



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nyandat v Barclays Bank of Kenya Limited (Cause 124 of 2018)  
[2023] KEELRC 1502 (KLR) (16 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1502 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 124 OF 2018  
AN MWAURE, J  
JUNE 16, 2023**

**BETWEEN**

**ALBERT WOGA NYANDAT ..... CLAIMANT**

**AND**

**BARCLAYS BANK OF KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed his claim dated February 5, 2018 and asks //inter alia for damages for breach of contract.

**Claimant's case**

2. The Claimant states in his claim that the Respondent was his employer from 3<sup>rd</sup> October, 2009 and the same was confirmed by a letter of offer dated 19<sup>th</sup> April, 2011.
3. He says he performed his duties diligently but in the course of the employment he was harassed and intimidated and mistreated and for a period of six (6) months he could not perform his duties and hence this dispute.
4. The Claimant says that on 7<sup>th</sup> November, 2016, he was accused by the Respondent of engaging a client against the Respondent's Manager's instructions and that he miss-sold a loan to the said client who was unhappy with the product.
5. He says that on 7<sup>th</sup> November, he got a letter inviting him for a disciplinary hearing on 16<sup>th</sup> November, 2016.
6. He says he attended the disciplinary hearing on 16<sup>th</sup> November, 2016 and defended his position. He says that the Respondent erroneously found the allegation against him were proven and he was issued a warning letter dated 17<sup>th</sup> November, 2017.



7. The Claimant says he appealed against the warning letter by his letter dated 29<sup>th</sup> November, 2016 and was invited for a meeting for an appeal hearing for 8<sup>th</sup> December, 2016.
8. He says after the hearing of appeal, he was informed he had succeeded and his warning letter had been withdrawn. The said letter was issued on 17<sup>th</sup> December, 2016.
9. The Claimant says despite being successful in his appeal, his rating was still retained at 70.4% instead of 80.4% which was underperforming.
10. He also says the Respondent rated him without considering the prevailing low market and high rate of defaulters. He says he appealed against his final rating of 2016 and he was heard on 7<sup>th</sup> February, 2017 but his low rating was maintained.
11. He said due to the continuous harassment, he wrote to the Director Human Resource and was informed to stop focusing on 2016 rating and focus on 2017 performance. He was then issued with a final warning letter.
12. Claimant says that due to all this harassment, he tendered his resignation on 23<sup>rd</sup> March, 2017 and the Respondent accepted his resignation. He says he was subjected to unfair disciplinary process and the Respondent had unsubstantiated reasons which lacked merits and were wanting in law and facts.
13. He prays for compensation of Kshs.4,108,300/= plus costs and interest.

#### **Respondent's case**

14. The Respondent filed his response as well as counter-claim dated 2<sup>nd</sup> May, 2018. He admitted that the Claimant's relationship with itself commenced on 1<sup>st</sup> April, 2011 and terminated around 23<sup>rd</sup> March, 2017 when he resigned.
15. The Respondent avers the Claimant was called to a disciplinary hearing for misconduct by miss-selling a product to a client and discredited his colleague before the client.
16. The Respondent says the Claimant attended disciplinary hearing on 16<sup>th</sup> November, 2016 where his representations were considered and he was issued a warning letter on 17<sup>th</sup> November, 2017.
17. The Respondent further says the Respondent appealed against the warning letter and appeal proceeded on 14<sup>th</sup> December, 2017 and confirmed they upheld their warning letter and consequently had withdrawn the warning letter.
18. As pertains to Claimant's disciplinary proceedings for underperforming this was as per the evaluation in February 2017 for the year 2017. One of the reason for under performance was poor relationship management.
19. On 15<sup>th</sup> February, 2017, the Claimant admitted he lost a client and Claimant was invited to a capability hearing on 27<sup>th</sup> February, 2017 and was informed he could show up with a colleague of his choice to be present at his hearing. He attended the capability meeting and was issued with a final warning letter dated 3<sup>rd</sup> March, 2017 and was informed of a need to improve he was also informed of his right to appeal the decision.
20. He appealed on 23<sup>rd</sup> February, 2017 but his appeal as unsuccessful. He was asked to revert to line manager and focus on 2017 performance.
21. The Respondent denies that they harassed or frustrated the Claimant but instead says disciplinary action was in accordance to fair process. The Respondent avers the Claimant resigned voluntarily and



so cut short his expectations. The Respondent prays the claim herein be dismissed with costs and further claimant to be ordered to settle a counter-claim of Kshs.4,430,061/= being a total amount made up as hereunder;

(i) Unsecured loan of Kshs.2,300,000/=

(ii) Secured loan of Kshs.2,300,000/=

Which was to be secured from his salary on monthly basis. They also pray for the interest on the above amount from 23<sup>rd</sup> March, 2017 until full payment as well as costs of the suit.

22. The Claimant did not avail himself to give evidence in court even though he was given opportunity by the court to avail his wife's medical report as he claimed she got a stroke and he was unable to appear in court. He did not appear on the scheduled date. Both the Claimant and the Respondent also did not file their written submissions and so the court proceeded without the benefit of the same.

### **Determination and analysis**

23. Flowing from the pleadings of the parties, the issues for determination are two, fold;

(i) Did the Respondent breach the Claimant's contract of service?

(ii) Is the Claimant entitled to awards claimed?

24. Going by the claim by the Claimant, it is not quite clear what his main demands from his employer was. The pleadings and the exhibits in court point to under performance evaluation of the Claimant for miss-selling a loan product to a client. The Claimant was served with a warning letter and he appealed the issuance of the warning letter. He was heard in an appeal and his appeal was successful and the warning letter was withdrawn by the letter dated 14<sup>th</sup> December, 2016.
25. The remaining issue hereafter was that the Claimant's rating for 2016 remained at 70.4% instead of being awarded a further 10% making his rating 80.4% after the withdrawal of the warning letter. He further says the Respondent did not consider the poor economic environment of the market. He appealed the rating again and the Claimant was invited for a capability meeting on 27<sup>th</sup> February, 2017 and was issued a final warning letter dated 3<sup>rd</sup> March, 2017. The same was valid for 12 months. He was also given a chance to appeal the final warning and he was uredo to improve his performance.
26. The Claimant appealed the final warning letter and also wrote to the Respondent Human Resource Director and the Director advised him to start focusing on 2017 objectives. He was issued with a final warning letter and he tendered a resignation dated 23<sup>rd</sup> March, 2017. The Respondent accepted his resignation and released him subject to paying him one month salary in lieu of notice.
27. The court has critically considered the pleadings and the exhibits considering the parties did not tender any evidence in court or submissions.
28. The court is at pains to fathom the issues or the claims that are being raised against the Respondent by the Claimant. The Claimant has not raised any grounds of unfair, unlawful or unprocedural termination of his employment. It therefore is surprising that he is praying for total of 12 months compensation and is not even pleaded what the same is made up. There is no evidence that the Claimant was unlawfully terminated and therefore there is no ground to award a compensation for unlawful termination.
29. What the court can decipher from the pleadings is that the Claimant was issued a final warning by the Respondent dated 3<sup>rd</sup> March, 2017 and that was after various other warning letters and communication



back and forth by the respective parties. The warning letter was valid for 12 months from 27<sup>th</sup> February, 2017 and claimant was expected to turn round within that period. At the same time, he was given opportunity to appeal the warning. On 23<sup>rd</sup> March, 2023, he tendered a resignation and promised to serve the notice period. The Respondent however, in all fairness allowed him not to serve the notice and undertook to pay him one month in lieu of notice.

30. The Claimant tendered his resignation under Section 35(1)(c) of *Employment Act* which provides that where a contract is to pay wages or salary periodically at intervals of or exceeding one month contract is terminable by either party at the end of the period of twenty eight days next following the giving of notice in writing.
31. The Claimant resigned voluntarily and there is no evidence adduced that he was forced to resign by the mistreatment or harassment of the Respondent. As held in the case of Kenneth Onialo–versus- Majlis Resort Lamu Case No.42 OF 2018 the Claimant is the one who abandoned his employment after he chose to resign. He was not dismissed and so there are no reasons that would in the remotest recourse justify the remedies he has claimed.
32. Under the circumstances, the Claimant has not proved his claim against the Respondent and so his case is dismissed accordingly. Each party will meet their costs of the suit.

#### **Counter-claim**

33. The Respondent produced a statement of account and the same seems to present that the Claimant was given unsecured loan and secured loans at different dates and that the said facilities were to be paid by deducting his monthly salary as agreed.
34. The Respondent did not clarify what the Claimant had repaid at the time of termination and for the secured loan what was the security and what became of the security.
35. The court will not give orders that are unsubstantiated. It is only prudent the respondent gives a clear account of the loans owed by the Claimant and the securities held to enable the court make an informed ruling pertaining to the counter-claim.
36. The case will be mentioned on 25/7/2023 for the Respondent to avail the statement and details of the same.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 16<sup>TH</sup> DAY OF JUNE 2023**

**ANNA N. MWAURE**

**JUDGE**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 has 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.

ANNA N. MWAURE

JUDGE

DRAFT

