



REPUBLIC OF KENYA



KENYA LAW
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**Nguru v Co-operative Bank of Kenya Limited (Cause E044 of 2022)
[2023] KEELRC 2836 (KLR) (9 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2836 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E044 OF 2022
M MBARÚ, J
NOVEMBER 9, 2023**

BETWEEN

JEPHTA ODHIAMBO NGURU CLAIMANT

AND

THE CO-OPERATIVE BANK OF KENYA LIMITED RESPONDENT

JUDGMENT

1. The claimant was employed by the respondent bank at Kongowea branch on 1st August 2013 and on commission based on direct sales staff. The claimant was promoted to the position of Business Banker at Kenyatta Avenue branch.
2. In the year 2021 the claimant was appraised in his performances with an exceptional score which earned him a 10% salary increase at Kshs. 105,869.85 per month.
3. In July 2021 the claimant resolved to buy a plot through the respondent's staff loan scheme. He settled for plot, land Title Number Kajiado/Kitengela/107019 and would buy the plot from Musti Investment Limited. In keeping with the pre-financing practice, the claimant requested M/s Index Africa Limited valuers to value the plot to guide the respondent on the open market and mortgage value. The claimant used Index Africa Limited because they are in the respondent's panel of service providers and the valuer's fees were friendly and who returned a market value of Kshs. 2,300,000 for the plot.
4. The report of the valuer was submitted to the respondent and who processed the loan request for Kshs. 2,300,000 and which was disbursed to the seller's account.
5. In January 2022, the claimant learnt that the plot had been re-valued by M/s Sterling Valuers Limited upon the respondent's request. The market value was placed at Kshs. 1,000,000 and a forced sale of Kshs. 750,000 for the plot.



6. With this information, the respondent accused the claimant of colluding with the seller and M/S Index African Limited to fraudulently overvalue the plot with the aim of having surplus diverted to the claimant. The claimant was taken through the disciplinary process culminating in a decision to summarily dismiss him from his employment on 11 April 2022. He lodged an appeal but this was rejected through letter dated 9 May 2022.
7. The claim is that termination of employment was unfair because M/s Index Valuers who provided the initial valuation of the plot is part of the respondent panel of service providers and the claimant had no expertise in the matter and hence relied on the valuers and the respondent did not establish that he had colluded with the seller and the valuer to get the surplus as claimed. The claimant was not told why the respondent used M/s Sterling Valuers to re-value the plot or why its report was more preferred. The summary dismissal was unreasonable and unfair as it caused the claimant loss and damage.
8. The claim is for the following dues;
 - a. Payment of salary for 19 days worked from 25 March 13 April 2022 Kshs. 67,050.90;
 - b. Salary in lieu of 23 pending leave days Kshs. 81,166.89;
 - c. Bonus for the year 2021 Kshs. 109,468.80;
 - d. Compensation for unfair termination of employment;
 - e. An order of injunction restraining the respondent from reviewing, revising, converting, changing the staff loan rates of 8% presently enjoyed by the claimant to commercial rates of 13%;
 - f. Exemplary damages; and
 - g. Payment of costs of the suit.
9. The claimant testified in support of his case that he worked diligently for the respondent until July 2021 when he decided to buy a plot. He applied for a loan facility at staff rates and identified the plot which was valued by one of the service providers, Index valuers. He did not participate in the process and the valuers submitted its report and he was allocated Kshs. 2,300,000 which was paid to the seller. Without his knowledge, the respondent appointed M/s Sterling Valuers to re-value the plot and the value reduced to Kshs. 1,000,000 upon which he was invited to attend disciplinary hearing and which led to his summary dismissal. This affected him since all his monies were held at the respondent bank and were applied for the loan. He had opened another account with Kenya Commercial Bank (KCB) and upon the summary dismissal this affected him as he had no other source of income. The process of getting his pension dues took time and upon the letter of summary dismissal issued on 11 April 2022, he started clearance and to protect his dues, he opened the KCB account to receive his pension dues.
10. At the time employment terminated the claimant had liabilities. The response that at the time of the plot purchase the claimant had the KCB account is not correct since this was opened upon exit from the respondent. He did not collude with the valuers as alleged and the claims made should be awarded.
11. Upon cross-examination, the claimant testified that on 28 February 2022 he was issued with a notice to show cause to explain why he had taken a fraudulent loan to which he replied and explained that he had been introduced to the seller of the plot which he had purchased at Ksh.1.7 million and was selling to him at ksh.2.3 million which was reasonable. During the disciplinary hearing, he was not allowed to call any witnesses. The issue arose as to why he had another account with KCB and he denied such



matter because he only opened the account after leaving the respondent. he opened the KBC account at Migori branch which was near his rural home.

12. In response and counterclaim, the respondent's case is that the claimant was paid Kshs. 2,300,000 through Musti Investment Limited for acquisition of plot title No. Kajiado/Kitengela/107019 through fraudulent acts performed by the claimant. The value of the plot as deliberately overvalued through a fraudulent scheme for the claimant to receive Kshs. 500,000 and Kshs. 468,300 on 13 and 15 July 2021 in his KCB account Number 1254XXXX8.
13. The respondent took the claimant through the due process and disciplinary hearing leading to summary dismissal and the claims made are without merit and should be dismissed with costs.

Counterclaim

14. In counterclaim, the respondent's claim against the claimant is that during his employment, he was advanced with credit facilities with given terms and conditions. He got a personal loan of Ksh.500,000 on terms of Staff Loan Application form dated 25 February 2021. He got residential property loan for Kshs. 2,300,000 on terms of Staff Loan Application form dated 2 May 2021.
15. Both the personal loan and residential loans would attract interest at commercial rates upon the claimant leaving the respondent's employment for any reason other than retirement. Since his exit, the claimant has not repaid the loans as at 19 July 2023 there was a balance of Kshs. 401,584.28 for the personal loan and Kshs. 2,414,286.10 for the residential property loan. Such loans are outstanding and should be repaid at 16% interests per annum from the date due and until paid in full.
16. The counterclaim is for Kshs. 2,815,830 together with interests at 16% per year from 19 July 2023 until payment in full and costs for the counterclaim.
17. In evidence, the respondent called David Ngige Wamuti and Lear Kerich.
18. Mr Ngige testified that he was employed as the investigator in this matter and was given access to the records for this purpose. The claimant was advanced a loan of Kshs. 2,300,000 to purchase a residential property. The respondent required that the plot be valued before the loan was advanced. As an employee, the claimant was at liberty to select a valuer of his choice from the respondent's panel of valuers. He selected Index Africa Limited who presented a valuation report and placed the market value for the plot at Kshs. 2,300,000 and on this basis the loan was advanced to the claimant through Musti Investment Limited, the vendor.
19. Mr Ngige testified that in December 2021, the respondent's credit management department received a tip off that some members of staff had received loans on the basis of inflated valuations and a decision was taken to re-value some plots. The claimant's plot. Kajiado/Kitengela/107019 was not revalued but an adjacent plot. Kajiado/Kitengela/107020 was revalued by Sterling Valuers Limited and a report dated 11 January 2022 submitted indicating the value at Ksh. 1,000,000. A number of other properties were checked and found to have been overvalued. The security department interviewed several persons including the valuers and Musti Investment Limited which revealed that there was criminal conduct by either the valuers, vendors and employees. The respondent lodged a criminal complaint at Banking Fraud Investigations Unit and the police were able to obtain information that revealed that an employee would identify a piece of land at the value of Kshs. 1,000,000 and who would then approach the valuer to inflate the costs at Kshs. 2,300,000 which would then be presented to the respondent to support the request for a loan. The loan sum would be paid to the vendor but would in return remit the difference to the employee.



20. The police were able to get statements from vendors. The claimant received Kshs. 500,000 and Kshs. 486,300 on 13 and 15 July 2021 into his KCB account No. 1252496788. The investigations were conducted after the claimant's dismissal, the respondent could not obtain the records in this regard and are held by the police.
21. Mr Ngige testified that the respondent had reasonable belief that the claimant was implicit in fraudulent scheme to obtain funds from the respondent, he was issued with notice and allowed to attend before a disciplinary panel.
22. Ms Kerich testified that as the employee relations manager, the claimant was an employee on contract and his employment was regulated on terms and conditions outlined in various policies of the respondent particular letter dated 2 September 2020. On 11 April 2022 the claimant was dismissed from his employment following his engagement in fraudulent valuation process that led to the undervaluation of land parcel Kajiado/Kitengela/107019 and exposed the respondent to loss of Kshs. 1,550,000.
23. Ms Kerich testified that the claimant was advanced a personal and residential property loans on the strength of valuations done by Index Africa Limited but upon investigations, it emerged that the valuation was overvalued at Kshs. 2,300,000 instead of Kshs. 1,000,000 and the claimant was paid the difference through his KCB account. He was issued with a notice to show cause and the respondent. A disciplinary hearing was conducted and he failed to give satisfactory responses leading to summary dismissal which was justified and lawful.
24. The loan facilities were advanced on employee rates and at the end of employment, the same is due with interests at commercial rates. The claimant owes the respondent Kshs. 2,815,830.38 as at 19 July 2023 which should be paid with 16% interests per year.
25. At the close of the hearing, both parties agreed and filed written submissions which are analysed and the issues which emerge for determination are whether there was unfair termination of employment; whether the claims made are with merit and whether the counterclaim is with merit.
26. On 11 April 2022 the respondent dismissed the claimant from his employment on the grounds that he had made a fraudulent loan application through false pretence and diverted funds for the purchase of a residential property valued at Ksh.2.3 million by using an inflated valuation. That the respondent established that the correct value for Kajiado/Kitengela/107019 was Kshs. 1,000,000 and not Kshs. 2,300,000 indicated by the claimant.
27. For such matter, the claimant was taken through the disciplinary process and the sanction of summary dismissal issued.
28. The claimant's case is that he used Index Africa Limited to value the property, Kajiado/Kitengela/107019 and who submitted a report to the respondent with a value of Ksh.2,300,000. He however does not contest that the property was revalued by Sterling Valuers Limited and found the value of Kshs. 1,000,000 for Kajiado/Kitengela/107019.
29. Called to account for this difference, the claimant did not submit any evidence that he agreed with the vendor for the purchase price at Ksh.2,300,000 or any other value. Musti Investment Limited was paid directly by the respondent for the benefit of the claimant. Such party would have greatly assisted the claimant in his case. No sale agreement, evidence or any matter was secured from them in this regard.
30. The value of Kshs. 1,000,000 for Kajiado/Kitengela/107019 stands.



31. The claimant did not challenge the matter that he received Kshs. 500,000 and Kshs. 468,300 on 13 and 15 July 2021 in his KCB account Number 1254XXXX8. His defence was that the subject account was opened at Migori his home town. This then gave credence to the case that the entire valuation of the property by Index Africa Limited and payments to Musti Investments were fraudulent. He cannot extricate himself by asserting that he innocently opened such an account so as to receive his pensions while employment was subsisting and only ended in April, 2022. In July 2021 he had no reasons to get his pension dues.
32. Under Section 44(3) and (4) of the *Employment Act*, 2007 (the Act), an employer is allowed to summarily dismiss an employee who is found to be in breach of the employment contract and more fundamentally where the employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property contrary to the provisions of Section 44(4)(g) of the *Act*. Without any evidence to the contrary, that the claimant received funds from the respondent based on fraudulent overvaluation of plot number Kajiado/Kitengela/107019 and that he was taken through the disciplinary process and he failed to give satisfactory responses, the summary dismissal was justified. His conduct justified the sanction issued.
33. On the claims made, for days worked until 11 April 2022, the respondent should pay. These are 19 days and the claim for Kshs. 67,050.90 is justified.
34. On the claim for 23 pending leave days, there is no record by the respondent that the claimant had exhausted his leave days. The claim for payment of Kshs. 81,166.89 is justified.
35. On the claim for bonus for the year 2021, such payment is discretionary and had not been allocated as due to the claimant at the end of his employment.
36. The claimant is also seeking to retain staff rates with regard to the repayment of his loan facilities. These facilities accrued in employment. with summary dismissal, this lapsed.
37. In the notice dated 11 April 2022 the respondent advised the claimant to pay his loans standing at Kshs. 370,318.45 and Kshs. 2,267,907.50 for personal and residential property loans respectively. This amounts are due to the respondent and whatever terminal dues are payable, such should be deducted from what the claimant owes in terms of Section 19(1)(h) of the *Act*;

an amount due and payable by the employee under and in accordance with the terms of an agreement in writing, by way of repayment or part repayment of a loan of money made to him by the employer, not exceeding fifty percent of the wages payable to that employee after the deduction of all such other amounts as may be due from him under this section; and

With termination of employment, the respondent had the right to demand for the advanced loans.
38. There is no plausible response to the counterclaim. The demand to pay the loans advanced were made without the claimant making any meaningful response or proposals to be allowed to repay these at preferential rates.
39. The claim for loans advanced repayment at Kshs. 2,815,830.38 is due and payable by the claimant to the respondent. Such debt shall be paid based at court rates as of 19 July 2023 and until payment in full.
40. Accordingly, judgment is entered for the claimant in the following terms;
 - a. 19 days and the claim for Kshs. 67,050.90;
 - b. 23 leave days Kshs. 81,166.89;



41. The counterclaim is hereby allowed in the following terms;
- a. The respondent is hereby entitled to Kshs. Kshs. 2,815,830.38 to be repaid with interests at court rates from 19 July 2023 until paid in full;
 - b. The dues owed to the claimant being lower, these shall be applied to offset the counterclaim;
42. Each party to bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 9TH DAY OF NOVEMBER 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

