



**Oketch v Co-operative Bank of Kenya Limited (Cause E069 of 2022)
[2024] KEELRC 13654 (KLR) (27 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13654 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E069 OF 2022**

**AK NZEI, J
MAY 27, 2024**

BETWEEN

JARED OKOTH OKETCH CLAIMANT

AND

THE CO-OPERATIVE BANK OF KENYA LIMITED RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent vide a memorandum of claim dated 7/9/2022 and pleaded that he was employed by the Respondent as a Sales Executive in the Respondent Bank's Consumer Banking Department and rose through the ranks to the position of a Personal Banker at the Respondent's Nkuruma Road Branch Mombasa, earning a gross salary of kshs. 105,869.85. That in 2021, the Claimant's appraisal returned that he had exceeded expectations, thus entitling him to a bonus equivalent to 10% of his annual basic pay.
2. The Claimant further pleaded that on 14/12/2022, he was appointed as the Coast Regional Personal Banker in an acting capacity, which is a managerial role, and which entitled the Claimant to an allowance amounting to the difference between the starting salary of managership at kshs. 175,000 and the Claimant's gross pay. It was the Claimant's further pleading:-
 - a. that in 2021, the Claimant resolved to buy a plot, No. Kajiado/Kitengela/107038 (the plot) through the Respondent's staff loan, which plot was valued at kshs. 2,300,000 by Savanna Consulting Valuers, which valuers were in the Respondent's panel of service providers, and whose charges the Claimant considered to be pocket friendly.
 - b. that the said valuers' report was submitted to the Respondent, and that upon studying the same, the Respondent processed the Claimant's loan request in the sum of kshs. 2,300,000 and disbursed the proceeds into the seller's account.



- c. that the Claimant came to understand that in 2022, the plot was, at the Respondent's request, revalued by M/s Sterling Valuers Limited who returned a market value of ksh. 1,000,000 and a forced sale value of kshs. 750,000 for the plot.
 - d. that armed with M/S Sterling Valuers Limited's report, the Respondent charged that the Claimant had colluded with M/s Savanna consulting to fraudulently overvalue the plot with the aim of having the surplus diverted to the Claimant; upon which the Claimant was taken through a disciplinary hearing which culminated in a decision to summarily dismiss the Claimant vide a letter dated 11/4/2022.
3. The Claimant further pleaded that his termination was substantively unfair as there was no valid and fair reason for the termination in that:-
- a. the initial valuer, Savanna Consulting, were part of the Respondent's service providers and that the Claimant lacks expertise in valuation business, and did not value the plot.
 - b. that the Claimant could not supervise Savanna Consulting when they were carrying out their duties professionally.
 - c. that it was never established that the Claimant colluded with the seller and the valuer as alleged, and that it was never established that there were surplus monies that were diverted to the Claimant.
 - d. that the Claimant was never told why the Respondent adopted the valuation by Sterling Valuers Limited, hook, line and sinker and impugned the report by Savanna Consulting, and yet both valuers are professionals in the field; with valuation being a business of opinion and judgment.
 - e. that if the Respondent felt that there was wrongdoing on the part of Savanna Consulting, there are known ways that it would have employed to bring the valuers to account without scapegoating or sacrificing the Claimant's employment.
 - f. that the Claimant, who is a family man and his employment was the sole source of livelihood, has suffered loss and damage following the loss of employment.
4. The Claimant sought the following reliefs:-
- a. A declaration that termination of the Claimant's employment was substantively unfair.
 - b. Salary for the 19 days worked between 25/3/2022 and 13/4/2022.....ksh. 67,050.90
 - c. Allowance for the role of Coast Regional Personal Banker.....kshs. 69,130.15
 - d. Salary in lieu of 37 pending leave days.....kshs. 130,572.81
 - e. Bonus for the year 2021.....kshs. 109,462.80
 - f. 12 months' gross wages in compensation under Section 49(1) (c) of the [Employment Act](#)....kshs. 1,270,438.20
 - g. Exemplary damages.
 - h. Costs of the suit and interest on all the awards.
5. On 5/1/2023, the Claimant filed his written witness statement dated 3/1/2023 and an evenly dated list of documents. The listed documents included a certificate of service dated 3/4/2022, a payslip for



- the month of March 2022, a commendation letter dated 7/11/2018, a letter of appointment as Coast Regional Personal Banker dated 11/12/2021, minutes of a disciplinary hearing dated 18/3/2022, a letter of summary dismissal dated 11/4/2022, appeal letter dated 22/4/2022 and a demand letter dated 23/5/2022.
6. The Respondent filed Response to the Claimant's claim on 16/1/2023, and denied the claim. The Respondent pleaded that plot No. Kajiado/Kitengela/107038 was deliberately overvalued, and that the plot's actual value was found to be kshs.1,000,000. That from the fraudulent scheme, the Claimant received from the vendor the difference between the actual value and the supposed purchase price. It was the Respondent's pleading that its actions were justified.
 7. On 24/5/2023, the Respondent filed an Amended Statement of Response and Counter-Claim. The Respondent pleaded, by way of a Counter-Claim, that during employment, the Claimant was advanced, at his request, credit as follows:-
 - a. Personal Loan of kshs. 500,000 on the terms of Staff Loan Application Form dated 25/2/2019.
 - b. Residential Property Loan of kshs. 2,300,000 on the terms of the Staff Loan Application Form dated 6/9/2021.
 8. The Respondent further pleaded that both loans would attract interest at commercial rates upon the Claimant leaving employment for any reason other than retirement, and that since leaving employment, the Claimant had not repaid the loans. That the outstanding sum for the Personal Loan was kshs. 242,790.28 as at 1/5/2023 and kshs. 2,500,460.72 for the Residential Property Loan as at the same date, together with interest at commercial rates of kshs. 16%. The Respondent Counter-Claimed a total sum of kshs. 2,743,251.00, together with interest at 16% per annum from 1/5/2023 until payment in full; and costs of the suit and of the Counter-Claim together with interest at 14% per annum from the date of judgment until payment in full.
 9. The Respondent also filed witness statements and a list of documents dated 22/5/2023, listing 12 documents, which included a contract dated 9/12/2016, a letter of employment dated 3/12/2018, a Staff Loan Application Form dated 25/2/2019, a copy of a Valuation Report by Savanna Consulting dated 3/9/2021, a copy of a Valuation Report by Sterling Valuers dated 11/1/2022, a show cause letter dated 28/2/2022, the Claimant's response to the show cause letter (undated) received by the Respondent on 8/3/2022, Notice of Exit Form dated 18/5/2022, computation of the Claimant's terminal benefits, Staff Loan Application Form dated 25/2/2019, a copy of a statement of account for the Personal Loan and a copy of a statement of account for the Residential Property Loan.
 10. The Claimant filed a Reply to the Counter-Claim on 30/5/2023 and reiterated the averments made in his statement of claim, and further stated that he was ready to start servicing the loans at the staff rates of 6% and 8% respectively upon securing alternative and/or comparable employment. He prayed that the Counter-Claim be refused with costs, and judgment be entered as prayed in the statement of claim.
 11. The Claimant filed a further witness statement on 30/5/2023.
 12. Trial commenced before me on 6/11/2023. The Claimant adopted his filed witness statements, which basically replicate the averments made in the statement of claim and Reply to the Counter-Claim, as his testimony. He also produced in evidence the documents mentioned in paragraph 5 of this judgement. He further told the Court that he was not a registered valuer, and did not, therefore, participate in the valuation of any property. The Claimant further testified that he was not in any way going to benefit from the alleged over-valuation, and that in any case, it was him who was going to bear the burden of an over-valued loan. That there was no valid reason for termination of his employment.



13. Cross-examined, the Claimant admitted having held an account in the Kenya Commercial Bank, but insisted that he opened the same when he was exiting employment.
14. The Respondent called 2 witnesses, David Wamuti (RW-1) and Leah Kariuki (RW-2), both of whom adopted their filed witness statements as their respective testimonies. RW-1 produced in evidence the Respondent's documents referred to in paragraph 9 of this judgment. Both witnesses were duly cross examined; and RW-1 testified:-
- a. that the Claimant had built a big brand in the banking industry.
 - b. that Savanna Consulting Valuers were part of the Respondent's panel of valuers, and that the Respondent Bank's service providers go through a rigorous vetting process before admission.
 - c. that the said valuers had done other work for the Bank in terms of valuation.
 - d. that usually, a valuer working for the banking industry takes out a professional indemnity cover, and that in the event of a rogue Valuer, the Bank can invoke remedy under the professional indemnity cover.
 - e. that Sterling Valuers were also in the Respondent Bank's panel of valuers, and that the reason why there were 2 valuations is because Savanna Valuers had gone rogue.
 - f. that there was nothing wrong in one opening an account with a different bank upon leaving employment.
 - g. that the Claimant left employment on 13/4/2022, while his Staff Exit Form was completed on 18/5/2022.
15. It is to be noted that the Claimant did not challenge the process adopted by the Respondent in terminating his employment. He only challenged the basis of the termination, and pleaded and testified that there did not exist any valid reason for his dismissal. Issues that fall for determination, in my view, are as follows:-
- a. Whether termination of the Claimant's employment by the Respondent was substantively unfair.
 - b. Whether the Claimant is entitled to the reliefs sought.
 - c. Whether the Respondent's Counter-Claim is merited.
16. The Court of Appeal stated as follows in the case of *Naima Khamis -Vs- Oxford University Press [E.A] Limited [2017] eKLR*:-
- “...We wish to take note of the provisions of Section 43(1) of the *Employment Act*, which provides that in any claim arising out of termination of a contract, the employer is required to justify the reason or reasons for the termination, and where the employer fails to do so, the termination is deemed to have been unfair.
- Also, Section 45(2) (c) requires a termination to be done according to a fair procedure. From the foregoing, termination of employment may be substantively and/or procedurally unfair.
- A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract, or fails to accord an employee an opportunity to be heard as by law required.”



17. In the present case, I have perused both the filed witness statements adopted on oath by the Respondent's witnesses, the said witnesses' oral evidence in Court and the Respondent's documentary evidence produced in Court by RW-2. I have not seen anything that points to, or demonstrates, or even implies the Claimant's involvement in any form of collusion, fraudulent or otherwise, with the Respondent Bank's appointed Valuers that led or may have led to the alleged plot overvaluation. Indeed, even the validity of the alleged act of over valuation by Savanna Consulting Valuers was not demonstrated. The alleged plot seller was not called to testify, and the Court was not told why the Respondent chose to believe one valuation report and not the other, and yet both valuation reports were said to have been from professional valuers who were in the Respondent's Panel of approved/appointed Valuers/service providers.
18. Indeed, part of RW-2's filed and adopted witness statement states as follows:-
- “
- “ 12. Preliminary investigations revealed that there could possibly be some criminal conduct by either the valuers, vendor or the employees.
The Respondent therefore lodged a criminal complaint at Banking Fraud Investigations Unit (BFIU).
- 14.....However, given that the investigations had not been concluded by the time of dismissal, and even todate, the Respondent was not allowed to obtain copies of the documents in the custody of the police.”
19. The show cause letter issued to the Claimant by the Respondent on 28/2/2022 states in part:-
- “Re: Show Cause Letter – Suspected Fraudulent Loan Application
-It is therefore suspected that you intentionally colluded with the vendor Musti Investment Limited and Valuers Savannah Consulting to over value the plot and that the difference of the loan amount disbursed to the vendor and actual purchase price was diverted back to you....”
20. The Claimant responded to the show cause letter, vide a letter received by the Respondent on 8/3/2022, and denied liability/culpability. This fact is captured at paragraph 14 of RW-2's witness statement. It is clear from all the evidence and material on record herein that the Claimant was dismissed from employment on the basis of mere suspicions.
21. Possibly aware of the foregoing position, the Respondent cited, in its written submissions, the Court of Appeal's decision in the case of Kenya Power & Lighting Company Limited -Vs- Aggrey Lukorito Wasike [2017] eKLR where the said Court stated:-
- “the test is, however, a Partly subjective one in that all an employer is required to prove are the reasons that he “genuinely believed to exist” causing him to terminate the employee's services.
-It is improper for a Court to expect that an employer would have to undertake a near forensic examination of the facts and seek proof beyond reasonable doubt as in a criminal trial before he can take appropriate action....”
22. The facts of the instant case are to be distinguished from the foregoing position because in the present case, the employer (Respondent) was specific that termination of the Claimant's employment was



based on suspicion. As already stated in this judgment, that position is captured in both the show cause letter and the oral evidence presented in Court by the Respondent's witnesses.

23. In my view, no valid reason for the Claimant's dismissal was demonstrated.
24. Section 43(1) of the Employment Act 2007 provides that:-
 - “(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or the 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.”
25. Section 45(2) (a) of the said Act provides that a termination of employment by an employer is unfair if the employer fails to prove that the reason for the termination is valid. Section 45(4) (b) of the Act on the other hand provides that a termination of employment shall be unfair:-
 - “(b) If it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.”
26. I find and hold that termination of the Claimant's employment was not based on a valid reason, and that the Respondent did not act in accordance with justice and equity in all the circumstances of the case. The termination was substantively unfair, and I so declare.
27. On the second issue, and having made a finding that termination of the Claimant's employment was substantively unfair, I award the Claimant the equivalent of ten (10) months' salary being compensation for unfair termination of employment. The evidence on record shows that the Claimant's gross monthly salary was kshs. 105,869.85. The equivalent of ten (10) months' salary is kshs. 1,058,698.5, which I award to the Claimant. I have taken into account the circumstances in which the Claimant's employment was terminated.
28. On the claim for payment for 19 days worked from 25/3/2022, the Claimant produced in evidence his payslip for March 2022, indicating payment of his full salary for that month. The claim is declined. The Respondent computed the Claimant's pay for 13 days worked in April 2022, but there was no indication that payment was made to the Claimant. I award the Claimant ksh. 45,877 being salary for 13 days worked in April 2022. The claim for kshs. 69,130.15 being acting allowance as Coast Regional Personal Banker was not proved, and is declined. The Claimant only produced in evidence a letter appointing him to act, but no evidence was led and/or produced on the acting allowance payable to him, if any.
29. The claim for kshs. 130,572.81 being payment in lieu of pending 37 leave days was not proved. The Claimant did not plead with precision the period of accrual of the alleged pending leave days. The Respondent (RW-2), however, admitted in evidence that the Claimant had 15.82 accrued leave days at the time of termination. No evidence was, however, adduced by the Respondent to show that any payment was made to the Claimant regarding those pending leave days. I award the Claimant ksh. 55,935 in that regard. The claim for kshs. 109,462.80 being bonus pay for the year 2021 was not proved, and is declined.
30. The claim for exemplary damages is disallowed, in view of the award already made herein pursuant to Section 49(1) (c) of the Employment Act.



31. On the third issue, the sum Counter-Claimed by the Respondent, kshs. 2,743,251 was not denied by the Claimant. All that the Claimant stated in his Reply to the Counter-Claim was that he was “ready to resume servicing the loan at the staff rates of 8% per annum and 6% per annum respectively upon securing alternative or comparable employment.” The Counter-Claim is allowed in the terms set out in this judgment.
32. In sum, and having considered written submissions filed on behalf of both parties herein, judgment is hereby entered for the Claimant against the Respondent as follows:-
 - a. Compensation for unfair termination of employment.....kshs. 1,058,698.5
 - b. Days worked in April 2022kshs. 45,877
 - c. Accrued leave days.....ksh. 55,935

Total Kshs. 1,160,516.5
33. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the Employment Act 2007.
34. The Claimant is awarded costs of the suit and interest at Court rates. Interest shall be calculated from the date of this judgment.
35. Regarding the Respondent’s Counter-Claim, judgment is hereby entered for the Respondent against the Claimant for the Counter-Claimed sum of kshs. 2,743,251, plus interest at Court rates. Interest shall be calculated from the date of this judgment.
36. The said awarded sum shall be paid by the Claimant to the Respondent at such rates and intervals as shall be agreed upon between the Claimant and the Respondent within thirty days of this judgment. Any security currently held by the Respondent over the Counter-Claimed and awarded sum shall remain so held by the Respondent until the sum awarded to it is fully paid by the Claimant.
37. Each party shall bear its own costs of the Counter- Claim.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 27TH MAY 2024

AGNES KITIKU NZEI

JUDGE

ORDER

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Claimant

.....Respondent

