



**Kimkerick v Co-operative Bank of Kenya Ltd (Cause 202 of 2018)
[2022] KEELRC 1158 (KLR) (11 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1158 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 202 OF 2018**

S RADIDO, J

MAY 11, 2022

BETWEEN

ABIDAN KAPCHANGA KIMKERICK CLAIMANT

AND

CO-OPERATIVE BANK OF KENYA LTD RESPONDENT

JUDGMENT

1. The questions arising for the Court's determination are:
 - i. Whether the termination of the Claimant's employment was unfair?
 - ii. Whether the Respondent proved the Counterclaim?
 - iii. Appropriate remedies.
2. The Cause was heard on 14 December 2021 and 17 February 2022. Abidan Kapchanga Kimkerick (the Claimant) and the Head of Employee Relations with the Co-Operative Bank of Kenya Ltd (the Respondent) testified.
3. The Claimant filed his submissions on 17 March 2022 and the Respondent on 6 April 2022.

Unfair termination of employment

Procedural fairness

4. Section 35(1)(c) of the *Employment Act*, 2007 requires the employer to give the employee written notice of termination of employment, while section 41 of the Act contemplates the employer allowing the employee an opportunity to make representations before the termination.



5. The Respondent issued the Claimant a notice to show-cause on 18 September 2017. The show-cause detailed the allegation against the Claimant and requested him to give a written response, and further that disciplinary action was in contemplation.
6. The Claimant responded on 21 September 2017, and on 16 October 2017, he attended a disciplinary hearing.
7. The Claimant was then given an opportunity to appeal, and he appealed, and the same was declined on 18 December 2017.
8. Despite contending that he was not allowed to ventilate the appeal, the Claimant did not demonstrate that an oral hearing of the appeal was provided for.
9. The Court finds that the Respondent complied with the requirements of procedural fairness.

Substantive fairness

10. By dint of sections 43 and 45 of the *Employment Act*, 2007, the Respondent had the burden of proving the reasons for terminating the Claimant's contract as valid and fair.
11. The reason for the termination of the Claimant's employment was that he had refused to fill in an online copy of a Performance Improvement Program despite instructions from his superiors.
12. To show that the Claimant had declined to fill the form, the Respondent's witness produced copies of emails dated 5 September 2017 between the Claimant, his Branch Manager and the Human Resources department.
13. In one of the emails, the Claimant stated:

I had already concluded with Samuel Matheri of Hrd that filling the document on my part does not add value. I have been on PIP and for the first time in my career as a banker since January 2016 when I was transferred to the current branch and role occasioned by an illusion. I also in my conversation with Samuel Matheri indicated to him that I will be responsible for any action that comes with me not filling the PIP document.
14. With the failure of the Claimant to comply with lawful instructions of his superiors exhibited in his email, the Court is satisfied that the Respondent had and proved valid and fair reasons to terminate his contract.

Counterclaim

15. The Respondent counterclaimed against the Claimant for Kshs 4,537,042/- on account of personal loan and house loan.
16. The Claimant denied having any loans with the Respondent in the Reply to the Counterclaim.
17. Apart from the employment termination letter, the Respondent did not place any contractual records before the Court to show that the Claimant had taken loans or had outstanding loans.
18. The Respondent did not prove the Counterclaim.

Conclusion and Orders

19. From the foregoing, the Court finds no merit in the Cause and Counterclaim, and both are dismissed.



20. Each party to bear its own costs.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS
11TH DAY OF MAY 2022.**

Radido Stephen, MCI Arb

Judge

Appearances

For Claimant Lusinde Khayo & Co. Advocates

For Respondent Federation of Kenya Employers

Court Assistant Chrispo Aura

