



**Oigo v Wakenya Pamoja Sacco Society Limited & another (Cause
2543 of 2016) [2022] KEELRC 1234 (KLR) (21 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1234 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2543 OF 2016**

**L NDOLO, J
JULY 21, 2022**

BETWEEN

VINCENT MOKUA OIGO CLAIMANT

AND

WAKENYA PAMOJA SACCO SOCIETY LIMITED 1ST RESPONDENT

SACCO SOCIETY REGULATORY AUTHORITY 2ND RESPONDENT

JUDGMENT

Introduction

1. The Claimant, Vincent Mokuo Oigo was an employee of the 1st Respondent, Wakenya Pamoja Sacco Society Limited, a savings and credit society regulated by the 2nd Respondent, Sacco Society Regulatory Authority (SASRA).
2. By way of an amended Statement of Claim filed in Court on 11th December, 2019, the Claimant initiated the present claim, alleging unfair termination of his employment by the 1st Respondent and non-payment of terminal dues.
3. The 1st Respondent filed an amended Statement of Response on 2nd November, 2020 and the 2nd Respondent filed a Statement of Defence and Counterclaim on 4th April 2018.
4. The matter was initially heard by Makau J and when the parties appeared before me on 21st September 2021, they agreed that I proceed from where my brother Judge had stopped.
5. The Claimant testified on his own behalf and the 1st Respondent called its Chief Executive Officer, Isaac Omwenga and the 2nd Respondent called its Acting Manager and Senior Legal Officer, Jeremiah J. Were.
6. At the time of writing this judgment, only the Claimant had filed final submissions.



The Claimant's Case

7. The Claimant states that he was employed by the 1st Respondent on 5th August 1994, in the position of a Savings Clerk. He rose through the ranks to become Chief Executive Officer effective 23rd December 2013. He was confirmed to this position by letter dated 17th April 2014. At the time of separation, the Claimant earned a monthly salary of Kshs. 277,744.
8. The Claimant worked for the 1st Respondent until 5th August 2016 when he was suspended from duty by the 2nd Respondent. The Claimant terms the suspension as illegal and unlawful and adds that the 1st Respondent had written to the 2nd Respondent seeking the lifting of the suspension to allow the Claimant resume duty.
9. The Claimant avers that the 1st Respondent subsequently issued him with a letter dated 27th October 2016, terminating his employment, on instructions and recommendations of the 2nd Respondent. The Claimant maintains that the 2nd Respondent had no authority or power to make any such recommendations.
10. The Claimant contends that the termination of his employment was unlawful and unfair. He points out that he was not accorded a fair hearing prior to the termination, contrary to the mandatory provisions of Section 41 of the Employment Act, 2007.
11. The Claimant therefore seeks the following remedies:
 - a) Reinstatement without loss of benefits or discontinuity of service plus payment of all salaries and allowances for the period he was not employed;
 - b) In the alternative, terminal dues and compensation amounting to Kshs. 23,212,988.92/- comprising of:
 - i) One month's salary in lieu of notice.....Kshs. 277,744.00
 - ii) Leave due (119 days).....1,271,212.92
 - iii) Severance pay for every completed year of service as per Clause 13.7 of the Human Resource Management Policy and Procedures Manual dated January 2015
(3 weeks x 277,744 x 22 years).....18,331,104.00
 - iv) 12 months' salary in compensation.....3,332,928.00
 - v) Damages for loss of employment
 - vi) Salary arrears for suspension period
 - vii) Costs of the case

The 1st Respondent's Case

12. In its amended Statement of Response, the 1st Respondent admits having engaged the Claimant as pleaded in the amended Statement of Claim, with his last position being Chief Executive Officer for the period between December 2013 and October 2016.
13. The 1st Respondent however denies that it unfairly terminated the Claimant's employment as alleged. It contends that the termination was as a result of mismanagement of its funds by the Claimant and adds that due procedure as set out in the Employment Act was fully adhered to.



14. The 1st Respondent confirms having received a directive from the 2nd Respondent in accordance with the provisions of Section 51 (c) of the [Sacco Societies Act](#), directing the suspension of the Claimant for mismanagement of funds. The 1st Respondent clarifies that it had sought for the Claimant's resumption of duty only to facilitate criminal investigations into the issue.
15. The 1st Respondent maintains that it had a legal duty to implement directives of the 2nd Respondent in order to avert further loss caused by the Claimant and other officials. It is on this basis that the 1st Respondent argues that the Claimant's termination was lawful and justified.
16. The 1st Respondent further maintains that the Claimant was given an opportunity to make his representation on the accusations levelled against him, which he did vide his letter dated 16th August 2016. The 1st Respondent claims to have taken the Claimant's response into consideration.
17. The 1st Respondent denies that the 2nd Respondent overstepped its mandate under the [Sacco Societies Act](#), by directing that the Claimant be suspended on account of mismanagement of funds. The 1st Respondent confirms having worked in consultation with the 2nd Respondent in investigating the claims of mismanagement of funds by the Claimant and other officials of the 1st Respondent.
18. The 1st Respondent contends that the Claimant was paid his terminal dues at the time of separation and maintains that the Claimant has no claim against it. It is further the 1st Respondent's contention that it is entitled to recover the sum of Kshs. 77,819,455 being money lost through mismanagement.
19. In conclusion the 1st Respondent urges the Court to find the Claimant's claim devoid of merit and to accordingly dismiss it with costs to the Respondents.

The 2nd Respondent's Case

20. On its part, the 2nd Respondent maintains that the Claimant was lawfully and legally suspended from duty, for mismanagement of funds and that it had power to recommend his suspension.
21. The 2nd Respondent avers that the Claimant failed to carry out his mandate as Chief Executive Officer of the 1st Respondent, of ensuring protection of members' funds deposited with the 1st Respondent in accordance with the provisions of the [Sacco Societies Act](#) and the Regulations, 2010 which Regulations grant the 2nd Respondent supervisory and regulatory power over both the 1st Respondent and the Claimant.
22. The 2nd Respondent states that in the course of exercising its supervisory and regulatory mandate over the 1st Respondent in line with the provisions of Sections 49, 50 and 51 of the [Sacco Societies Act](#), it received information and complaints from members of the 1st Respondent, leading it to reasonably believe that the business and activities of the 1st Respondent were being conducted in a manner contrary to the provisions of the [Sacco Societies Act](#) and the Regulations.
23. The 2nd Respondent adds that in exercise of its powers as mandated by the provisions of Section 51 of the [Sacco Societies Act](#) as read together with Regulations 66, 67 and 68 of the [Regulations](#), 2010 it ordered the suspension of the Claimant, vide its directive issued on 5th August 2016.
24. The 2nd Respondent avers that the Claimant was accorded a chance to respond to the directive which he did vide his letter dated 16th August 2016. The 2nd Respondent maintains that the Claimant's response was duly considered prior to the decision to terminate his employment.
25. It is the 2nd Respondent's case that the decision to terminate the Claimant's employment was justified and that due process was followed. The 2nd Respondent argues that the Claimant was found to



have embezzled funds belonging to the public and additionally was guilty of breaching the fiduciary trust bestowed upon him by concealing and/or facilitating the concealment of fraudulent activities committed in the management of the 1st Respondent and was therefore unfit to hold office as Chief Executive Officer.

26. It is on this basis that the 2nd Respondent maintains that the claim against it is defective and is not supported by law. The 2nd Respondent urges the Court to dismiss the claim in its entirety with costs to the Respondents.
27. By way of Counterclaim, the 2nd Respondent seeks compensation from the Claimant for loss of members' funds and further putting the 1st Respondent at the risk of loss of members' funds through:
- a) Allowing and/or facilitating payment of cash advances totalling to Kshs. 3,780,000 to one Nelson G. Simba;
 - b) Allowing and/or facilitating the irregular and illegal advancement of a credit facility of Kshs. 3,000,000 to one Vincent Sagwe Rioba;
 - c) Allowing and/or facilitating the irregular overdraw of member FOSA savings accounts held by the 1st Respondent to the tune of Kshs. 40,175,230;
 - d) Imprudently and recklessly entering into and/or causing the 1st Respondent to enter into a fixed lease agreement in respect of a building in Kisii town for the sum of Kshs. 200,000 per month running from 1st November 2014 to 31st January 2020, purportedly for purposes of conducting a deposit taking microfinance business, while knowing that the 1st Respondent had not been granted a license or authority to open or operate such business, leading to a loss of five (5) years' and three (3) months' rent amounting to Kshs. 12,600,000, which the 1st Respondent was legally bound to pay, for a building which it cannot and will never use;
 - e) Imprudently and recklessly incurring or causing the 1st Respondent to incur capital expenditures in the sum of Kshs. 18,264,225 purportedly for the renovation of a building for deposit taking microfinance activities, while knowing the 1st Respondent had no authority to open or operate such business, leading to loss of the said sum of Kshs. 18,264,225;
 - f) Failing to discharge the statutory duties of Chief Executive Officer of a Sacco society as prescribed in Regulation 64 of the Regulations 2010, leading to loss of members' funds and/or putting the 1st Respondent at the risk of losing members' funds by:
 - i) Failing to report insider lending to the Authority;
 - ii) Failing to implement internal controls to prevent fraud and embezzlement of members' funds;
 - iii) Opening and operating places of business without the approval of the 2nd Respondent;
 - iv) Failing to secure the correctness and accuracy of statutory reports;
 - v) Granting credit facilities to persons who were not members of the 1st Respondent, contrary to the law;
 - vi) Granting credit facilities without ensuring that the said facilities were fully secured, contrary to the law.
28. The 2nd Respondent urges the Court to find merit in its Counterclaim against the Claimant and enter judgment in the following terms:



- a) That the Claimant's suit be dismissed with costs;
- b) A declaration that the Claimant wilfully and intentionally abused duty entrusted to him as the Chief Executive Officer of the 1st Respondent;
- c) That judgment be entered against the Claimant for the sums of money as particularized in the removal directive dated 24th October 2016 in favour of the 1st Respondent;
- d) Costs plus interest.

The Claimant's Evidence

29. In his testimony before the Court, the Claimant denied every allegation of mismanagement of funds alleged by the Respondents and maintained that the Respondents did not give him time to make his representation, prior to termination of his employment.
30. The Claimant further testified that the allegations of misconduct were never proved and thus his termination on that ground was unlawful and unfair.
31. The Claimant further argued that he was entitled to severance pay, in line with the provisions of Section 13.7 of the Human Resource Manual.
32. As regards the Counterclaim, the Claimant denied any culpability, insisting that his actions were in line with the provisions of the law. In particular, the Claimant stated that Nelson G. Simba was eligible for the loan facility advanced to him and that the loan had been duly repaid.
33. On the issue of lease agreement and building renovations, the Claimant stated that he could not proceed with leasing of property without approval by the Board. He further stated that a letter of no objection had been issued and thus the lease and renovations were necessary.
34. The Claimant maintained that there was no loan that was not repaid and no staff member was advanced more than they were entitled to. He contended that all Sacco records were properly kept and that no loans were written off due to irregularities.
35. On cross examination, the Claimant conceded that the 2nd Respondent had a duty to supervise Saccos and that it equally had a duty to look into the allegations levelled against him.
36. The Claimant also conceded that as at the time of opening of the Kisii office for microfinance business, there was no licence from the Central Bank of Kenya. He however fronted the letter of no objection as the basis for opening of the office.
37. The Claimant insisted that he was not aware of any loss of funds during his tenure as Chief Executive Officer of the 1st Respondent, pointing out that he had not been charged with any criminal offence relating to the alleged fraud.
38. The Claimant contended that the Counterclaim raised against him by the 2nd Respondent was not supported by any evidence and asked the Court to dismiss it with costs.
39. The Claimant reiterated that he was not accorded a fair hearing, noting that he was never invited for any oral hearing, despite being entitled to a chance to make his representation orally to counter the allegations levelled against him.
40. The Claimant blamed the 2nd Respondent for initiating the termination of his employment, which he termed as unlawful and unfair.



The 1st Respondent's Evidence

41. Isaac Omwenga testified for the 1st Respondent. He told the Court that the Claimant owes the 1st Respondent the sum of Kshs. 77,819,455 which was lost during his tenure as Chief Executive Officer, arising from loans irregularly advanced to members of the 1st Respondent.
42. Omwenga also accused the Claimant of causing payments without proper authorisation, thus occasioning loss to the 1st Respondent.
43. Regarding the issue of lease of premises for microfinance business, the witness testified that the Claimant did not brief the 1st Respondent's Board properly before paying rent for the premises and initiating the process of renovations in the building, despite there being a requirement for him to do so.
44. On cross examination Omwenga confirmed that as Chief Executive Officer, the Claimant implemented the decisions of the Board and could not spend money without a Board resolution nor sign cheques on his own.
45. The witness conceded that the responsibility of approving loans is placed on the 1st Respondent's Loans Committee and that the Chief Executive Officer plays only an advisory role. He however stated that the Chief Executive Officer could overrule the decision of the Loans Committee but did not specify the particular rule under which the Chief Executive Officer could exercise such power.
46. Omwenga confirmed that the Claimant's employment was terminated on 26th October 2016 as per the directive and recommendation of the 2nd Respondent. He further told the Court that the Claimant was invited for a disciplinary hearing by the 1st Respondent's Board but did not have any minutes of such a hearing.
47. He specified that the Claimant attended the meeting, despite the fact that he was not formally invited for it. He testified that the allegations levelled against the Claimant were read out to him. He averred that the Board acted as a disciplinary committee for senior management staff of the 1st Respondent, including the Claimant.
48. The witness further confirmed that the Claimant's termination was effected immediately the 1st Respondent received the 2nd Respondent's recommendation for his removal.
49. Regarding the allegations on the loan facilities alleged to have been advanced irregularly, the witness stated that the loan to Vincent Sagwe was given without proper documentation as the said customer had not filled any loan application form. The loan to Nelson G. Simba is said to have been irregular because the customer had not given security, prior to the loan disbursement. The witness testified that the security was given after disbursement of the loan.
50. The witness confirmed that the Claimant's dues were tabulated as Kshs. 798,362.23 being salary in lieu of notice, leave pay, shares, less tax. He however told the Court that this money was not paid out to the Claimant, stating that the Claimant was indebted to the 1st Respondent to the tune of Kshs. 969,773.86, thus leaving a post set-off balance of Kshs. 171,411.61.

The 2nd Respondent's Evidence

51. Jeremiah J. Were testified on behalf of the 2nd Respondent. He told the Court that upon receipt of complaints, the Claimant was given a period of thirty (30) days to respond to the allegations levelled against him, which he did on 16th August 2016.



52. The witness maintained that the 2nd Respondent considered the Claimant's response and made its recommendations and findings for consideration by the 1st Respondent, with regard to the Claimant's employment. He contended that the 2nd Respondent acted well within its powers as provided under Section 51 (c) of the *Sacco Societies Act* as read with Regulations 66, 67 and 72 of the *Regulations*, 2010.
53. On cross examination, Were confirmed that in launching investigations into the management of the 1st Respondent, the 2nd Respondent had acted on anonymous reports.
54. He stated that the 2nd Respondent investigated the allegations levelled against the Claimant and prepared a report in which it recommended the Claimant's removal. He admitted that the report was not availed to the Court.
55. Were maintained that the termination of the Claimant's employment was for a valid reason and that due process was followed. He averred that the Claimant was given a fair hearing and that he was further informed of his right to appeal the decision vide letter dated 25th October 2016.
56. According to the witness, the 2nd Respondent properly exercised its powers in giving its directive to the 1st Respondent regarding the Claimant.

The Claimant's Submissions

57. In his written submissions, the Claimant submits that there were no valid reasons for the termination of his employment and that the Respondents failed to explain to him how his detailed response to the suspension letter was unsatisfactory, if at all. He argues that the 2nd Respondent who recommended the termination of his employment had no role in the affairs of the 1st Respondent warranting it to recommend and/or direct his removal from office.
58. The Claimant further submits that the termination was unlawful, unfair and un-procedural as the Respondents failed to comply with the mandatory provisions of Section 41 of the *Employment Act*, 2007.
59. To buttress its position, the Claimant relies on the decision in *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR where it was held that for a termination of employment to be fair, the employer must prove that there were valid reasons for it and that the employee was accorded a fair hearing as required under the provisions of Section 41 of the *Employment Act*, 2007.
60. The Claimant submits that he has proved that the termination of his employment was unlawful and unfair and thus seeks maximum compensation as provided by Section 49 as read with Section 50 of the *Employment Act*.
61. The Claimant further submits that he is entitled to one month's salary in lieu of notice being Kshs. 277,744 as provided under Section 35 of the Act.
62. On leave days due, the Claimant argues that he is entitled to pay in lieu of 119 leave days earned but not taken, translating to the sum of Kshs. 1,271,212.92. He further argues that no evidence has been availed to the Court to prove that had utilised all his leave days.
63. With respect to severance pay the Claimant submits that he is entitled to compensation under this head in accordance with Clause 13.7 of the 1st Respondent's Human Resource Management Policy and Procedures. He claims the sum of Kshs. 3,525,221.31.



Analysis and Determination

64. Having examined the pleadings, evidence and submissions on record, the following issues emerge for determination in this case:
- a) Whether the termination of the Claimant's employment was lawful and fair;
 - b) Whether the Claimant is entitled to the reliefs sought;
 - c) Whether the Counterclaim against the Claimant has merit;

The Termination

65. On 27th October 2016, the 1st Respondent wrote the following letter to the Claimant:

“Dear Sir,

RE: TERMINATION OF SERVICE

Following the recommendations and administrative Directions received by this office from Sacco Societies Regulatory Authority (SASRA) under REF: SASRA/SS/CS.2349/ENF/2016(18) which you are aware of and the Joint Board, Supervisory Committee and SASRA officials meeting held at SASRA offices Nairobi on 26th October, 2016 under Min. No. 1/26/10/2016, we wish to bring to your attention that your services with Wakenya Pamoja Sacco Society Ltd as a Chief Executive Officer has been terminated with effect from 26th October, 2016.

Please note that you are entitled for (sic) terminal dues as per section 13 of the Society's Human resource Policy.

You are further directed to hand over any SACCO property in your possession to the Ag. CEO.

We wish you the best in your future endeavors.

Yours faithfully,

(signed)

Hezekiah Nyasamba

Ag. Chairman

WAKENYA PAMOJA SACCO SOCIETY LTD”

66. In issuing this letter, the 1st Respondent relied on a directive issued by the 2nd Respondent on 25th October 2016, directing that the Claimant be removed from office as Chief Executive Officer of the 1st Respondent.
67. The termination letter was preceded by a suspension letter dated 5th August 2016, by which the Claimant was suspended for a period of 90 days. The suspension was triggered by a directive issued by the 2nd Respondent on the same day. The directive was contained in a detailed notice of intention to remove the Claimant as an officer of the 1st Respondent. It contained a litany of allegations ranging from irregular advancement of credit facilities, overdrawn members' accounts, unsanctioned expenditure on third party premises, to failure to update members' shares register.



68. The Claimant was required to submit a written explanation on the allegations levelled against him within 30 days and he did so on 16th August 2016.
69. Overall, the Claimant in his response, acknowledged that there were certain lapses in the management of the 1st Respondent. In his conclusion he states:

“Just like any other financial institution, WPS has had several challenges from within and without. Competitors in the region, former staff and/or directors, literacy levels of members and even poor crop seasons, are accelerating most of the challenges. However, we are on course and hope that the challenges can be overcome with time.

WPS is a leader in Sacco and MF business in the region. I am aware that there are areas the WPS has not adhered to under my watch and given opportunity I hope to transform the institution by building on the challenges to become opportunities. It’s my dream that the WPS will maintain to be the leader with best co-operative principles in the region and country.

Removing me from the institution that I have freely worked for the last 22 years would deny me an opportunity to put into practice the experience and professionalism we have gained over the years and the same will definitely go to waste. My entire life and that of my family has been revolving in the co-operative movement.

Once again I am sorry for the lapses that may have occurred in the course of discharging my duties as the Chief Executive Officer of the said Wakenya Pamoja Sacco Society (WPS) and further apologize for any inconvenience caused.”

70. From the foregoing, it is not in contest that there were management lapses within the 1st Respondent at the time the Claimant served as its Chief Executive Officer. It is also not in controversy that the 2nd Respondent had a statutory mandate under the *Sacco Societies Act* (Cap 490B, Laws of Kenya) and the *Sacco Societies (Deposit Taking Sacco Business Regulations)* 2010 to supervise the affairs of the 1st Respondent.
71. The question remains whether the subject lapses constituted a valid reason for termination of the Claimant’s employment by way of removal.
72. As a general rule, any employer terminating the employment of an employee is required to demonstrate a valid reason for doing so. This is the essence of Section 43 of the *Employment Act* which provides as follows:

43.

- (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or 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.
- (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the



employer to terminate the services of the employee.

73. In defining what constitutes a valid reason for termination of employment, the Court of Appeal, in its decision in *Reuben Ikatwa & 17 others v Commanding Officer British Army Training Unit Kenya & another* [2017] eKLR held that a reason that would cause a reasonable employer to terminate employment is a valid reason.
74. By the Claimant's own admission, the 1st Respondent, for which he worked as Chief Executive Officer, is a financial institution holding funds belonging to the public. It follows therefore that the Claimant had a fiduciary duty of care and by his own admission, there were lapses under his watch.
75. In my view, the Claimant being the captain of the 1st Respondent, cannot escape culpability by blaming the Board or other employees of the 1st Respondent. Responsibility lay at his doorstep and I therefore find and hold that there was a valid reason for his removal.
76. The Claimant faults the procedure adopted by the Respondents in executing the removal. In particular, he points out that he was not afforded an oral hearing and relies on Section 41 of the *Employment Act* which provides thus:
- (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
 - (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.
77. I have already stated that the Claimant, as Chief Executive Officer of the 1st Respondent, had a fiduciary duty. Sections 48, 49, 50 and 51 of the *Sacco Societies Act*, alongside Regulations 66, 67 and 72 of the *Sacco Societies (Deposit Taking Sacco Business) Regulations* provide an elaborate system of removal of Sacco Society Officers, such as the Claimant. This is what was applied in dealing with the Claimant's case and the Court did not find anything in the adopted process that derogated from the procedural fairness dictates of Section 41 of the *Employment Act*.
78. In the result, the Claimant's claims for reinstatement and/or compensation and damages are without basis and are dismissed. The claims for terminal benefits were not proved and are also dismissed.

The Counterclaim

79. In its Counterclaim against the Claimant, the 2nd Respondent seeks compensation from the Claimant for loss of members' funds and further putting the 1st Respondent at the risk of loss of members' funds, through various acts and/or omissions.
80. However, no evidence was led to support the Counterclaim which therefore fails and is dismissed.

Final Orders

81. Ultimately, both the Claimant's claim and the Counterclaim against him are dismissed.
82. Each party will bear their own costs.



83. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF JULY 2022

LINNET NDOLO

JUDGE

Appearance:

Mr. Nyabena for the Claimant

Miss Matunda for the 1st Respondent

Miss Omwenga for the 2nd Respondent

