



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nduuru v Cooperative Bank Limited (Cause 1301 of 2016)  
[2025] KEELRC 572 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 572 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1301 OF 2016  
CN BAARI, J  
FEBRUARY 27, 2025**

**BETWEEN**

**ROBERT MWANGI NDUURU ..... CLAIMANT**

**AND**

**COOPERATIVE BANK LIMITED ..... RESPONDENT**

**JUDGMENT**

1. In a Memorandum of Claim dated 30<sup>th</sup> June, 2016, the Claimant impleaded the Respondent seeking inter alia, a declaration that he was unfairly terminated, compensation for the alleged unfair/unlawful termination, leave pay and salary in lieu of notice.
2. In a Response to the Claim dated 14<sup>th</sup> March, 2017, the Respondent denied the Claimant's allegations, and maintained that there was substantive justification, and that due process was followed in the manner in which separation occurred.
3. The matter was first heard on 16<sup>th</sup> February, 2022 when the Claimant testified as CW1 and calling his Ex-wife to testify as CW2 on 19<sup>th</sup> December, 2023. The two adopted their witness statement and the Claimant produced the documents filed in support of his case. The Respondent's case was heard on 14<sup>th</sup> October, 2024 with the calling of one Leah Kerich to testify on behalf of the Respondent.
4. Parties were thereafter directed to file their respective submissions to the Claim and submissions were filed for both parties.

**The Claimant's Case**

5. The Claimant's case is that he was employed on 26<sup>th</sup> January, 2010 as a Micro Credit Officer by the Respondent at a consolidated monthly salary of Kenya Shillings Sixty two thousand four hundred and seventy five Thousand(62,475/). He states that he was confirmed to permanent employment on 26<sup>th</sup> October, 2010 and posted to its Gikomba Branch.



6. The Claimant states that he was on the 11<sup>th</sup> August 2011 appointed as Acting Group Lending Officer. He states further that on 4<sup>th</sup> November, 2011 he was appointed as a mentor for Eunice Nkatha Karatu, a staffer at the Respondent's Bank for purposes of training and progress evaluation.
7. It is the Claimant's case that on 28<sup>th</sup> June, 2012 he was transferred to Mombasa-Digo Road Branch, where he worked until his termination. He avers that on 17<sup>th</sup> July 2014, by a letter of even date, the Claimant received a commendation letter from the management of the Respondent for attaining a Master of Science in Procurement and logistics.
8. It is his case that on 11<sup>th</sup> September 2014, he was issued with a show cause letter for engaging in employment while in the service of the bank, and was required to respond to the allegations and show cause why disciplinary action should not be taken against him.
9. He states that on 30<sup>th</sup> September 2014, he was subjected to a disciplinary hearing and terminated from the service of the Respondent on 22<sup>nd</sup> October 2014 for allegedly engaging in gainful employment outside the bank, while still in the Respondent's employment.
10. It is the Claimant's case that on 17<sup>th</sup> February 2015, a dispute was referred to the Chief Industrial Relations Officer for Conciliation, and that on 6<sup>th</sup> October 2015, a Conciliator appointed in the said dispute issued her findings and recommendations.
11. It is the Claimant's case that at the time of termination he was earning a consolidated(gross) monthly salary of Kenya shillings One Hundred and Eight Thousand (108,000/).
12. On cross-examination, the Claimant admitted receiving a salary from Kenya Methodist University and further admitted that teaching may affect his objectivity.
13. The Claimant further confirmed on cross-examination that he would take the Respondent's time to mark examinations as marking can happen anywhere and at any time. It was the Claimant's further assertion that he could not give an assurance that he did not take the Respondent/Bank's time to do desk research.
14. The Claimant prays that he be awarded the reliefs listed in his statement of claim.

### **The Respondent's Case**

15. The Respondent states that the Claimant is its former employee employed initially as a Micro Credit officer on 26<sup>th</sup> January,2010 and posted to Gikomba Branch within Nairobi area. It states that on 26<sup>th</sup> October,2010, the Claimant was confirmed to the banks permanent terms and conditions of employment and transferred on 28<sup>th</sup> June, 2012 to Digo Branch within Mombasa region.
16. It is the Respondent's case that sometime in the month of September 2014, investigations were carried out by the Respondent's Security department, which revealed that the Claimant was receiving money through his Bizwise Account number 011XXXXX000 at Digo Branch through Electronic Fund Transfer for salary credit from Kenya Methodist university and Mount Kenya University.
17. It states that its code of conduct provides that no employee shall be employed outside the bank or in any business that competes with or provides services to the bank or its subsidiary, and/or (2) in a manner that would affect their objectivity in carrying out their bank responsibilities and/or(3)where the outside employment would conflict with scheduled hours including overtime, or performance of the bank assignment.



18. The Respondent further states that the Claimant was on 11<sup>th</sup> September, 2014 issued with a show cause letter to explain why disciplinary action should not be taken against him for breaching his term and conditions of employment as contained in the code of conduct, whereby it was discovered he was engaging himself in gainful employment outside his employment contrary to code of conduct.
19. It is the Respondent's position that the said show cause letter clearly stated that being involved in gainful employment while still in the employment of the Respondent was a serious gross misconduct, and the explanation was to reach the Human Resources Manager's office by close of business of 17<sup>th</sup> September, 2014.
20. The Respondent states that the Claimant responded to the show cause vide a letter dated 17<sup>th</sup> September 2014, explaining that indeed, it was true that he was offering his services for supervision, consultation and research since he wanted to pursue PHD course in Supply Chain Management, but defended himself that the services did not conflict with the business of the Respondent.
21. The Respondent further states that the contract of employment prohibited the Claimant from engaging in any other trade or business without the express consent of the Respondent during the continuance of his engagement with the bank, or be engaged directly or indirectly in any trade or occupation other than the business of the bank.
22. It avers that its staff manual prohibited employees including the Claimant from engaging in private business while still in the bank's employment with monetary gains, which is likely to affect his productivity while carrying on with the bank's duties.
23. The Respondent states that the Claimant's in his response admitted the allegations as offering supervision consultation and research, and further lied that he never received any financial gain when in actual sense he was receiving money into his account without informing the management.
24. It states that the Claimant was invited to appear before a disciplinary committee to answer to the charges of being employed outside his formal employment with the Respondent, and contrary to the code of conduct which was to take place on 30<sup>th</sup> September, 2014 at Co-op Trust Plaza Nairobi.
25. It states that the Claimant was accompanied by one employee by the name Henry Were who was a union official as per the CBA, and other legal requirement. That the charges levelled against him was being engaged in employment outside the bank which had been confirmed though salary payments to the Claimant's Bizwise Account No. 011XXXXX000.
26. It is stated that the Claimant failed to support his allegations of being a PHD student at the JKUAT and further failed to substantiate the extra salary he was earning from the teaching institutions contrary to the code of conduct governing the bank's employees.
27. It is the Respondent's case that on 22<sup>nd</sup> October, 2014, the Claimant was issued with a letter terminating his services on the ground of being engaged in gainful employment outside the bank, while still in the employment of the Respondent contrary to the code of conduct.
28. The Respondent aver that the Claimant's was a clear case of violating its terms and conditions of employment by engaging in gainful employment while still an employee of the Respondent.
29. On cross-examination the Respondent's witness (RW1) confirmed that the Claimant reported to work from 8am and left at 5pm. She further confirmed that no warning letter(s) was issued to the Claimant for absence, and that both Methodist University and Mount Kenya University do not run businesses that compete with the Respondent's.



30. The witness further told court that the Claimant did not have performance issues as result of holding the three jobs and had also not lost objectivity as at termination.
31. The witness further confirmed that the Claimant was required to inform the Respondent's Management of any engagement and salary earned outside employment, but that this requirement was not expressly stated in the Respondent's Human Resources Manual.
32. The Respondent therefore prays that the Claimant's suit be dismissed with costs.

### **The Claimant's Submissions**

33. The Claimant submits that the Respondent did not provide any proof that the Claimant was engaged in any other employment while still employed by the bank, save for the salary credits received in the Claimant's account which was held at the Respondent bank. He submits further that the Respondent bank did not adduce any evidence in the form of employment or appointment letters to demonstrate the allegation that he was gainfully employed elsewhere.
34. It is the Claimant's submission that the foregoing reasons, given as grounds to terminate him from employment, have not been proved, hence justifying his position that the termination of his employment was unfair contrary to Section 45 of the *Employment Act*.
35. The Claimant submits that the Respondent did not establish any business competition between a university and a bank, such as the Respondent. That the Claimant provided services which were academic in nature and did not therefore, compete with the business of a bank which are financial in nature.
36. It is his submission that the part time work of offering consultation, research and supervision, did not interfere with the Claimant's duties, and which he states is evidenced by the attendance register which he always signed to indicate the time he reported and departed from work. He submits further that he has never been issued with a warning letter for reporting late to work or being absent, and he also has never be accused of poor performance, since the Respondent did not submit an adverse report on the Claimant's performance and productivity throughout the period he was employed.
37. The Claimant submits that he was not issued with any letter inviting him for a disciplinary hearing, but was only called by the branch manager on phone and asked to appear for a disciplinary hearing on 30<sup>th</sup> September 2014. He submits further that he was not requested to be accompanied by a fellow employee or a union representative and neither was an explanation made on the reasons he was being invited to appear at a disciplinary hearing.
38. The Claimant submits that he was denied an opportunity to cross examine the Respondent's witnesses at the disciplinary hearing. he sought to rely in the case of *Galgalo Jarso Jillo -versus - Agricultural Finance Corporation* (2021) eKLR, to buttress this position.
39. It is his prayer that the court finds in his favour and awards him the reliefs sought.

### **The Respondent's Submissions.**

40. The Respondent on its part, submits that it adhered with substantive justification in relying on matters that bordered on compatibility with the Respondent in relation to his terms and conditions of service. The Respondent submits further that it has proved that it had valid reasons to terminate the Claimant being that he was engaged in gainful employment while in the service of the Respondent Bank contrary to the provisions of the Bank's Business Code of Conduct and Ethics and the Bank Staff Manual.



41. The Respondent submits that the Claimant deliberately failed to notify it of his engagement with Mount Kenya University and Kenya Methodist University and which was a deliberate attempt by the Claimant to hide the fact that he was working for the two other institutions. That the Claimant was unable to support the assertion of being a PHD student both at the disciplinary hearing and before this Honourable Court.
42. The Respondent urges this Court to find that the Respondent has proved on a preponderance of evidence that the Claimant was engaged by the learning institutions. In view of the foregoing, the Respondent submits that it has been able to prove the reason for termination of the Claimant was fair and valid and urges this Honourable Court to find that it has met the requirement of substantive fairness as contemplated by the provisions of Section 43 and 45 of the Employment Act, 2007.
43. It is the Respondent's submission that the Claimant confirmed to this Court that he was taken through a disciplinary process, he confirmed having been invited to a disciplinary hearing on 30<sup>th</sup> September, 2014, and confirmed attending the disciplinary hearing. The Respondent further submits that the hearing was preceded by a show cause letter which the Claimant responded to and that he was allowed every opportunity to defend his case which he did.
44. The Respondent submits that in terms of procedural fairness, it has demonstrated that it complied with the provisions of Section 41 of the Employment Act, 2007. It placed reliance in the case of Langat Vs Unilever Tea Kenya Limited (Cause E004 of 2021) (2022) KEELRC 1238 (KLR) to support this assertion.
45. In conclusion the Respondent urges this Court to find that the Claimant's termination was both procedurally and substantively fair and lawful.

### **Analysis and Determination**

46. I have considered the pleadings, the witnesses' oral testimonies and the rival submissions. The issues that present for determination are:-
  - i. Whether the Claimant was unfairly terminated; and
  - ii. Whether the Claimant is entitled to the remedies sought.

### **Whether the Claimant was unfairly terminated**

47. For a termination/dismissal to be said to be fair, the employer must adhere to the tenets of fair procedure enunciated in Section 41 of the Employment read with Section 4 of the Fair Administrative Actions Act and Article 47 of the Constitution. The law further demands that an employer meets the substantive justification test provided for under Sections 43, 45 and 47(5) of the Employment Act for a termination to be considered fair and lawful.
48. Section 41 of the Employment Act, 2007, requires that an employer, before terminating/dismissing an employee on the ground of misconduct, poor performance or physical incapacity, explains to the employee in a language the employee understands, the reasons for which the employer is considering termination.
49. The Claimant herein, was terminated from the service of the Respondent on 22<sup>nd</sup> October 2014 for allegedly engaging in gainful employment, while still in the Respondent's employment. On cross-examination the Claimant admitted receiving a salary from Kenya Methodist University and further admitted that teaching may affect his objectivity.



50. On the issue of procedure, the Claimant confirmed receiving and responding to a show cause notice. He further confirmed being invited to a disciplinary hearing which he attended accompanied by a representative named Henry from his Union. It was his further evidence that he had sufficient time to prepare for the hearing.
51. In *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR, the Court of Appeal stated:-
- “Section 41 of the *Employment Act*, provides the minimum standards of a fair procedure that an employer ought to comply with. The Section provides for notification and hearing before termination on grounds of misconduct. The court stated that four elements must be discernable for the procedure to pass:
- a. an explanation of the grounds of termination in a language understood by the employee;
  - b. the reason for which the employer is considering termination;
  - c. entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made
  - d. hearing and considering any representation by the employee and the person chosen by the employee.”
52. The Claimant faults the disciplinary process only on the basis that he was notified of the hearing through a phone call. He however attended the hearing pursuant to the telephone call, accompanied by his representative and participated in the hearing. He did not at the hearing object to the proceedings premised on the manner of invitation to the hearing.
53. The Claimant was aware of the impending disciplinary hearing having received a show cause notice listing out the charges levelled against him and responding to the same. That he was invited to the hearing via telephone, does not in my view render the process improper or unlawful in any way. The invitation informed him of the date, the time, the venue of the hearing and the need to be accompanied. The invitation is not required to spell out the charges a fresh having already been done vide the show cause letter which he admitted responding to.
54. In the premise, I return that the Respondent has demonstrated compliance with the bare minimum standards of a fair hearing, and which renders the Claimant’s termination procedural fair, and so I hold.
55. The second limb, has to do with the fairness and justifiability of the grounds for the termination. Section 43 of the *Employment Act*, obligates an employer to establish a valid reason that would cause a reasonable employer to terminate/dismiss an employee as to render the dismissal or termination fair.
56. Reasons for termination/dismissal have generally been agreed to be matters the employer at the time of termination/dismissal, genuinely believed to exist, and which caused the employer to terminate the employee. (See *Charles Musungu Odana v Kenya Ports Authority* [2019] eKLR).
57. The Respondent’s position is that the Claimant in his response to the show cause vide a letter dated 17<sup>th</sup> September 2014, admitted that it was true that he was offering supervision, consultation and research services to MKU and Methodist Universities, on the basis that he wanted to pursue a PHD course in Supply Chain Management. It is his further contention that the services he provided did not conflict with the business of the Respondent.



58. The Respondent further insisted that its code of conduct provides that no employee shall be employed outside the bank or in any business that competes with or provides services to the bank or its subsidiary, and/or (2) in a manner that would affect their objectivity in carrying out their bank responsibilities and/or (3) where the outside employment would conflict with scheduled hours including overtime, or performance of the bank assignment.
59. The question is whether the Claimant's engagement with MKU and Methodist Universities was a fair reason for the Respondent to terminate his services.
60. The general principle is that nothing stops an employee from engaging in another gainful employment except where it is expressly prohibited by law, policy, an employee's employment contract or Code of Conduct and Regulation. Nothing in my view, stops an employee from engaging in other paying jobs outside the primary employer's working hours such as during annual leave, off days, public holidays or on weekends, especially in the technology age.
61. The Claimant worked for two other companies/organization and earned salaries that were channelled through the Respondent's Bank. The court was told that the Claimant clocked in at the Respondent's premises every work day at 8am and clocked out at 5pm.
62. Clause 4.0 of the Respondent's Business Code of Conduct states thus:-

“Employees must not be employed outside the Bank

1. ....
2. In a manner which would affect their objectivity in carrying out their Bank responsibilities and/or
3. Where the outside employment would conflict with scheduled hours, including overtime, or performance of the Bank assignments.”

63. The Claimant did not tell the court when he did the other two jobs that he held. In my view, to be at one place from 8am-5pm every day of the week, and still earn salary from other employers, can only say that the primary employer/Respondent's time and resources could have been used for the benefit of other employers.
64. It is also confirmation that the employee was not dedicated to the Respondent as it would not be humanely possible for the employee to apply himself 100% to the Respondent's work.
65. The Claimant also admitted on cross-examination that he used the Respondent's time to mark examination which explains how he was able to manage three jobs that were presumably running concurrently.
66. In my view, although it is possible for an employee to juggle more than one jobs in the era of technology, I would be slow to ignore the employer's concerns especially when the Claimant did not tell the court when he performed the other two jobs.
67. In *British Leyland UK Ltd v Swift* (1981) I.R.L.R 91 Lord Denning stated:-

“The correct test is; was it reasonable for the employers to dismiss him” If no reasonable employer would have dismissed him, the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered in all these cases that there is a band of reasonableness, within which an employer might reasonably take one view; another quite reasonably takes a different view. One would quite



reasonably dismiss the man. The other quite reasonably keeps him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him.”

68. Section 43 of the *Employment Act* states:-

- “(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
- (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

69. By the Claimant’s own admission that he was offering supervision, consultation and research services to MKU and Methodist Universities while working for the Respondent, I reach the conclusion that the Respondent had valid reason, under Section 43 of the *Employment Act*, to justify termination. The Claimant was clearly in breach of clause 4.0 of the Respondent’s, Business Code of Conduct.

70. I thus find and hold that the Claimant’s termination was substantively fair and justified.

#### **Whether the Claimant is entitled to the remedies sought**

71. The Claimant seeks an order for payment of one-month salary in lieu of notice, compensation for unfair termination, exemplary damages, and salaries from the date of termination to the time of the award.

72. With the finding of a fair and lawful termination, the claims for pay in lieu of notice, compensation, exemplary damages and salaries since termination fail, and are all dismissed.

73. A claim for leave days is proved through production of leave forms that are by law an obligation of the employer.

74. Leave days not taken become payable upon termination/resignation or expiration of contract. Annual leave is a statutory right which accrues to an employee whether or not he/she has applied for it. It is the employer’s primary responsibility to advise an employee to take leave when due or effect pay in lieu of leave. (See *Andrew Mutisya Mwanzia v. Hilal Hardware Limited* (2021) eKLR).

75. When not taken, annual leave becomes an accrued benefit which is monetized and paid out at separation. The Respondent did not at all controvert this claim and as things stand, nothing shows the Claimant either utilized or was paid for the balance of his leave days at termination.

76. The court in *Benjamin Aviha v G4S Security Services Kenya Limited* [2019] eKLR held:-

“Failure by an employer to maintain proper records shifts the evidentiary burden to the employer to prove compliance with statutory obligations.”

77. For the reasons foregone, the claim for leave succeeds and is allowed as prayed.

78. In the end, the claim partly succeeds and orders granted as follows:-

- a. A declaration that the Claimant’s termination was fair and lawful.
- b. That the Respondent to pay the Claimant on account of 20 days of leave not taken



c. The claim having partly succeeded, each party shall bear their own costs.

79. It is so ordered.

**DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS  
27<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**C. N. BAARI**

**JUDGE**

Appearance:

Ms. Kubai present for the Claimant

Ms. Okelloh h/b for Ms. Obiayo

for the Respondent

Ms. Esther S. – CA

