



**Ndunyu v Choice Microfinance Bank Ltd & another (Employment and Labour Relations Cause 1201 of 2018) [2025] KEELRC 1156 (KLR) (24 April 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1156 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1201 OF 2018**

**B ONGAYA, J**

**APRIL 24, 2025**

**BETWEEN**

**MOSES KING'ORI NDUNYU ..... CLAIMANT**

**AND**

**CHOICE MICROFINANCE BANK LTD ..... 1<sup>ST</sup> RESPONDENT**

**SIMON GACHUNI ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The claimant filed the Amended Statement of Claim on 24.11.2022 through Guserwa & Company Advocates. The claimant prayed for judgment against the respondent for:
  - a. A declaration that the Claimant's alleged termination and or reorganization of staff structure was unlawful.
  - b. That the verbal notification by the 2<sup>nd</sup> respondent of the claimant's termination be and are hereby rescinded.
  - c. A permanent injunction be and is hereby issued against the 2<sup>nd</sup> respondent or persons acting under title from in any way illegally interfering with the claimant's employment.
  - d. Damages for wrongful loss of employment.
  - e. General damages
  - f. Costs of the claim
  - g. Special damages as prayed under paragraph 7A of the Statement of Claim thus:
    - i. 2 months' pay in lieu of notice  $Kshs.420,000 \times 2 = Kshs.840,000.00$ .



- ii. Salary arrears for December 2017 to June 2018 Kshs.100,000.00 x 7 months = Kshs.700,000.00.
  - iii. Salary arrears for days worked from 01.07.2018 to 17.07.2018 at Kshs.100,000.00/30 x 17 = 56,666.66.
  - iv. Maximum 12-months compensation Kshs.420,000 x 12 =Kshs.5.040,000.00.
2. The respondent filed their amended Statement of Response dated as amended on 14.12.2022 through Muraguri, Muigai, Waweru & Co Advocates. The respondent prayed that the suit be dismissed with costs. Further, the respondent prayed for the following prayers under the counter-claim:
- a. The sum of Kshs 1,000,000.00 being the penalty paid by the 1<sup>st</sup> Respondent to the Central Bank of Kenya due to the Claimant's negligence.
  - b. The sum of Kshs 180,000.00 being the allowances the claimant paid to himself as sitting allowance for board meetings plus 35% tax.
  - c. The sum of Kshs 200,000.00 being the amount advanced to the Claimant and at an interest rate of 10% per month.
  - d. The sum of Kshs 165,000.00 as at 17<sup>th</sup> July, 2018 being salary cash advanced to the claimant and at an interest rate of 10% per month
  - e. The sum of Kshs 364,981.00 as at 17<sup>th</sup> July, 2018 being salary loan advanced to the claimant and at an interest rate of 24% per annum.
  - f. The sum of Kshs 22,000 irregularly paid to Mnyamwezi Safari Tours for Car Hire Services
  - g. The sum of Kshs 62,500.00 being the value of the Laptop plus the laptop bag that stands unreturned as at 17<sup>th</sup> July, 2018.
  - h. Costs of the suit
  - i. Interest on (g) above at court rates from the date of instituting this suit until payment in full.
  - j. Costs of the suit.
  - k. Any other relief that is just and expedient in the circumstances.
3. The claimant's case was that he was an employee of the respondent, employed on 01.12.2017 as a Chief Executive Officer. His duties included liaising with the Central Bank of Kenya on regulatory issues.
4. The claimant states that he served the respondent diligently up and until the 10.07.2018 when the 2<sup>nd</sup> respondent unilaterally ejected him from his office and subsequently reorganized the management of the respondent and in the claimant's place, appointed an acting Chief Executive Officer (CEO).
5. It is the claimant's case that the respondent had longstanding regulatory issues prior to and during the employment of the claimant. Further, by virtue of the claimant's position it was his responsibility to liaise with the regulator in addressing the issues.
6. The regulatory issues revolved around a lapse in corporate governance. As CEO he was forced to address the issues, and in resolving the same, he was to implement the Central Bank's recommendations, namely:
- i. The 2<sup>nd</sup> respondent was forced to resign from his position of corporate banking executive.



- ii. Mr. Robert Mungai Mburu was forced to tender his resignation as a director pursuant to being found to have carried out acts that were fraudulent in nature.
  - iii. Mr. Bernard Kirimi the chairman was subjected to investigations by a committee that comprised the claimant as a member, investigating issues of fraudulent activities which recommended action against him in line with the Central Bank's recommendation, to which he refused to comply by resigning.
  - iv. Suspension of noncompliant accounts, namely:
    - a. Choice premier Sacco Ltd No. 001xxxxxxxx36;
    - b. Instapay Kenya Ltd No. 001xxxxxxxx39 & 001xxxxxxxx26; and,
    - c. Rapid Choice Kenya Ltd No. 001xxxxxxxx27.
7. It was the claimant's case that the aforesaid events seriously affected his relationship with the 2<sup>nd</sup> respondent as he partly owned the aforesaid companies and was a substantive director therein.
  8. The claimant states that on 10.07.2018 the 2<sup>nd</sup> respondent raided the 1<sup>st</sup> respondent's premises and held a management meeting where he unilaterally announced that he had terminated the claimant's contract and proceeded to appoint Josphat Njeru as acting CEO.
  9. On the part of the respondents, it was stated that soon after the claimant was confirmed into the bank's terms of employment, the respondent began to notice lapses in the claimant's performance of his duties, namely:
    - i. He created a new hierarchy for the bank's management team without consulting the board.
    - ii. He collapsed the human resource department so that he had full control of who is hired and fired.
    - iii. He hired an inexperienced finance manager.
    - iv. Under his watch an inexperienced former intern was appointed as a bank signatory.
    - v. Under his watch the respondent bank was penalized Kshs 1,000,000 on account of the bank submitting inaccurate banking statistics monthly returns for the month of April 2018, which he had duplicated the figures for the month of March, 2018.
    - vi. That the claimant would authorize and receive irregular payments such as sitting allowances for board meetings an allowance reserved for the board chair and members only as he was a permanent employee and all payments should have been as per his employment contract.
  10. On account of the several lapses as alleged, on 28.06.2018 the respondent issued the claimant with a notice to show cause why disciplinary action should not be taken against him. He was invited for a disciplinary hearing on 05.07.2018.
  11. During the disciplinary hearing, which similarly sought to appraise his performance, the aforesaid issues were raised concerning the claimant's management of the bank. It was the respondent's case that the claimant remained nonresponsive or failed to give satisfactory answers to the board.
  12. The respondent pleaded that in view of the claimant's failure to offer substantive exculpation to the issues raised and unsatisfactory performance in his integral position, the respondent terminated the claimant on 17.07.2018.



13. It is the respondent's case that in an attempt to retaliate for his termination, the claimant opted to report the matter to the Directorate of Criminal Investigations yet there was no criminal element to the dispute. Additionally, he also reported to the respondent's custodian bank, Cooperative Bank, with a view to halting any transactions fully aware of the potential consequence of his actions to the respondent's business.
14. Following the claimant's termination, the respondent states that it computed the claimant's terminal benefits against his liabilities to it, where the claimant owes the respondent Kshs 401,980.00.
15. The parties filed their respective submissions. The court has considered the parties' respective cases and makes finding as follows.
16. To answer the 1<sup>st</sup> issue the Court returns that there is no dispute that the parties were in a contract of employment. The claimant was employed by the 1<sup>st</sup> respondent as the CEO effective 01.12.2017 reporting to the 1<sup>st</sup> respondent's full board on quarterly basis. The appointment was upon probationary terms of service for 3 months (lapsing on or about 01.03.2018). After probation the contract could be terminated by either party serving 2 months' notice or pay in lieu thereof. The claimant was to be paid Kshs.320, 000.00 per month and a further Kshs.100, 000.00 per month upon completion of 12 months' of service or until the 1<sup>st</sup> respondent broke even in its performance – which has not been shown to have ever occurred.
17. To answer the 2<sup>nd</sup> issue, the Court finds that the contract of service was terminated. On 05.07.2018 the claimant and the 1<sup>st</sup> respondent held a meeting which is said to have been an appraisal meeting - per the respondent's letter being undated and ref.no. SL/07/08 titled "Notice of non confirmation and termination of employment". The claimant denies receiving that letter but the respondent urges that it was delivered by registered post and email when the claimant declined to collect it from the 1<sup>st</sup> respondent's board chairman. The claimant has pleaded and claimed for outstanding salaries and payment until 17.07.2018, the effective date of the termination per that letter. In the circumstances the Court returns that the termination was effective 17.07.2018 as per the letter declining confirmation and imposing the termination. The claimant appears to rely on that letter to urge his claims and the Court returns that the letter was indeed issued and the claimant must have received it.
18. To answer the 3<sup>rd</sup> issue, the Court returns that the termination was unfair in view of the following findings:
  - a. While the respondent's witness (RW) testified that the termination was on account of the claimant's change of the organizational structure, thereby causing confusion in the operations, the same RW failed to rebut the claimant's testimony that the structure as communicated by the claimant had been sanctioned by the 1<sup>st</sup> respondent's Board. In particular RW testified and confirmed that she had no board minute exhibited and showing that the claimant had acted without due board approval. That reason for termination is found not to exist as at termination and it was not fair as was envisaged in sections 43 and 45 of the prevailing *Employment Act, 2007*.
  - b. While it was alleged that the claimant had failed to manage staff, RW testified and confirmed that she had no evidence to show that staff that may have resigned at the material time had left upon grounds attributable to the claimant.
  - c. The purported appraisal of performance and then alleged termination or denial of confirmation on 05.07.2018 was invariably unfair because it was undertaken belatedly after lapsing of the agreed 3 months' probationary period and in absence of extension of the agreed



probationary service. It was misconceived and procedurally unfair, in breach of the contractual provision on probationary term, for the 1<sup>st</sup> respondent to purport to undertake the belated appraisal. It appears to the Court that as at 05.07.2018 the claimant had constructively got confirmed in appointment because the three months of probationary service had lapsed and there was no contractual provision to extend the three months and no such extension was alleged on the part of the respondent.

- d. The mutual evidence for the claimant and the 1<sup>st</sup> respondent was that the Kshs.1, 000,000.00 surcharge paid to Central Bank was not attributable to the claimant but was due to an audit about transactions long before the claimant got employed by the respondent. The claimant cannot be held liable in that respect.
  - e. RW testified and confirmed that the claimant had no authority to hire or terminate staff of the 1<sup>st</sup> respondent and had no evidence to show that the claimant had hired or terminated staff as had been alleged.
  - f. The termination is found to have been unfair in procedure and substance.
19. The Court returns as follows on remedies prayed for the claimant and in the counterclaim for the respondent:
- a. Reinstatement is not available in view of the lapsed three years of limitation attached to grant of the order per section 12 of the *Employment and Labour Relations Court Act, 2011*. Further, it was confirmed that the 1<sup>st</sup> respondent had since moved on by hiring another person in position of CEO. It would be impracticable to enforce reinstatement.
  - b. The Court has considered the prevailing factors in section 49 of the Act and that the claimant had served full probationary period of three months and the 1<sup>st</sup> respondent failed to terminate probationary service per the contract by serving a month's notice. The Court has considered the aggregate period that had been served. Two months' salary is awarded for the unfair abrupt termination making Kshs.620, 000.00.
  - c. The Court upholds the computation by the respondent of the claimant's final dues upon headings of salary for 17 days worked in July 2018; July allowances; unutilised leave days; two months' salary in lieu of notice and less tax making a net of Kshs.652, 341.00. The Court further upholds liabilities due to the respondent of Kshs.1, 054, 321.00 with a net payable by claimant of Kshs.401, 980.00. The Court has awarded the claimant Kshs.620, 000.00 less 401, 980 .00 makes Kshs. 218,020.00 due to the claimant, less PAYE. While making the finding the Court has noted that the claimant admitted the loans and liabilities as computed for the respondent. The letter of appointment did not designate the claimant as a director and did not provide for payment of board sitting allowance and the same is recoverable as was computed. Further, it is by mutual testimony of the claimant and RW that the Kshs.1, 000,000.00 surcharge was for transactions prior to claimant's employment and the counterclaim in that respect was a mere afterthought and unjustified.
  - d. The Court has considered parties' margins of success and each to bear own costs of the suit including the counterclaim.

In conclusion judgment is hereby entered for the parties with orders as follows:

- a. The declaration that the termination was unfair.
- b. The respondent to pay the claimant Kshs. 218,020.00 less PAYE by 31.05.2025 failing interest to run thereon at court rates from the date of this judgment till full payment.



c. Each party to bear own costs of the suit including the counterclaim.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS  
WEDNESDAY 24<sup>TH</sup> APRIL, 2025**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

