



REPUBLIC OF KENYA



KENYA LAW
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**Odera v Cooperative Bank of Kenya Limited (Cause 62 of 2019)
[2023] KEELRC 380 (KLR) (10 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 380 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 62 OF 2019
SC RUTTO, J
FEBRUARY 10, 2023**

BETWEEN

FRANCIS OTIENO ODERA CLAIMANT

AND

COOPERATIVE BANK OF KENYA LIMITED RESPONDENT

JUDGMENT

1. The instant suit was commenced by way of a Memorandum of Claim dated 29th January, 2019 through which the claimant avers that he was employed as a graduate clerk on 6th August, 2017. He states that he executed his duties with dedication, professionalism and hard work, thus was promoted through rank and file. That following a series of events, the claimant was demoted from his position as a Service Manager to that of a desk officer with no disciplinary hearing. That despite having been reprimanded, he received a letter from the respondent dated 23rd May, 2018 inviting him to a disciplinary hearing. That subsequently, he received a letter terminating his employment on account of an alleged audit lapse and desertion of duty. The claimant has termed the termination as not only unfair and discriminative but a witch-hunt. Consequently, the claimant seeks against the respondent several reliefs being:
 - a. A declaration that the termination of employment was unfair, unprocedural, wrongful and illegal;
 - b. 192 months payment being the remaining months before he could attain the retirement age;
 - c. General damages for unlawful termination and dismissal from employment;
 - d. Three month's salary of kshs 109,785/= in lieu of notice, accrued leave pay, gratuity for the 11 years accruing from 5th February 2007 and salary from 8th June, 2018 till payment in full.
 - e. Costs of the suit; and
 - f. Interest thereon on (b) and (c)



- g. Any other relief this Honorable Court may deem fit to grant.
2. The claim was opposed through the respondent's Reply and Counterclaim. The respondent avers that contrary to the claimant's averments, he had been subject to various warnings and cautionary measures. That on or about 29th March, 2018, the respondent's human resource division received an audit report for the report March, 2017 to February, 2018 highlighting several control lapses at the branch where the claimant was in charge of branch operations. That based on the preliminary findings of the audit report, the claimant was issued with a letter of transfer and redeployment as a service desk officer, a position within his grade, but one without responsibility allowance which is earned by service managers.
 3. That upon further consideration of the audit report, the claimant was issued with a notice to show cause dated 11th April, 2018 for operational lapses found at Kisumu branch where it was noted that he had neglected and carelessly performed his work. That the claimant responded to the show cause letter and was subsequently invited to attend a disciplinary hearing on 23rd May, 2018 to which he responded to with a letter of resignation dated 25th May, 2018. That upon considering the claimant's response, non-attendance to the disciplinary hearing, and his letter of resignation, the respondent summarily terminated his employment. That the claimant is not entitled to any of the reliefs sought as his termination was procedural, just and fair and all his terminal dues paid.
 4. In its counterclaim, the respondent avers that during the claimant's employment, he applied for and was advanced various staff loans which he had not cleared as at the date of his resignation. That his liabilities stood at kshs 5,764,069.73 and remain outstanding to date.
 5. It is against this background that the respondent has asked the Court to dismiss the claimant's Memorandum of Claim and enter judgement in its favour for the sum of kshs 5,764,069.00 together with interest at court rates.
 6. The matter proceeded for hearing on 7th July, 2022, with both parties calling oral evidence.

Claimant's case

7. The claimant testified in support of his case and at the outset, adopted his witness statement to constitute his evidence in chief. He proceeded to adopt his bundle of documents and supplementary documents, which he produced as exhibits before Court.
8. It was his evidence that during his employment with the respondent and at around July 2013, he was diagnosed with Bipolar Disorder, a mental health condition that causes extreme mood swings that are characterized by emotional highs (mania or hypomania) and lows (depression). That the respondent had full knowledge of his ailment.
9. That sometimes in May, 2018, he received a notice to show cause dated 11th April 2018 which indicated that he was being accused of an alleged audit lapse with the particulars that he; allegedly failed to conduct MPESA cash checks and physical cash checks on tellers, allegedly failed to ascertain that the checkers at the branch were carrying out their checking duties in a proper manner, allegedly irregularly authorized tile repair works at the branch; and allegedly paid a total of one hundred and ninety five million Kenyan shillings to Afya Sacco FOSA - Kisumu Agent on sixty five different instances without conducting call backs to the account signatories.
10. That the notice to show cause was issued at a time when he was away and the issues arising therein were investigated when he was away on sick leave, a fact the respondent was well aware of because they even



- refused to cater for his medical bills. That he only had seven days to respond to the letter, a period he termed as insufficient as he was unwell and out of the office.
11. That in respect of the allegations set out in the show cause letter, he rectified the mistake and appointed a new service manager to implement the same. That further, in a bid to save the bank's corporate image and prevent possible injury to staff customers, he sought and was granted authority to repair the broken tiles. That he further made the call backs where appropriate and the signatories who were not called had missing phone numbers which he ensured was corrected.
 12. That however, in reprimand, he was unfairly demoted from his position as a Service Manager to that of a Desk Officer with no disciplinary hearing to plead his case. That despite having already been reprimanded, on 24th May 2018, he surprisingly received a letter dated 23rd May 2018, inviting him to a disciplinary hearing on the same notice to show cause he had already been unfairly adjudged and punished.
 13. That from the chronology of events and when it became apparent that he would not be accorded a fair hearing, he wrote to the respondent on 25th May, 2018 inquiring on why he had been summoned for a disciplinary meeting yet he had already been reprimanded and demoted from his position. Further, that the bank had not suffered any loss whatsoever from the allegations cited in the notice to show cause as there were no complaints of fraud about the cheques that had been sent to AFYA Sacco FOSA-Kisumu agent and no losses were incurred on the issue of cash checks. That in fact, the respondent had not suffered any loss whatsoever from the allegations raised in the notice to show case.
 14. That the foregoing notwithstanding, on or about the 8th June 2018, he received a letter from the respondent terminating his employment on account of an alleged Audit Lapse and desertion of duty.
 15. That at the time of carrying out the said Audit and consequently making the decision to terminate his employment, he reiterates that he was on sick leave, a fact the respondent was well aware of. That to aggravate the situation, the respondent had failed/and or refused to cater for his medical bills contrary to its policies and procedures.
 16. That his termination was not only unfair and discriminative but a witch-hunt on him to find a loophole to finally terminate his employment. That it is against the foregoing background, immense psychological suffering, humiliation and frustrations that he was left with no option but to resign by issuing 3 months' notice which the respondent easily accepted and even let him loose immediately.
 17. That the foregoing chronology of events points to an employer who was hell bent to terminate his employment at all costs as: his alleged infractions had not caused any financial hemorrhage to the bank; he has a health condition, which was only diagnosed in 2013, a fact that was well known to the respondent; some if not all the alleged infractions happened when he was either hospitalized or under heavy medication, much to the knowledge of the respondent; and Clause 14.4 of the Cooperative Bank Staff Manual provides for retiring an employee on health grounds, an option that was never explored.

Respondent's case

18. The respondent called oral evidence through Ms. Leah Kerich who testified as RW1. She identified herself as the head of employee relations at the respondent bank. Similarly, she proceeded to adopt her witness statement and bundle of documents filed on behalf of the respondent, to constitute her evidence in chief.
19. RW1 testified that the claimant's employment was subject to provisions of the Collective Bargaining Agreement and the provisions of the respondent's Staff Manual in place and Administrative circulars at any given time.



20. That the claimant was posted to various branches of the respondent Bank in various capacities culminating in his promotion to the level of Supervisory Grade (SG2) on 23rd April 2012 and subsequent posting as the Branch Manager-Kisumu East on 28th March 2017.
21. RW1 highlighted the respondent's disciplinary record as follows:
 - a. That on 29th December, 2014, he was issued with a First Warning Letter for negligently authorizing irregular fuel payments to one of the respondent's employee by the name, David Odongo;
 - b. That on 20th February, 2015, he was issued with a Cautionary letter for irregularly authorizing overdrawing of an account belonging to a customer of the Respondent, Civil Trust Engineering and Construction Ltd A/c No.01136454930400;
 - c. That he was issued with a first warning letter on 11th October, 2016 for failing to adhere to the respondent's lending and operational guidelines at Kisumu East Branch;
 - d. That for the year 2018, he was issued with a First warning letter on 18th January 2018 for failing to act on a misposting of a customer cheque no.132560 of Kshs 500,000 into wrong A/c No.01109294020300 instead of A/c No.01143432852600 thereby occasioning loss of the same to the respondent; and
 - e. For the year 2018, he was issued with a Second Warning Letter (Final Warning Letter) on 30th January, 2018 for breach of discipline occasioned by poor customer service leading to customer complaint.
22. It was RW1's further testimony that the human resource division received an audit report in respect of its Kisumu East Branch for the period commencing March 2017 upto February 2018 highlighting several control lapses at the Branch where the claimant was in charge of the Branch Operations as the Service Manager.
23. That based on the preliminary findings of the Audit Report, the claimant was issued with a letter of transfer and redeployment as Service Desk Officer, a position within his grade, Supervisory Grade 2, but one without responsibility allowance which is earned by Service Managers.
24. That this horizontal move in his line of service was pursued in a bid to cushion the respondent due to the earlier audit lapses which had exposed it to losses. That following his redeployment, the claimant retained full salary but the benefit of Responsibility Allowance which is only earned by Service Managers, was withdrawn given that he was no longer serving as a Service Manager.
25. That upon further consideration of the Audit Report, the respondent issued the claimant with a notice to show cause letter dated 11th April, 2018 for operational lapses found at Kisumu East Branch as it was noted that he neglected and carelessly or improperly performed his work.
26. That during the audit, the claimant was requested to provide the evidence of the call backs which he alleged to have done via his personal Safaricom line 07****0 and out of 65 transactions which he approved between year 2017 and 2018, he was only able to provide evidence for call backs for 3 transactions.
27. That the claimant responded to the show cause letter by way of two separate letters, the first letter being dated 20th April, 2018 wherein he pleaded leniency and a second letter dated 12th May, 2018 where he admitted the cash checks were not done properly.



28. That he was subsequently invited to attend a staff disciplinary hearing meeting scheduled for 28th May, 2018 and was informed of his right to tender documentary evidence in support of his case and his entitlement to the presence of a member of staff at the hearing.
29. That the claimant responded to the invitation with a letter of resignation dated 25th May, 2018. That after consideration of his responses, non-attendance of the disciplinary hearing and letter of resignation, the respondent summarily terminated his services in accordance with the provisions of his employment contract and the Employee Manual and Policies as read with relevant provisions of the *Employment Act*.
30. That the claimant was notified of his termination and of his right to appeal. That further, his Certificate of Service was made ready for collection.
31. That since the claimant was served with two valid warning letters, the commission of a 3rd offence within twelve (12) months amounted to gross misconduct warranting summary dismissal.
32. That the claimant was therefore invited for a disciplinary hearing to give clarification on the issues highlighted in the audit report and the same did not impute any guilt on his part but was in effect an opportunity for him to be heard; which hearing he failed to attend.
33. That despite the invitation to attend the hearing, the claimant willfully refused as evinced in his resignation letter and the respondent was therefore left with no other option but to terminate his employment. That the claimant absconded duty during the notice period, a matter which exacerbated the need for the respondent to issue the termination notice.
34. That the claimant's contention that he served a three (3) month notice is vehemently denied as evinced by his resignation letter which took effect immediately in utter contravention of the respondent's Staff Manual on serving a termination notice. That further, the claimant did not pay the respondent a month's salary in lieu of notice in order to be discharged from its services.
35. That further, the claimant could not be retired on ill-health grounds as alleged as such would only be effected upon confirmation by a qualified medical practitioner and certification by the Bank's appointed doctor that he is unfit to remain in the Bank's service on account of his illness. That the claimant never raised these issues during the tenure of his employment and has not tendered any evidence showing that he had notified the respondent of such ailment.
36. That the respondent has insured its medical scheme with CIC insurance which covers all employees and their eligible dependants and the claimant was eligible for the cover. That the Medical Insurance Cover has conditions of use and has a Clause on excluded conditions listed under Clause 46.2 (F) thereof and one of the excluded conditions is any medical treatment arising from self-inflicted illness or injury, including drug abuse, alcoholism and attempted suicide.
37. That the claimant did not notify the respondent of his admission to Kilimani Hospital which was not in the Panel of CIC Insurance and as such, it was not responsible to pay for the medical expenses arising therefrom.
38. That from the medical records filed by the claimant in his bundle of documents, his doctor indicated that the admission to Kilimani Hospital was as a result of alcoholism and he was diagnosed with Alcohol use Disorder which is one of the excluded conditions which he was well aware of.
39. That it is her belief that based on the diagnosis of alcoholism from his own doctor, the claimant was unable to execute his duties with the respondent resulting in several audit lapses, errors and lack of concentration at work hence the numerous disciplinary lapses.



40. That further, the respondent has in place a Wellness Program where its employees are supported in coping with personal challenges including alcoholism and she is verily aware that the claimant did not seek such assistance from the respondent.
41. That his terminal benefits were computed and the net amount of Kshs.57,436.00 was debited into his current account No. 01125012569600.
42. RW1 further confirmed that the respondent noted that the claimant was erroneously not paid his one month's salary in lieu of notice at the time his terminal dues were computed and upon notice, it immediately computed and credited his Bank account No. 01125012569600 on 22nd February, 2019. That the claimant applied for withdrawal of his pension benefits amounting to Kshs.1,745,826.17 which were processed and released to him on 12th July, 2018.
43. With regards to the counterclaim, RW1 stated that the claimant had outstanding staff loans which stood at Kshs.5,764,069.73 as at 9th July, 2019 and remain outstanding to date.
44. That according to the Staff Manual, the respondent has discretion to recall payment of the staff loans advanced to the claimant upon him ceasing to be an employee.
45. That further, the terms of the letter of dismissal and the Staff Manual, clearly stipulate that the respondent has the discretion to vary the interest rate for loans advanced to members of staff to the prevailing commercial bank interest rates upon termination of employment.
46. That due to the persistent default in repaying the outstanding loans, the respondent issued the claimant with a pre-listing notice on 22nd October, 2018 warning him that he would be listed as a defaulter with the Credit Reference Bureau if his loans were declared non-performing and subsequently issued him with a 30 days' notice on 18th March, 2019 notifying him of the intention to take remedial action to recover the outstanding loans which had been declared non-performing.
47. That the claimant has not remedied the default to date hence is liable to the respondent for the outstanding liability of Kshs.5,764,069.73 in unpaid loans plus interest at the prevailing commercial bank interest rates until payment in full.

Claimant's Submissions

48. The claimant filed written submissions through which he maintained that he had been a diligent employee of the respondent having been in its employ since January 2007 as a Graduate Clerk and thereafter rising through the ranks. That his demotion to the position of Service Desk Officer without hearing was not in line with the principles of fair hearing as provided under Article 50 of *the Constitution* and as guaranteed under Clause 28.5 of the respondent's Human Resource Manual. On this issue, he invited the court to consider the case of Evans Odhiambo Kidero & 4 Others vs Ferdinand Ndungu Waititu & 4 Others.
49. He further submitted that he was subjected to punishment without being accorded a fair hearing which was contrary to the legitimate expectation that one should not be condemned unheard. That the respondent acted as Judge, jury and executioner in his case. That further, the Human Resource Manual did not foresee an employee being subjected to two forms of punishment being demotion and subsequent termination as was in this case. In support of his position, reference was made to the case of Cooperative Bank of Kenya Limited vs Yator (Civil Appeal 87 of 2018) KECA 95 (KLR) and Mahlakoane vs South African Revenue Service 2018 (39) ILJ 1034 (LAC).
50. It was the claimant's further submission that the respondent was aware that he had been diagnosed with Bipolar Disorder and had incurred costs in the form of medical bills. That the failure to reimburse him



of the costs indicated that the respondent had no regard for its employees' mental health and also paints a picture of a discriminatory employer who ultimately dismissed an employee on nothing else but his health status. That this is contrary to the provisions of Articles 27 (4) & (5) and 28 of *the Constitution*. On this score, reliance was placed on the case of *Jansen vs Legal Aid South Africa* (JA121/2014 (2018) ZALCCT 17; (2018) 39 ILJ 2024 (LC)).

51. It was further submitted by the claimant that the respondent was hell bent on terminating his services by subjecting him to punishment before any disciplinary process. That the respondent sought to in turn sanitize its actions by issuing a notice to show cause and eventually terminate his services. He maintains that his termination was unlawful and unjustified.

Respondent's Submissions

52. On its part, the respondent submitted that the claimant had engaged in acts of gross misconduct and negligence that contravened the express provisions of his contract, its Operating Manual Vol. III Cash & Cash Movement, its Code of Conduct and Ethics and the *Employment Act*. That the claimant's acts of gross misconduct and negligence constrained the respondent to issue him with 5 different warning and/or cautionary letters.
53. It was further submitted that the termination was substantively fair as the respondent had valid and fair reasons to do so. That the same passes the test for substantive fairness as set out under section 43 (2) of the *Employment Act* and the burden and standard of proof laid down in the case *Kenya Revenue Authority vs Reuwel Waithaka Gitahi & 2 Others* (2019) eKLR.
54. The respondent further submitted that the claimant's gross misconduct destroyed the relationship of trust and confidence required for the employment relationship between him and the respondent to continue. The respondent urged the Court to dismiss the claim and uphold the dismissal in line with the decisions of the court in *Violet Kadala Shitsukane vs Kenya Post Savings Bank* (2020) eKLR and *Samson Thuku Mutiso vs Diamond Trust Bank Kenya Limited* (2015) eKLR amongst others.
55. With regards to the claimant's argument on double punishment, the respondent submitted that the same was not true and that his redeployment was not a demotion but a horizontal deployment. That there was therefore no reasonable justification for the claimant to deem his transfer as a punishment. That had he done so, the proper approach was to object in his response to the show cause letter.
56. The respondent further submitted that the claimant's allegations of discrimination on grounds of ill health and failure to pay for the expenses incurred at the hospital were untrue, as his bipolar disorder had not interfered with his work performance since his doctor confirmed that he was fit to work and pursue further studies.
57. That further, the claimant's allegation that the respondent had refused to retire him on health grounds is misconceived and disingenuous as he had neither made such a request nor had he met the conditions for retirement on health grounds as provided for in its manual.
58. The respondent submitted that the claimant's purported resignation was improper and irregular as he had failed to give notice as required by the contract and had also failed to pay the requisite gross salary in lieu of notice. That the resignation was intended to avoid disciplinary action and that the respondent properly exercised its right to reject it.
59. That notwithstanding its refusal to accept the resignation, the respondent urged the court to find that the claimant's intended resignation signified a clear and voluntary intention on his part to sever the employment relationship between him and the respondent. That therefore, he cannot claim unfair



termination nor payment of gross salary for the remainder of the claimant's service before attaining retirement age as the same is untenable.

60. In addition, the respondent submitted that the claimant, having failed to oppose the counterclaim, should be deemed to have admitted the same and as such, the court should allow the same.

Analysis and determination

61. Flowing from the pleadings, the submissions and evidence on record, this Court is being called to resolve the following questions;
- a. Was the claimant's termination of any legal consequence in light of his resignation?
 - b. If the answer to (a) is in the affirmative was the claimant's termination unfair and unlawful?
 - c. Is the counterclaim justified?
 - d. Is the claimant entitled to the reliefs sought?

Legal consequence of the claimant's termination?

62. On record and as part of the respondent's documents, is a letter of resignation dated 25th May, 2018, emanating from the claimant. I will reproduce the same, hereunder:

“Francis Otieno Odera,

Thro'

The Manager,

Kisumu branch

RE: RESIGNATION WITH IMMEDIATE EFFECT

I refer to your letter dated 23/5/18 inviting me to attend a disciplinary learning meeting to be held on 28/5/18, and I wish to state as follows: -

That I did call backs for all the FOSA cheques before paying out cash amounting to Ksh.195 million and there has been no complaint about any of the cheques being fraudulent.

That I sought authority to repair broken tiles in Kisumu East Branch which was granted. The works were supposed to be assessed by sourcing department and they have not done so. The repairs were done to safeguard the bank's corporate image and prevent possible injury to staff and customers.

Cash checks were done and if for one reason or another they were not done properly, that was regrettable, no loses were incurred as a result.

I was downgraded from position of service manager to that of service desk officer as result of audit findings in Kisumu East Branch, Therefore to be invited again to appear before a disciplinary hearing to me is a double punishment which I cannot withstand.

I therefore thank the bank for giving me the opportunity to serve in various capacities for a period of 10 years which I did diligently.

However I wish to state that the audit should not be used as a tool for witch hunt to send a particular group of people home.

Thank you



Francis Odera”

63. It is apparent that the said letter of resignation was triggered by the respondent’s invitation to attend a disciplinary hearing scheduled for 28th May, 2018. The claimant registered his protest and termed the disciplinary hearing as double punishment. The letter of resignation was stamped “received” on 28th May, 2018 at the respondent’s head office at Nairobi.
64. The respondent appears to have ignored the claimant’s letter of resignation as it proceeded to terminate his employment through a letter dated 8th June, 2018.
65. The Black’s Law Dictionary (10th Edition) defines the term resignation to mean: -

“The act or an instance of surrendering or relinquishing an office, right or claim. A formal notification of relinquishing an office or position; an official announcement that one has decided to leave one’s job or organisation, often in the form of a written statement.”
66. Through his letter of resignation, the claimant unequivocally announced his intention to leave the respondent’s employment with immediate effect. Indeed, under cross examination, the claimant stated that his resignation was to take effect immediately and that the respondent had not disputed his resignation. He further stated that by resigning, he was telling his employer that he did not want to continue working there. On her part, RW1 admitted that the respondent received the claimant’s resignation.
67. It is this court’s considered view that once the claimant had formally notified the respondent of his intention to resign with immediate effect, the same took effect and it did not matter whether or not the resignation was accepted. There was no action required on the part of the respondent to validate the resignation. It was complete on its own.
68. My thinking on this issue accords with the determination of the Court in *Edwin Beiti Kipchumba vs National Bank of Kenya Limited* [2018] eKLR, where the learned Judge reckoned that “resignation by an Employee from employment, is basically termination of employment at the instance of the Employee. It is a unilateral act. The *Employment Act* does not require the Employer to accept a notice of termination issued by the Employee, for that notice to take effect.”
69. It is also instructive to note that despite the respondent snubbing the claimant’s letter of resignation, it issued him with a certificate of service indicating his last day of service as being 28th May, 2018. This happens to be the date his letter of resignation was received at the respondent’s head office. Therefore, the respondent was in essence acknowledging that the claimant was no longer its employee beyond 28th May, 2018.
70. As stated herein, the respondent did not accept the claimant’s resignation and instead issued him with a letter of termination dated 8th June, 2018.
71. It is evident that the letter of termination from the respondent came almost fourteen (14) days after the claimant had already tendered his letter of resignation. Thus, was the same of any legal consequence?



72. In the South African case of *Lottering vs Stellenbosch Municipality*, (2010) 31 ILJ 2923 (LC), the Court found as follows: -

“That the resignation is a final unilateral termination of the employment contract and once the applicant had submitted the first resignation that was the end of the contract. This means that there was no longer a contract of employment once she resigned.”

73. Similarly, in the case of *Kennedy Obala Oaga vs Kenya Ports Authority* [2018] eKLR, the Court cited the South African case of *Mtati vs KPMG (Pty) Ltd* (2017) BLL 315 (LC) where it was held that where an employee tenders a resignation immediately, there and then, the employer is deprived of jurisdiction to continue with the disciplinary process as resignation takes effect immediately. The Court went on to hold that “Authority to discipline the Employee is based on the existence of a contract of employment. Without a contract, there is no authority.”

74. I wholly adopt the position taken in the above cases and similarly find that the claimant’s resignation took effect immediately thus signifying the end of the employment relationship and subsequently, the respondent lost jurisdiction over him as an employee. That included the right to terminate his employment.

75. To this end, the claimant’s resignation having taken effect on 25th May, 2018, the employment relationship was completely severed. Consequently, the employment relationship had ceased to exist and there was nothing to terminate. The claimant had pulled the plug on the employment relationship and the respondent had no hold on him. The purported termination was therefore of no legal consequence.

76. In this respect, I find and hold that the purported termination by the respondent through its letter dated 8th June, 2018, to be of no effect hence is null and void.

77. Having found that the termination by the respondent to be null and void, it is not logical to determine whether the same was unlawful and unfair. As held in the case of *Kennedy Obala Oaga vs Kenya Ports Authority* (supra): -

“Summary dismissal was null and void, not based on an Employer-Employee relationship, and it makes no sense to inquire whether, or declare, such a decision is fair or unfair. The decision must be treated as if it was never made. It was null and void, without any legal consequences. To say it was unfair, would suggest that decision has legal consequences.

78. Therefore, I do find that no determination can be made by the Court as regards the fairness or otherwise, of the claimant’s termination.

Counterclaim

79. The respondent counterclaimed against the claimant for the sum of kshs 5,764,069.73 being his outstanding liabilities with the bank. The claimant did not file a response to the counterclaim despite being granted leave to do so by the Court on 7th March, 2022 and on 28th March, 2022. The counterclaim was therefore unopposed. If anything, the claimant admitted during cross examination that he had outstanding loan liabilities with the respondent. In the circumstances, I cannot help but find in favour of the respondent hence the counterclaim claim succeeds.



Reliefs

80. As there has been no finding on unlawful termination, the claim for compensatory damages and salary in lieu of notice cannot be sustained.
81. The claim for accrued leave pay fails as it was not specifically pleaded, hence it is not clear for what period the claimant is alleging he did not proceed on leave.
82. The claim for gratuity collapses as the claimant did not lay a basis for the same. Was it contractual? If so, where is the same stipulated?

Orders

83. In the final analysis, the Court arrives at the determination that the claimant effectively resigned on 25th May, 2018 and his subsequent termination on 8th June, 2018, by the respondent was null and void.
84. The claim is dismissed in its entirety with an order that each party bears its own costs.
85. Judgement is entered for the respondent on the counterclaim in the sum of Kshs 5,764,069.73, being the claimant's outstanding loan liabilities, together with costs. Interest will run from the date of Judgment until payment in full

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF FEBRUARY, 2023.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Munyua

For the Respondent Mr. Oloo

Court Assistant Abdimalik Hussein

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court had been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

