her right to representation. The Respondent adds that at this meeting the reason for extension of the Claimant's probation was explained to her. According to the Respondent, the Claimant was non-committal on when she could provide the requisite documentation for conclusion of her vetting by the CBK. As a result, a decision was made that her employment be terminated.
 17. The Respondent's case is that the termination of the Claimant's employment was lawful and fair.
 18. By way of Counterclaim, the Respondent claims that the Claimant breached confidentiality by forwarding email correspondence containing confidential information to Benson Metho on 22nd January 2016 and to Omondi Omollo on 1st February 2016 and 4th February 2016, without prior permission from the Respondent. The Claimant was also accused of forwarding the Respondent's Strategic Business Plan to Omondi Omollo, without prior authorisation.
 19. In addition, the Respondent states that, upon the Claimant's request, it took over her loan facility of Kshs. 1,500,000 from Chase Bank. The Respondent avers that as at September 2016, the outstanding loan balance stood at Kshs. 1,428,220.
 20. The Respondent therefore counterclaims the following from the Claimant:
 - a. The sum of Kshs. 1,428,220 together with interest at prevailing commercial rates from 27th October 2016 until payment in full;
 - b. General and aggravated damages for breach of confidentiality and misrepresentation;
 - c. Costs of the Counterclaim plus interest.

Findings and Determination

21. There are three (3) issues for determination in this case:
 - a. Whether the termination of the Claimant's employment was lawful and fair;
 - b. Whether the Claimant is entitled to the remedies sought;
 - c. Whether the Respondent has made out a proper counterclaim against the Claimant;

The Termination

22. On 4th February 2016, the Respondent wrote to the Claimant as follows:

“Dear Ms. Kunga,

RE: Notice To Terminate Your Contract



We refer to the Letter of Offer dated 29th June, 2015 in which we offered you employment in the position of Head of Business Development on a three (3) year contract, subject to successful completion of a six (6) months' probation period, in accordance with applicable laws and the policies and procedures of the Bank in this regard.

Further reference is made to our letter dated 31st December 2015 in which an offer to extend your probation was made, for reasons stated in the said letter. As you know, under the [Employment Act](#), probation may only be extended with your agreement. We note that to date, despite several reminders and discussions with the undersigned, you have failed to acknowledge and/or respond to the said letter.

We further note that your vetting by the CBK, as a key personnel, remains outstanding as two of your referees have failed, neglected and/or refused to respond to enquiries by the CBK, a matter which has been brought to your attention on several occasions. We further note that despite several reminders you have failed, neglected and/or ignored to submit your MBA certificate to support averments made in your Curriculum Vitae and during your interview, that you hold an MBA from the University of Nairobi. These matters touching on your background and experience, are at the heart of your recruitment by the Bank as a key personnel and ought to have elicited your highest attention. We regret that this has not been the case.

In view of the foregoing, the bank is left with no other option but to terminate your services. You are hereby served with a seven (7) days' notice of the termination of your contract.

Kindly clear with the undersigned before you exit the organization to facilitate payment of your final dues.

Yours faithfully,

For and on behalf of

REMU Microfinance Bank Ltd

(signed)

Nancy Waweru

Ag. Chief Executive Officer”

23. Prior to this letter, the Respondent had, by letter dated 31st December 2015, given notice to the Claimant of the decision to extend her probation period for a further three months on account of:
 - a. The Claimant's failure to avail a certified copy of her MBA certificate to support her averment in her curriculum vitae that she held an MBA from the University of Nairobi;
 - b. Pending vetting by the CBK due to failure by the Claimant's referees to respond to enquiries by the CBK regarding her background and experience.
24. The letter informed the Claimant that the extension would provide her with “additional time to perform the full range of responsibilities and demonstrate your ability to more fully and consistently meet outlined expectations for this position.”
25. It is on record that the Claimant objected to the proposed extension of her probation. In her final submissions dated 14th February 2024, she cited the decision in *Leah Shigadi Sinoya v Avtech Systems Limited* [2017] eKLR where it was held that extension of probation without the concurrence of the affected employee is ineffectual.



26. The subsequent termination letter dated 4th February 2016, cites the following reasons for the Respondent's decision to terminate the Claimant's employment:
- a. The Claimant's failure to respond to the notice of extension of her probation period;
 - b. Inconclusive vetting by the CBK on account of failure by the Claimant's referees to respond to inquiries by the CBK;
 - c. The Claimant's failure to avail a copy of her MBA degree certificate.
27. The Claimant confirmed to the Court that she was opposed to the extension of her probation, because there was no valid reason for it. She denied the allegation that her referees were non responsive to inquiries by the CBK.
28. She was however unable to confirm that she was an MBA holder. All she produced was a provisional transcript but she did not avail either a letter of completion from the University of Nairobi or the degree certificate itself. In the interview questionnaire completed by the Claimant, she indicated that she held an MBA degree in addition to a Bachelors degree in Economics. This was also the position contained in her curriculum vitae submitted at recruitment.
29. It is firmly established in jurisprudence that in cases of unlawful or unfair termination of employment, the standard of proof placed on the employer to justify the reason for termination, is on a balance of probability. In its decision in *Kenya Revenue Authority v Rewel Waitbaka Gitahi & 2 others* [2019] eKLR the Court of Appeal stated as follows:
- “The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it “genuinely believed to exist,” causing it to terminate the employee's services. That is a partly subjective test.”
30. From the facts of this case, it is evident that the Claimant obtained employment from the Respondent through misrepresentation and this placed her within the cross hairs of gross misconduct. Moreover, her confirmation in employment was subject to vetting by the CBK, in line with prudential guidelines, which bound the Respondent as a regulated financial institution.
31. Although the parties held divergent positions regarding the responsiveness or lack thereof of the Claimant's referees, it is clear that the Claimant's failure to submit her MBA degree certificate put a significant dent on her credibility and the Respondent could not reasonably process her confirmation. The Claimant was fully informed of these issues by the Respondent, who went ahead to offer her an opportunity to serve a prolonged probation period, which the Claimant rejected.
32. I therefore find and hold that the Respondent had a valid reason for terminating the Claimant's employment and that in doing so, procedural fairness was observed. The claim for damages in compensation is therefore without basis and is disallowed.

The Counterclaim

33. The Respondent's Counterclaim against the Claimant is two-fold. First, is the sum of Kshs. 1,428,220 being an outstanding loan advanced by the Respondent to the Claimant. In her pleadings, testimony and submissions, the Claimant admits this claim and there is nothing more to say about it.
34. The second limb of the Counterclaim is for general and aggravated damages for breach of confidentiality and misrepresentation. While the facts regarding the Claimant forwarding the Respondent's confidential information to third parties and her misrepresentation regarding her



professional qualifications were proved, no evidence was adduced to show the actual damage suffered by the Respondent, if any, as a result of the Claimant's actions. This part of the Counterclaim therefore fails and is disallowed.

Final Orders

35. Finally, I enter judgment in favour of the Respondent as against the Claimant in the sum of Kshs. 1,428,220 being outstanding loan balance.

The Respondent is also entitled to accrued interest on this amount.

36. Each party will bear their own costs.

37. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 9TH DAY OF MAY 2024

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JUDGE

Appearance:

Mr. Kibungei for the Claimant

Mr. Kithi for the Respondent

