



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 621 OF 2014

BETWEEN

JOB OMAMBIA MARIARACLAIMANT

VERSUS

CONSOLIDATED BANK OF KENYARESPONDENT

Rika J

Court Assistant: Emmanuel Kiprono

Omwoyo Masese & Company Advocates for the Claimant

Mutteithia Kibira & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 15th April 2014. He avers, he was employed by the Respondent Bank on 1st November 2007. He was in the position of Credit Manager as of 31st December 2013, when he claims that the Respondent terminated his contract unfairly. His last gross monthly salary was Kshs. 147,298.
2. The reason given by the Respondent in justifying termination was that the Claimant was engaged in fraudulent land transaction, yet the transaction had the approval of a Land Valuer appointed by the Respondent – Mureithi Valuers Company.
3. The Claimant applied for a loan in May 2011, based on land valuation given by Mureithi Valuers. The loan application was approved by the Respondent. In November 2013, prior to the valuation, the Claimant had applied for a staff loan to purchase two plots, within Narok Town, registration numbers CISMARA/OLELESHWA/4204 and 4205.
4. He worked for 5 years. He did not have a single warning. He prays for Judgment against the Respondent for: -
 - a. Declaration that termination was wrongful.
 - b. 3 months' salary in lieu of notice at Kshs. 441,894.
 - c. Service gratuity at 23 days' salary for 5 complete years of service, at Kshs. 651,510.
 - d. 12 months' salary in compensation for unfair termination at Kshs. 1,767,577.

Total...Kshs.2,860,981.

- e. Loss of future earnings.

- f. Reinstatement.
- g. Costs.
- h. Interest.
- i. Any other suitable remedy.

5. The Respondent filed its Statement of Response on 16th May 2014. It is conceded that the Claimant was employed by the Respondent, on terms stated in his Statement of Claim. He was dismissed by the Respondent lawfully and fairly.

6. He applied for a staff loan of Kshs. 4,180,000, on 15th October 2013. He indicated that he wanted to buy residential property in Narok, from one Daniel Olomae Sapit. He presented a valuation report from Mureithi Valuers, a firm the Respondent was not comfortable with, owing to past falsified valuation reports.

7. The report indicated that the property consisted two titles- CISMARA/ OLELESHWA/ 4204 and 4205, with one permanent house, an ablution block and semi-permanent poultry structure, valued at Kshs. 4,700,000.

8. On 7th November 2013, the Respondent instructed Royal Valuers to do fresh valuation. Its report of 12th November 2013 indicated that the plots were not registered in the name of Daniel Olomae Sapit; they were already registered in the name of the Claimant. Registration was on 18th October 2013. Royal Valuers also established that the plots were vacant and undeveloped. Their market value was Kshs. 750,000 each, amounting to Kshs. 1,500,000 for both plots. Mureithi Valuers had quoted a market value of Kshs. 4,700,000, with developments valued at Kshs. 3,300,000. The Claimant attempted to obtain a loan of Kshs. 4,180,000 fraudulently.

9. The Respondent wrote to the Claimant on 15th November 2013 asking him to explain the discrepancy. He replied on 18th November 2013, totally contradicting himself, and confirming there was dishonesty involved. He was called to a disciplinary hearing which took place on 4th December 2013. The committee heard the Claimant and concluded that the Claimant acted dishonestly. It was recommended that his contract is terminated. He received his pension, and does not merit service pay. Other prayers similarly have no legal and factual foundation. The Respondent prays that the Claim is dismissed with costs.

10. The Claimant gave evidence, as did Respondent's Human Resource Manager Rose Mukoba, on 10th December 2020, closing the hearing. The Claim was last mentioned in Court on 19th February 2021, when Parties confirmed filing of their last arguments.

11. The Claimant restated the contents of his Statement of Claim in his evidence. He emphasised that Mureithi Valuers was in the panel of Valuers retained by the Respondent. He was called after he lodged his application and advised to make a formal application, as his first application based on the valuation by Mureithi, was not approved. The Respondent said it was uncomfortable with Mureithi. He never saw the second valuation report by Royal. He was summoned by the Respondent who alleged that the Claimant had attempted to obtain loan fraudulently. He did not have contact with Mureithi before valuation. The Claimant was prejudged. Adam Kasaine, Head of Retail said from the outset that the Respondent was done with the Claimant. The summary dismissal letter is dated 31st December 2013, before the disciplinary panel presented its report to the executive. The Claimant was unable to secure alternative job after dismissal. He did not have a warning. He was a Champion –ISO Challenge at his Isiolo Branch. He did not act fraudulently. The Respondent appointed the valuer. He was to pay the loan through his salary check off.

12. Cross-examined, the Claimant told the Court he applied for an initial loan in 2011 which was granted. He had not developed the property by 2013 when he applied for a second facility. There was an open market valuation. Developments were assigned a value of Kshs. 3.3 million. The Respondent appointed another valuer. He valued the two plots at a total of Kshs. 1.5 million. The Claimant explained in his letter of 18th November 2013, that the plot where the residence was perceived to be had been transferred. The plots had been transferred to the Claimant by 18th October 2013. He applied for the loan while the plots were in his own name. He was accorded a hearing, but was not given enough attention. His role of Credit Assistant demanded a lot of integrity. He was paid pension. He did not defraud Olomae Sapit.

13. Redirected, the Claimant told the Court that previous transaction relied on valuation done by Mureithi. There was no issue then. The first property in 2011 belonged to the same vendor. Sapit told the Claimant in 2013 that he had an adjacent plot with a residential house. The Claimant applied for a loan to acquire this. He was not an expert on valuation. At the time of valuation, it was in the name of Sapit. Sapit was traveling out of the country and opted to transfer to the Claimant. The maps and mutation forms were interchanged at the lands registry, but development was there. If approved, the loan would have been recovered through salary check-off.

14. Mukoba restated that the Claimant applied for loan, to buy plots with developments. The valuation by Mureithi confirmed there were developments, while Royal confirmed there was none. When asked to explain, the Claimant stated that where the house was perceived to be was transferred in his name. He regretted that the house was not where it was thought to stand. He did not disclose to the Respondent that the property was already in his name, when he sought the loan. The Respondent does not finance owners of property to buy their own property. He received pension and terminal dues.

15. Mukoba told the Court on cross-examination that she sat in the disciplinary committee as its secretary. Jecinta was not present, but signed the minutes of the disciplinary committee. Decision to dismiss was made at the hearing. The report was signed in January 2014. Dismissal was on 4th December 2013. Banking industry values integrity. The Claimant's good performance and promotion, was not concurrent with the offence over which he was dismissed. The Respondent did not involve the Police. The Respondent would have been exposed, based on the faulty valuation by Mureithi.

16. Redirected, Mukoba told the Court that Royal valued the plots at Kshs. 1.5 million. Mureithi valued developments at Kshs. 3.3 million. If the Claimant had asked for loan for vacant plots, there would have been no problem. The Respondent gave reasons for its decision. Attempted fraud led to loss of trust. If the Claimant had accessed the loan based on Mureithi's valuation, and defaulted in repayment, the Respondent stood to lose Kshs. 3.3 million.

17. The issues as understood by the Court are: whether the Respondent had valid reason to justify termination; whether fair procedure was followed; and whether the Claimant merits the remedies sought. The relevant law is to be found in Sections 41, 43, 45, 47 [5] and 49 of the Employment Act 2007, read with Section 12 [1] of the Employment and Labour Relations Court Act, 2011.

The Court Finds: -

18. The Claimant was employed by the Respondent Bank on 1st November 2007 up to 31st December 2013. At the time of leaving employment, he was a Credit Assistant. This is attested in his Certificate of Service issued by the Respondent, dated 3rd February 2014. His pay slip of December 2013, shows that his gross monthly salary was Kshs. 147,298.

19. He was summarily dismissed by the Respondent, through a letter dated 31st December 2013.

20. The letter states that the Claimant was involved in a fraudulent transaction, with the serious intention to defraud the Bank of Kshs. 4,180,000 by: presenting a valuation report which indicated that the property to be purchased consisted two plots, on which stood one permanent house, an ablution block and a semi-permanent poultry [structure?], all valued at Kshs. 4.7 million, yet in reality the plots to be purchased were vacant and valued at Kshs. 1.5 million only; failing to disclose to the Bank that the two plots were already registered in the name of the Claimant; and disregarding the principle of segregation, and his duty to protect the Bank's interest as the Claimant allowed the same person who was selling the property, to handle the whole process.

21. On procedure, it is agreed that the Respondent issued the Claimant a letter dated 15th November 2013, which although not expressly stated to be a letter to show cause, was in the nature of a letter to show cause. The charges against the Claimant were set out. He was asked to *"kindly let us understand why you still require financing, yet you have already acquired the properties."*

22. The Claimant replied through his letter of 18th November 2013. He expressed regret stating that he had learnt that the developments assigned valuation of Kshs. 3.3 million, did not sit on the two plots he was being financed by the Respondent to buy. He went on to say that there was a mix-up at the Land Registry. He also confirmed that the plots were transferred to him on 18th October 2013.

23. He was heard by the disciplinary committee on 4th December 2013. It was recommended that he is summarily dismissed.

24. There were some notable defects in the procedure. First, the report was signed and dated after the Claimant had already been dismissed. The committee signed on 2nd and 3rd January 2014. The Acting Chief Executive Officer signed on 3rd January 2014. It is indicated at the bottom of the report, presumably by the Acting CEO, that recommendation would be brought to the attention of *"HOC for attention/implementation."* The report had already been implemented on 31st December 2013 with the dismissal of the Claimant. Second, it is agreed that Jacinta Wanga signed the report, but did not attend the actual hearing. Courts have held, especially in claims relating to Fair Administrative Action Act, that a person who was not involved at the hearing, has no business signing the end report. The report is owned by those who participate in the hearing.

25. The Court is persuaded that save for the defects identified above, procedure was largely in conformity with Sections 41 and 45 of the Employment Act. The Claimant was issued a letter to show cause; he responded at length; and was heard in full.

26. There was, overwhelmingly, valid reason to justify termination. The Claimant was a Credit Officer, a Banker, with understanding of the premium placed in banking industry, on the virtues of integrity, honesty, trust and confidence.

27. He applied for a staff loan of Kshs. 4,180,000 on 15th October 2013. He was to purchase residential property in Narok County. He provided valuation report from Mureithi Valuers, indicating the property was valued as follows:

§ Plot 4204...Kshs. 700,000.

§ Plot 4205...Kshs. 700,000.

§ Developments...Kshs. 3,300,000.

Total...Kshs. 4,700,000.

28. The Respondent sought a second valuation, which was done by Royal Valuers. It was reported that: -

§ The plots were already registered in the Claimant's name, on 18th October 2013.

§ The plots were vacant with no developments.

§ They had an open market value of Kshs. 750,000 each- total Kshs. 1.5 million.

The two Valuers basically agreed on open market value, at Kshs. 1.4 and Kshs. 1.5 million respectively, the significant departure being in the purported developments, valued at Kshs. 3.3 million by Mureithi.

29. The plots were registered in the name of the Claimant on 18th October 2013. The loan had not been approved or processed by the time he was registered as the owner of the plots. He did not disclose to the Respondent that he had effected registration. The Respondent does not finance staff to buy their own properties. He misled the Respondent, stating that there were developments valued at Kshs. 3.3 million. The plots were vacant. His explanation about the mix-up at the Lands Registry is incomprehensible. He could have ended up facing criminal charges for attempting to obtain by false pretences. The mix-up if any, ought to have been manifested in the initial land registry search, and report by Mureithi Valuers. One does not buy a property and start advancing improbable theories about mix –up at the Registry which has just registered him as the owner of the subject property. It is not helpful to the Claimant to suggest that he could escape liability, because the firm of Mureithi Valuers, was in the panel procured by the Respondent. The transaction belonged to the Claimant. He, and he alone, stood to benefit from the windfall of Kshs. 4.1 million.

30. He totally abused the trust and confidence placed on him as a Credit Assistant. Could he continue to be trusted to lend credit assistance in the Bank, while he was at the centre of a sizeable delinquent credit transaction? He nearly misled the Respondent to lend him a large sum of Kshs. 4.1 million, while he had already acquired the property over which the loan was sought. He lied that there were developments worth Kshs. 3.3 million, which with the open market value of Kshs. 1.4 million, justified the loan amount of Kshs. 4.1 million. In event he defaulted, the Respondent would be hampered in pursuing the debt, as there were no developments on the plots, of any value.

31. There was substantive reason to justify dismissal under Sections 43 and 45 of the Employment Act. The Respondent discharged its evidential burden, under Section 47[5] of the Employment Act 2007.

32. The prayer for 3 month's salary in lieu of notice is not merited, as the Claimant was engaged in gross misconduct, which justified summary dismissal.

33. He has not established the prayer for service / gratuity. He was subscribed to the N.S.S.F as shown in his pay slip of December 2013. He was paid his dues under the Respondent's Staff Retirement Benefits Scheme, as shown in the statements exhibited by the Respondent.

34. Reinstatement is completely out of the reach of the Claimant, having been summarily dismissed for valid reason. Even had the Court found termination was unfair, it would not give an order of reinstatement, given that dismissal took place on 31st December 2013- over 7 years ago, while the E&LRC Act, places a time-limit of 3 years from the date of termination, on the remedy of reinstatement.

35. The prayer for loss of future earnings has no support in fact and law, and is declined.

36. It is declared that for reasons stated at paragraph 24 above, termination was unfair and the Claimant would ordinarily merit some minimal compensation.

37. Having failed in almost all frontiers, the Claimant would ordinarily meet the costs of the Claim.

38. The Court is satisfied that an order for Parties to bear their costs, would in the end satisfy mutual obligations.

IT IS ORDERED: -

a. Procedure was flawed, warranting a declaratory order, that termination was unfair.

b. No order on the costs.

Dated, signed and released to the Parties under Ministry of Health and Judiciary Covid-19 Guidelines, at Chaka, Nyeri County, this 28th day of May, 2021

James Rika

Judge