



IN THE REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

ELRC. CAUSE NO. 2141 OF 2014

ANNE WACEKE MAKORI.....1ST CLAIMANT

JAMES ASIBA.....2ND CLAIMANT

EMILY CHEMILI LANGAT.....3RD CLAIMANT

VERSUS

FAULU MICROFINANCE BANK LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimants were employed by the Respondent until 11.11.2014 when they were laid off. They brought this suit on 2.12.2014 under Certificate of urgency alleging that the layoff was done contrary to section 40 of the Employment Act and their employment contracts, and it amounted to unfair termination and also breach of their contracts of service. They further averred that they were discriminated during the termination and they were treated like criminals by the employer. Therefore the suit seeks the following reliefs:

- (a) Reinstatement of the claimants to their former employment and positions without loss of benefit and/or seniority and continuity of service.
- (b) In the alternative, payment to the claimants, actual pecuniary loss suffered since the date of termination including salary, house allowance plus all other accruing allowances.
- (c) Declaration that the claimants have suffered unfair and wrongful redundancy exercise in the first instance.
- (d) Declaration that the respondent is not entitled to recall the credit facilities together with accrued interest in advance granted to the claimants contrary to the Offer Letters of credit signed by the claimants and the respondent.
- (e) In the alternative the respondent grants 50% discount on all the credit facilities granted to the claimants less accrued interest should the respondent recall all the credit facilities.
- (f) A declaration that the respondent intentionally breached the provisions of the Employment Act, Article 2,10,20,26,27,28,41,43,47 and 48 of the Constitution.
- (g) A declaration that the claimants are entitled to be granted and or participate in the Employee Share Option Plan (ESOP).
- (h) Maximum compensation for loss of employment.
- (i) General damages.
- (j) Aggravated and exemplary damages.
- (k) Costs of the suit plus interest.

2. The Respondent denied the alleged unfair termination and averred that the Claimant's services were fairly terminated on account of redundancy and the procedure followed was in accordance with section 40 of the Employment Act and their employment contracts.

3. In addition, the Respondent averred that it paid the Claimants all their terminal dues less the loans owing. It further averred that the claimants have breached their confidentiality covenants and counterclaimed against the Claimants the following reliefs:-

(a) Kshs. 10,597,214 against the 1st Claimant;

(b) Interest on (a) above at commercial rates with effect from 1.12.2014 as against the 1st claimant;

(c) General damages for breach of contract and confidence as against all the claimants;

(d) Interest on (c) above at court rates;

(e) Costs and interest thereon at court rates.

4. The Claimants denied the counterclaim vide their Reply to Defence filed on 4.3.2015.

5. On 2.12.2014, Onyango J granted interim orders stopping the Respondent from charging interest at commercial rate, on the Claimant's loans. The order was confirmed by Abuodha J on 12.2.2016 after inter-parties hearing of the Claimants' interlocutory application and directed that the Claimants will continue repaying their outstanding loans at staff interest rates pending trial of the suit.

6. The suit was heard on diverse dates when both sides tendered evidence and thereafter filed written submissions.

CLAIMANT'S CASE

7. Ms Ann Waceke Makori, the first Claimant testified as CW1. She told the court that she is a practising Advocate but previously she was employed by the Respondent where she started on 2.12.2006 and worked until 11.11.2014 when her position of General Manager Legal and Human Resources was declared redundant. Her gross pay was Kshs. 870,400 plus other benefits at the time of termination.

8. She further testified how on 10.11.2014 the Respondents' Managing Director summoned her to his office where she found him with the Group Human Resource Manager Mr. William; that the Managing Director told her that a strategy meeting held that morning had resolved that her position be declared redundant; that the MD further told her to choose between resignation or being declared redundant; that finally the MD told her to hand over immediately to the Senior HR Manager Mr. Iha but due to other scheduled meeting, the handing over was postponed to the following date.

9. She contended that her termination on account of redundancy was without prior notice and the selection criteria followed to declare her redundant was not communicated to her. She contended that she was a stellar performer as evidenced by the Recognition Awards, Salary Reviews and Promotions.

10. She testified that on the same day at 9.19 p.m. the Managing Director sent a memo to all staff via email communicating the Claimant's redundancies and creation of 3 new General Manager positions and appointed Mr. Peter Iha as Head of HR, and Ms. Purty Raaria as Head of Legal. She further testified that on 11.11.2014 she received a letter referenced redundancy and terminating her appointment with effect from the same date.

11. She stated that during her employment she obtained credit facilities at staff interest rate of 9% on reducing balance; that after the termination all her terminal benefits were applied to set off her outstanding loan balances but she was never served with any statement to confirm whether the loans were fully settled; and that she is not sure whether or not the loans were fully settled.

12. She further contended that she was on Employee Share Option Plan (ESOP) but she was laid off before the shares were paid for. She therefore prayed for the reliefs sought in the suit.

13. On cross-examination, she reiterated that the MD summoned her to his office on 10.11.2014 at 2.15 p.m. and found him with the Group HR Manager. She admitted that the Old Mutual bought 67% of the Respondent's shares and became controlling shareholder. She further admitted that the Respondent's adopted the Old Mutual Group operating model vide the Boards resolution on 4.4.2014.

14. However, she denied being aware of the Old Mutual Operating Manual dated 31.3.2014 and whether it was introduced to the Respondent to establish governance structure to ensure efficiency. She further denied ever being notified of the restructuring of her role as the Head of Legal and HR. She also denied that she participated in the said restructuring but admitted that her role was split into two and new officers appointed vide the letter dated 12.11.2014.

15. She further admitted that 2 months before the termination she had an informal meeting with the MD and the Board Chairman where she was asked whether she was comfortable with HR or legal and she responded that she was okay with either or both. She also admitted that after splitting her role into two, the new roles were junior to the role she was holding.

16. She confirmed that the redundancy letter offered terminal dues including salary due, 2 months' salary in lieu of notice, severance pay of one month salary for every year served, leave days due and pension. The letter indicated her dues as Kshs. 8,931,606 gross and the net as Kshs. 6,264,192 after statutory deductions but she never signed the letter.

17. She confirmed that after settling off the loans owing with the said net dues, a balance of Kshs. 10 million was still left outstanding. She admitted that the offer letters she signed indicated that the loan was to be paid through check off. She also admitted that all the loans were taken in 2014.
18. She also admitted that the Respondents Staff Loan Policy provides that loans due are to be paid by check off through payroll and that upon exit, the employer has the discretion to convert the interest rate to the prevailing commercial rates or retain it at staff rate (see page 302 of the defence bundle). She admitted that the policy was published in 2013 when she was still in employment. She contended that she stopped servicing the loan balance after the Respondent retained all her money in the account in contempt of court orders which directed that she continues servicing the loan under the staff rates.
19. She admitted that by the letter dated 19.11.2014, the MD notified her that her loan balance after offsetting with her terminal dues was Kshs. 10 million and asked her to make arrangement to pay the same.
20. She further admitted that she signed a non-disclosure Agreement with the Respondent which prohibited her from disclosing confidential information. She confirmed that Clause 10 of her Appointment Letter also prohibited her from disclosing confidential documents. She contended that all the documents she produced including minutes and Memos are not marked confidential. She admitted that some of the minutes she produced have been filed by the Respondent with footer marked confidential but she contended that a party cannot be allowed to mark documents as confidential in order to defeat a matter pending in court.
21. She admitted that she never signed any agreement for ESOP shares. Finally, she admitted that she is the Chairperson of IPOA but contended that she does not earn any salary but only sitting allowance.
22. Upon re-examination, she contended that she was offered ESOP by the Respondent vide a letter from the MD. She reiterated that she was not privy to the discussion to split her role and she was not even aware that it was going to be split. She contended that the discussion she held with the MD and Board Chair was an informal chat not based on any notice of intended redundancy.
23. She contended that the bank has not formally told her that it recalled the loan because that would be in contempt of the court order which directed her to repay the loan at staff rate. Finally she maintained that the minutes she produced were not confidential and they did not disclose any confidential information.
24. Mr. James Asiba, the second Claimant testified as CW2. He told the court that he joined the Respondent on 2.1.2007 as ICT Manager and rose through the ranks to become General Manager Commercial Services earning a gross pay of Kshs. 740000 plus other benefits.
25. On 10.11.2014 at 2.32 p.m. he was summoned by the MD to the office despite the fact he was to resume work the following day after being on annual leave. Due to bad traffic he arrived at 5.40 p.m. and found the MD and Head of HR Mr. William. After being given a seat Mr. William casually told him that due to the integration process that had just started following the requisition of the Respondent by Old Mutual Group the Respondent's structure had changed.
26. In the end he was told that new roles had been created and vacancies filled and therefore his position of Commercial Manager Commercial Services had been declared redundant. Mr. William further told him that an amicable separation had been proposed by the remuneration committee of the Respondent's Board including payment of one month salary for every year served plus two months in lieu of notice and leave days due totalling to Kshs. 6,243,200.
27. He contended that his redundancy was not due to his performance and as such maintained that he was not told why he was laid off. He further contended that he was not served with any prior notice before the redundancy; and that he was treated like a criminal by being told to hand over immediately and by being blocked from accessing the computer system and his official email
28. He further stated that before the termination he had applied for ESOP but admitted that he never paid for any shares under the ESOP.
29. He contended that part of his terminal dues were used to settle his loans totalling to Kshs. 3.8 million and the net also retained and he was not aware whether it has accruing interest. He prayed for interest on the withheld money at the same rate as the loan by the bank or at same rate as Treasury Bills.
30. On cross –examination, CW2 stated that the redundancy letter offered Kshs. 4,550,000 as severance pay. He maintained that he learned about the restructuring after being given a redundancy letter on 11.11.2014 but on being shown minutes dated 4.4.2014 he admitted that the Old Mutual Operating Model was adopted by the Respondent effective 4.4.2014.
31. He further maintained that he was not informed about splitting of his role as General Manager Commercial Services and clarified that he was not involved in the meeting that resolved the same. He denied further that he was notified in writing or otherwise that the Group Head of IT would be in charge of the Respondent and other affiliate companies.
32. He denied ever being served with written notice before 11.11.2014 that his position was going to be redundant but admitted that he was advised to apply for the position of Group Head of IT which was going to be created. He contended that the said job was never advertised and therefore he never applied for the same.
33. On being shown letter dated 14.10.2014 appointing Mr. Allan Njenga as the Group Procurement Manager for Old Mutual, CW2 contended that the said letter and Mr. Njenga were both strangers to him. He further denied knowledge that Mr. Njenga took over his role in the Respondent bank.

34. As regards the benefits offered vide the redundancy letter, he contended that his loan was shown as Kshs. 3.4. Million and a net of Kshs. 1,286,245. However, he contended that he was never notified whether the said net sum was paid into his bank account. He further contended that he has not sought the items that were offered vide the redundancy letter.

35. As regards the alleged breach of non-disclosure agreement he contended that he has not personally produced any minutes of the employer and clarified that he had no access to the said documents. Finally he stated that since the termination he has never secured any alternative gainful employment.

36. Ms Emily Chemeli Lang'at, the 3rd Claimant testified as CW3. She stated that she joined the Respondent on 1.7.2007 as a procurement officer but later rose to become Head of Procurement and Premises earning Kshs. 305,000 plus other benefits.

37. On 10.11.2014 at 3 p.m, he was summoned by the Managing Director Mr. Charles Njuguna to his office where she also found the Group HR Manager Mr. William Wambugu. After being given a seat the Group HR Manager casually told her that the new Group structure is about to be rolled out and her position had become redundant. He further stated that he was sure that she had met Mr. Allan Njenga the new Group Procurement Manager. She was then told to hand over to the General Manager Finance and on the following day 11.11.2014, she was served with a redundancy letter.

38. She contended that she had a car loan of Kshs. 300000 which was recovered from terminal dues but the car logbook was retained until her lawyer intervened. She contended that no redundancy notice was served upon her before the termination letter dated 11.11.2014. She contended that the termination was unfair and prayed for judgment.

39. She also admitted that she had signed a non-disclosure agreement but denied that she breached the same. She contended that the minutes of the employer was only used in this court and not given to the public.

40. On cross-examination, she admitted that the position of Group Procurement Manager was advertised and she did the interview after being told that it was a higher position from what she was holding in the Respondent. However she denied that she was given notice that her job in the Respondent bank was going to be declared redundant.

41. She denied the alleged breach of non-disclosure agreement and contended that she had no access or custody of the employer's documents. Finally she contended that her application for the higher position of Group Procurement Manager had no relation with her redundancy.

DEFENCE CASE

42. Mr. Peter Iha, Respondent's Head of Human Capital testified as RW1. He confirmed that in November 2014 he was the Senior HR Manager of the Respondent while the 1st Claimant was the General Manager Legal and HR, the 2nd Claimant was the General Manager Commercial services and the 3rd Claimant was the Procurement and Administration Manager. He further explained that he joined the Respondent in November 2012.

43. He further testified that upon acquisition of the Respondent the Old Mutual in March 2014, restructuring of the management was started on the basis of models agreed between the Respondent and the Old Mutual. The first model was Old Mutual Group Operation model and the second one was the Old Mutual shared services model. As a result the 1st Claimant's role was split into Legal Department and the HR Department. The 2nd Claimant's role was split into General Manager ICT and Operations, and Procurement Manager. The 3rd Claimant's role became superfluous and absorbed under the Group Procurement Manager.

44. He further testified that the 1st Claimant was notified of the impending redundancies in a meeting held in June 2013, which she attended, and where acquisition and possible redundancies were discussed. He referred to the minutes of the special board held on 27.6.2013 to support that allegation. He further referred to the 1st Claimant's Affidavit sworn on 1.12.2014, in which she deposed in paragraph 24 that she had been notified of split of her role into legal and HR and she indicated that she could take either of the new positions.

45. He also contended that the 2nd Claimant was also notified of the intended split of his role as admitted in his written statement paragraph 5 where he stated that he met the MD and Mr. William, who advised him to apply for the new positions to be advertised. RW1 further stated that the 3rd Claimant was notified of the new structure and she applied for the new position and was interviewed but she was unsuccessful.

46. However, he admitted that no written notice of redundancy was served on the Claimants before the termination on account of redundancy.

47. He further testified that the Claimants were paid their terminal dues as indicated in the termination letters. He said that the total due for the 1st Claimant was Ksh. 8,931,607 but after statutory deductions and loans her dues became negative Kshs. 10,597,213. He explained that the 2nd Claimant's total dues was Kshs. 6,840,108 and after statutory deductions plus loans owing, he was entitled to Kshs. 1,286,206. He further stated that the 3rd Claimant's total due were Kshs. 2,767,371 but after statutory deductions and loans, she was entitled to Ksh. 1,532,013.95.

48. He contended that the authority to set off the outstanding loan from the terminal benefits came from the Letters of Offer and the Staff Loan Policy Manual which he produced as exhibits.

49. He contested that the 1st Claimant has not serviced her loan since 11.11.2014 to date despite the court orders issued on 12.2.2016

directing her to continue servicing the loan under the staff interest rates.

50. He further testified that the Claimants have produced minutes on page 101-121, without the employer's authority, yet they are confidential documents. He contended that the said action was a violation of the confidentiality agreement contained in their Letter of Appointment and the Non-disclosure Agreement. Therefore he prayed for general damages for breach of confidentiality from all the claimants and further for the payment by the 1st Claimant of his outstanding loan plus interest at the commercial rate.

51. On cross-examination, RW1 admitted that the Claimants were not party to the two operating models by the Old Mutual. He further admitted that the Claimants were not present when the said models were drawn. He further admitted that although the 1st and 2nd Claimants were listed in the said restructuring model, the position of the 3rd Claimant was not indicated as among the affected roles.

52. He admitted that the Memo dated 10.11.2014 was the first document given to the employees about the intended organizational structure. He contended that the memo appointed him as the Head of HR in acting capacity. He admitted that the Claimants were given one day verbal redundancy notice instead of 30 days written notice. However he maintained that the Claimants were aware of the intended redundancy before 10.11.2014.

53. He reiterated that the 1st Claimant's total dues was Kshs. 8,931,6060.99 less statutory deductions of Kshs. 2,667,414.50 leaving a net of Kshs. 6,264,192.49. He further reiterated that after setting off the net dues against the loans owing, there remained an outstanding loan balance of Kshs. 10,597,414.

54. However, he denied that the loan was recalled and contended that the Claimant was directed by the court to continue servicing the loan at staff rates of 9%. He further contended that the Respondent wrote a demand for payment of the loan but denied the allegation that the Claimant wrote several letters asking for the outstanding loan. He admitted that the 2nd and 3rd Claimants have no outstanding loan.

55. He maintained that the 1st Claimant attended Special Board Meeting on 27.6.2013 where it was agreed that there would be no redundancies. He admitted that in paragraph 23 of his written statement dated 14.8.2018 he stated that there was to be no redundancy after the acquisition of the Respondent but the Respondent breached that promise.

56. He reiterated that the minutes in page 101 – 121 of the Claimant's bundle are confidential documents and specifically pointed out that the minutes on page 101-106 are marked confidential. He admitted that under the Companies Act, minutes of a company like the Respondent herein are not confidential but reiterated that the minutes produced by the Claimants are confidential records of the bank and no permission was sought by the production.

57. . He further admitted the minutes produced herein are meant for litigation and court use only. Finally he denied that sending auctioneer to auction 1st Claimant's house amounted to recalling of her loan or harassment.

58. On re-examination he reiterated that after the set off with terminal dues the 1st Claimant still had a loan balance of Kshs. 10,597,213.60 as at November 2014. He further reiterated that since then she has failed to service the loan despite the order of the court dated 12.2.2016 which directed her to continue servicing the loan under staff interest rate. He contended that auctioneers were sent to the 1st Claimant's residence after she defaulted even after service of notice.

59. As regards the resolution not to undertake redundancies by the Respondent in 2013, RW1 contended that Old Mutual was not a party to the same and it did not bind it after the acquisition in 2014.

60. He further stated that other than letters of offer and loan policies, there was no authority to deduct loan from terminal dues by check off on the pay roll.

61. As regards the ESOP, he contended that there was no agreement between the Claimants and the shareholders or between the Claimants and the Respondent. Further he contended that there was no share distribution under the ESOP.

62. Finally he stated that there was a good reason for declaring the Claimants redundant and they were notified about it before and even one of them applied for the new jobs.

CLAIMANTS' SUBMISSIONS

63. The Claimants submitted that their redundancy was not justified by a valid reason and as such it was substantively unfair. They relied on the **Kenya Airways Limited v. Aviation & Allied Workers Kenya & 3 Others [2014]eKLR** where the Court of Appeal held that redundancy must result from involuntary situation beyond the control of employer such as economic down turn and operational requirement of the employer.

64. According to the Claimant's herein, their redundancy was a deliberate and malicious move by the Respondent to hound them out of employment after the divesture transaction between it and the Old Mutual. They submitted that the Respondent has failed to prove a valid reason for their dismissal based on its operations requirement. They contended that operational requirement means a requirement based on economic, technological, structural or similar needs of an employer.

65. In addition, they submitted that the redundancy was procedurally wrong because it did not comply with the mandatory provisions of section 40 of the Employment Act. They contended that they were not served with a prior written notice of 30 days before the layoff, and they were not given any opportunity for consultations to try to avert the redundancy and mitigate its effects on them. They further submitted

that they were unfairly treated in the manner in which the decision to lay them off was communicated and in the manner in which they were denied access to their official emails. They further submitted that they were denied their terminal dues and their loans recalled immediately after the termination.

66. As a result of the foregoing matters, they contended that they are entitled to the reliefs sought in the suit. They relied on **Benson K. Nguti v Kenfreight (EA) Ltd [2014]eKLR** where this court awarded 12 months' salary compensation and the award was upheld by both the Court of Appeal and the Supreme Court. They further prayed for the counterclaim to be dismissed because they did not breach their confidentiality contract by producing the employer's minutes as evidence in this court. They relied on **SB1 International Holding Ag(Kenya) v Amos Hadar[2015] eKLR and Leland I. Salan v Intercontinental Hotel[2013]eKLR** to support the foregoing opinion.

RESPONDENT'S SUBMISSIONS

67. The Respondent submitted that the redundancy of the Claimants was substantively and procedurally fair since the law was complied with. It contended that the reason for the redundancy arose from a restructuring following the acquisition of the majority of its shares by the Old Mutual Holdings Limited (Kenya) in March 2014.

68. It further submitted that under the said Shareholder Agreement, the Respondent was bound to adhere/comply within the governance principles of the majority shareholder, as contained in the Old Mutual Group Operating Manual (OMGO Manuel). It further submitted that from 4.4.2014 it embarked on restructuring of its management to accord with the OMGO Manual and the Old Mutual Shared Services Model (OMSS MODEL). The OMGO Manual is a blueprint to enhance management and oversight by Old Mutual while the OMSS Model was to enhance efficiency and output of each department within Old Mutual's subsidiaries and affiliates by emphasizing and building on specialization.

69. The Respondent submitted that as a result of the adoption of OMSS Model, the roles of 1st and 2nd Claimants were split and realigned to ensure specialization in specific areas and thereby increase efficiency output and performance of both individual departments and the company as a whole. The 1st Claimants role of General Manager Legal and HR was split and realigned into two departments headed by two individuals namely Head of Legal and Head of HR.

70. The 2nd Claimant's role of General Manager was split into two roles, namely General Manager, ICT and Operations and Group Procurement Manager which also took over the role of the 3rd Claimant. The Respondent submitted that as a result of the said restructuring, the Claimants positions were abolished and they became redundant.

71. The Respondent relied on **Karutha Ngonzi & 11 Others v Kapice Apparel (EPZ) Ltd [2017]eKLR** where the court held that terminating employment on the basis of operational requirement is a fair reason for termination under section 45 (2) (b) of the Employment. The Respondent further relied on **Heritage Insurance Company Limited v Christopher Onyango & 23 Others [2018]eKRL** where the Court of Appeal held that termination due to operational requirements amount to redundancy.

72. As regards the procedural fairness, the Respondent submitted that it complied with section 40 of the Employment Act. It contended that the 1st Claimant was made aware of the restructuring and possible redundancies as far back as June 2013 going by the minutes of Special Board Meeting held on 27.6.2013. The Respondent further submitted that the 1st Claimant was notified of the restructuring and possible redundancy by the Respondent's MD and HR Manager in September 2014.

73. It further submitted that the 2nd Claimant was notified of the restructuring and possible redundancy before 10.11.2014 when it advised him to apply for the position of Group Head IT. It also contended that the 3rd Claimant was aware of the redundancy of her role as far back as 1.10.2014 when she was invited to apply for the position of Group Procurement Manager and did interview on 9.10.2014 but failed

74. It submitted that redundancy notice need not be in writing and relied on **Phillemon Oeni Kidavi v Brinks Security Ltd [2018]eKLR** where Mbaru J held that a verbal notice to The employee issued in terms of section 40 of the Employment Act is sufficient provided it is brought to the employee a month before the termination.

75. According to the Respondent, the purpose of a redundancy notice under section 40 of the Act is to make the employees aware of the intended redundancy and which may affect them, and initiate consultations. It contended that the Claimants were notified of the intended redundancy and they were engaged in an effort to determine their failure in the company. It further contended that it also embarked on assessments of their suitability base on their individual skills and capabilities with respect to the new positions which were lower job grades than the ones earlier held by the 1st and 2nd Claimants.

76. It also contended that the Claimants were offered alternative job positions. In its view the principle of first in last out was not applicable in this case and as such it relied on the criteria of skills, ability and reliability of Claimants. Finally it contended that, it was only after it determined that the Claimant could not be absorbed elsewhere in the company that it served them with termination letters.

77. As regards the Claim for shares under the ESPO Scheme, it contended that the Claimant did not adduce any documentary evidence to prove their entitlement to such benefits. Consequently it prayed for the said claim to be dismissed for lack of legal or factual basis.

78. As regards the counterclaim, the Respondent contended that the 1st Claimant had obtained a personal development loan of Ksh. 10,000 on 18.6.2014, Car loan of Kshs. 350,000 on 1.4.2014 and staff personal loan of Kshs. 400,000.00 on 14.2014, all at staff interest rate. It further submitted that after setting off the said loan against her terminal dues there was still outstanding loan balance of over Kshs. 10 million; that on 19.11.2014 it demanded from the Claimant she starts to repay the loan balance with interest at commercial rates a per the loan agreement and loan policies. It therefore prayed for the loan balance from the 1st Claimant with interest at commercial rates.

79. Finally, the Respondent submitted that the Claimants have violated their non-disclosure agreements by producing confidential information belonging to it as exhibits in this case. Specifically it pointed out of minutes on page 105-109 of the claim and Memorandum of Agreement on page 142-148 of the claim bundle which was marked confidential. Consequently, it prayed for General Damages for breach of trust and confidence in so far as the information contained in the said documents.

80. It distinguished this case from the **Leland L. Salano case** and **Magdalane Kiboi Case** contending that the information in the instant case was contractual obligation created by a written non-disclosure agreement as well as individual employment contract. In conclusion it prayed for the Claimant's suit to be dismissed with costs and its counterclaim be allowed as prayed.

ISSUES FOR DETERMINATION

81. There is no dispute that the Claimants were employed by the Respondent until 11.11.2014 when their employment contracts were terminated on account of redundancy. The main issues for determination revolve around the fairness or otherwise of the termination of the claimants contract of service on account of redundancy. It is now trite law that for termination of an employee's contract of service to pass test of fairness, it must be grounded on a valid and fair reason, and it must be done in accordance with a fair procedure.

82. The parties did not agree on the issue for determination and therefore I have framed the same as follows:

- (a) Whether the termination was justified by a valid reason.
- (b) Whether the procedure followed was fair.
- (c) Whether the Claimants are entitled to the reliefs sought in their suit.
- (d) Whether the claimants breached confidentiality covenant by producing confidential information as evidence herein.
- (e) Whether the respondent is entitled to the reliefs sought by its counterclaim.

JUSTIFICATION

83. Redundancy has been defended under section 2 of the Employment Act as:

“the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practice commonly known as abolition of office, job or occupation and loss of employment”.

84. From the foregoing definition, it is clear that when it comes to termination on account of redundancy, the reason for the termination cannot be blamed on the employee. The reason must relate to an involuntary happening or cause that is beyond the employer's control or which is inevitable in relation to the employer's operational requirements. In this case, the reason cited for the redundancy herein is that Old Mutual bought 67% of the Respondent's shares in a deal which gave the majority shareholder the right to impose its management strategy.

85. According to the respondent, the foregoing matters prompted the need to restructure its management in order to align it with the said requirements of the majority shareholder with respect to oversight and efficiency. It is common ground that the first and second claimants' roles were each split into two and given to other persons, while the 3rd claimant's role was subsumed in one of the new roles carved from the 2nd claimant's role. Up to that point one can conclude that the claimants' redundancy was justified after their positions were abolished.

86. However, the question that arises is whether, the termination was inevitable. The jurisprudence emerging from our Court is that redundancies and their extreme effects can be averted or minimized through the use of consultations between employers and their employees, either directly or through their representatives. While discussing the purpose of serving a prior statutory notices of redundancy, the Court of Appeal in the **Kenya Airways case**, *supra*, stated as follows:

“The purpose of the notice under section 40 (1) (a) and (b) of the Employment Act, as is also provided for in the said ILO Convention No. 158 – Termination of Employment Convention, 1982, is to give the parties an opportunity to consider “measures to be taken to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.” The consultations are therefore meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it is unavoidable. This means that if parties put their heads together, chances are that they could avert or at least minimise the terminations resulting from the employer's proposed redundancy. If redundancy is inevitable, measures should be taken to ensure as little hardship as possible is caused to the affected employees.”

87. The evidence before the court show that the claimants were never invited to any formal consultation to discuss how to avert the intended redundancy or to minimise the effects of the redundancy. Whereas it is clear from the record that the claimants had a hint of looming restructuring of the respondent's management, their abrupt redundancy caught them unawares. They were busy in their duties or away on leave when they were summoned by the respondent's MD and the Group HR manager and given the bad news verbally, a day before they were served with the termination letters.

88. They were not formally consulted on whether they were willing to take the available junior positions in the respondent or elsewhere in the Old Mutual Group of Companies. In fact, even before they were served with the termination letters, a Memo was circulated to the staff

announcing their redundancy and the new positions which had already been filled. In my view, the said conduct by the employer clearly manifests a resolve to terminate the claimants' contracts rather than to retain them.

89. The foregoing matters happened even with clear indication from the claimants that they were interested in the proposed new positions. Respondent acknowledged that its own MD and Board Chairman had earlier asked the 1st claimant which role she was comfortable with between Legal and HR and she said that she was okay with either of them or even both. Likewise the respondent had also advised the 2nd claimant to apply for the position of Group General Manager ICT but it was never advertised. The 3rd claimant had also applied and was interviewed for the position of Group Procurement Manager but she was not appointed.

90. The burden of proving that the redundancy was inevitable lies with the employer by didn't of section 43 and 45 of the Employment Act. In this case the respondent contended that the claimants' roles were abolished and new ones created but of a lower job grade compared to what the first and second claimants were holding.

91. The claimants were in charge of those new roles before the restructuring and the respondent did not question their performance. They all showed interest in the newly created positions but as stated above, they were not afforded any formal consultation about their desire to take them before they were filled, in order to avert the redundancy or minimize its effects. Without that opportunity being given to the claimants, one cannot say that the redundancy was inevitable.

92. Although the respondent contended that the redundancies herein were resorted to after determining that the claimants could not be placed anywhere in the company or the group, the truth is that such efforts, if any, were made after the relevant positions were already filled. The failure to consult with the claimants led to unnecessary redundancy and financial hardships on them.

93. It follows that, though restructuring is a fair reason for redundancy, the same cannot be taken blindly as valid reason where the employer, like in this case, fails to give consultation a chance to see if the intended redundancy can be averted or its effects minimised. That was the gist of the above excerpt from the decision of Court of Appeal in the **Kenya Airways Case**, *supra*. Consequently, I find and hold that in the circumstances of this case restructuring was not a valid reason for terminating the claimants' employment contract on account of redundancy and as such the respondent has failed to prove that the redundancy was justified.

PROCEDURE

94. Section 40(1) of the Employment Act provides for a mandatory procedure for redundancy. First, it provides for at least one month prior notice in writing to the employee or his trade union, and the area Labour Officer. Second, it provides for a fair selection process of the person to be laid off including a consideration of seniority in time and skill. Third, there should be no unfair treatment on the basis of union membership. Fourth, employer must pay accrued leave. Fifth, employer must pay at least one month salary in lieu of notice, plus severance pay of not less than 15 days' pay for each completed year of service.

95. In this case the Respondent has not produced any written notice of the said redundancy served on the Claimants and the area Labour Office at least one month before the effective date of the redundancy. The only letter produced was the one dated 11.11.2014, which terminated their services with effect from the same day. As a result of the failure to serve the notice before the intended redundancy, there were no consultations with the claimants and the labour officer to try and avert the redundancy or to mitigate the adverse effects of the redundancy. (see the **Kenya Airways case**, *supra*.)

96. Having found that the notice of the redundancy was never served on the claimants and the local labour officer, and that no formal consultations were held to try and avert or minimise the redundancies or effects of the redundancy, I see no need of considering whether a fair selection was conducted. Suffice it to say, however, that the skills, experience and performance were not the reason why the claimants were discharged since according to some letters produced as evidence, they were stellar performers. Therefore, the reason as to why the respondent preferred other persons over the claimants was not made known to them or this Court.

97. The other procedural requirement is the computation and payment Salary in lieu of notice, accrued leave and severance pay before the effective day of the redundancy. In this case the respondent computed and paid the said dues to the claimants less statutory deductions and their outstanding staff loans. In deed the claimants' case is that they are not claiming the said terminal dues herein.

RELIEFS

98. Having found that the termination of the claimants' employment on account of redundancy was not justified by a valid reason and that the procedure followed was not in accordance with section 40 of the Employment Act, I make a declaration that the claimants suffered unfair and unlawful redundancy, which amounted to an unfair termination.

99. The claimants prayed for reinstatement to their former positions without loss of benefits and or seniority. However the said relief is impossible to grant because the said position were abolished, and also because three years have since lapsed after the termination. Under section 12(3) (vii) of the ELRC Act, the court is barred from reinstating an employee after the lapse of three years from the date of separation.

100. The claimants prayed for payment of salary and allowances for the period they would have worked until their official retirement age of 60 years but the same is declined because no factual or legal basis was shown to warrant granting of that relief.

101. However, they are entitled to compensation for the unlawful and unfair termination by dint of section 49(1) read with section 50 of the Employment Act. Considering the claimants' long service of about 7 years; that they did not contribute to the termination through any fault on their part; that they have not secured alternative gainful employment todate; and finally the conduct of the respondent during the

termination which exposed them to harsh economic hardship instead of mitigating the same, I award each claimant the maximum 12 months' gross salary as compensation.

102. The claimants further prayed for declaration that the respondent is not entitled to recall claimants' loans prematurely. In the alternative they prayed for an order that the respondent grants them 50% discount in case of a premature recalling of their loans. The respondent denied that it prematurely recalled the claimants' loans and contended that it only notified them that the loans would be attracting interest at commercial rates.

103. I have carefully considered the evidence adduced by both sides and it clear that after the termination the claimants' redundancy benefits were deducted to clear their outstanding loans. In fact all the 1st claimant's dues were used to set off the loans and still a balance in excess of Kshs 10 million was left outstanding. The said loans were payable by instalments for agreed periods in years and at agreed staff interest rates. The loans were also secured by collaterals. Therefore, the respondent has the onus of proving that it was entitled to a recall of the loans under either the contract of employment or the loan contract.

104. The respondent has produced Offer Letters in respect of loans advanced to the 1st and 2nd claimants which contained the following similar clauses for Set Off, Combinations or Consolidation of Accounts:

“The Bank shall be entitled (but shall not be obliged) at any time and without notice to the borrower to combine, consolidate or merge all or any of the borrower’s accounts and liabilities with and to the Bank anywhere in or outside the Republic of Kenya and may transfer or set off any sums in credit in such accounts in or towards satisfaction of any of the Borrower’s liabilities whether actual or contingent, primary or collateral notwithstanding that the credit balance on such accounts may not be expressed in the same currency and the lender is hereby authorized to effect any necessary conversion at the Bank’s own rate of exchange prevailing.”

105. The respondent further produced its HR Manual which provides under clause 6.6.3 headed Development Loans that:

“Loans shall be repaid to the institution over an agreed period of time and at a negotiated interest. Loan repayment shall be made through deductions from the payroll.”

106. The above documents is evidence that the claimants only agreed with the respondent to recover their loans by deducting their salaries. They also authorised the respondent to exercise discretion in recovering the loans from their accounts in the bank or monies paid through their accounts. However, the said clauses cannot be read in isolation but in relation to the entire contract. Therefore, the lender's discretion cannot be exercised contrary to express terms of the loan contract, or in a manner that violates the basic rights of an employee. In this case, the claimants were being discharged from the bank for no fault of their own, and the respondent's loans were secured. There was no justification for recalling the loans prematurely, especially when there was no default in the payment. Consequently, I make declaration that the respondent is not entitled to prematurely recall the credit facilities plus accrued interest.

107. In view of the foregoing, the prayer for an order that the respondent grants them 50% discount in case of a premature recalling has no basis since the contract does not provide for any premature recalling of the loans. However, the parties to a contract enjoy the free will to renegotiate the terms of their contract.

108. The claimants further prayed for declaration that Article 2, 10, 20, 26, 27, 28, 41, 43, 47, and 50 of the Constitution were breached by the respondent. I have already made a finding of fact that the decision to declare the claimants redundant was not justified and the mandatory procedure provided by the law was not adhered to. The said decision had detrimental effect to the claimants including loss of livelihood, loss of status and loan burden. Consequently, I make declaration that the impugned decision violated the claimants' right to fair labour practices under Article 41 of the Constitution and the right to fair administrative action under Article 47 of the Constitution. In addition, the claimants' right to be treated with dignity under Article 28 of the constitution was violated by the abrupt redundancy and the withholding of their redundancy dues which would have cushioned them from severe economic hardship after the separation. The statutory provision for payment of severance pay after redundancy is not for cosmetic purposes but protect employees declared redundant from being exposed to inhuman conditions while looking for alternative employment.

109. The claimants prayed for damages for the said constitutional violations. In **John Gakuo & ano v county Government of Nairobi & 3 others [2018] eKLR** the Court of Appeal awarded Kshs, 1, 500,000 to the employee as damages for breach of the appellants right to fair administrative action. Again in **Oi Pajeta Ranching Limited v David Wanjau Muhoro [2017] e KLR** the Court of Appeal awarded Kshs. 7,500,000 to the employee as damages for racial discrimination in the payment of salary. In this case, I award the each claimant kshs. 1,000,000 as general damages only for the violation of the rights under Article 28 of the Constitution because I have compensated the other violations under section 49 of the Employment Act. I decline to award aggravated and exemplary damages because no basis has been shown for the same to be awarded.

110. Finally, as regards the claim for entitlement to participate in ESOP, the claimants produced letters dated 12.4.2013 from the respondent which show that their application for ESOP of 400,000 shares and 213,477 respectively were accepted subject to signing of a formal ESOP Agreement and Shares Offer Contracts. However, they did not produce any formal shares contract and evidence of either direct Cash payment or monthly deductions in respect of the said shares under the ESOP. In fact they admitted that they were never formally allotted any shares and the never paid any money for purchase of shares under the ESOP. Consequently, I decline to make declaration that the claimants are entitled to be granted and/or participate in the Employee Share Option Plan (ESOP).

Whether the claimants breached confidentiality agreement.

111. The respondent contended that the claimants signed a confidentiality agreement under a Non-disclosure Agreement and their Appointment letters but they breached the same by producing them to court as exhibits without its permission. The claimants denied any

wrong doing by contending that the said documents were not confidential and the information in them was also not confidential.

112. I have carefully considered the documents complained of at page 88 to 121 and 142 to 148 of the claimant's bundle. Page 88 to 121 are minutes and Special Resolutions of the respondent's Board of directors while page 142 to 148 is a Memorandum of Agreement between Faulu Trust and Food for the Hungry Association in respect of Shares in Faulu Deposit Taking Microfinance Limited, and Concept paper on the Divesture of the said Microfinance. Some, like page 101 to 106 are clearly marked Confidential at the foot.

113. In my view all the foregoing documents and the information therein are not public but private and confidential. The claimants have not shown how else the said private documents came to their possession if not through interaction with the same during their course of employment. Even without the said express term barring them from use of confidential information during or after separation, the claimants herein had a contractual obligation to seek permission from the respondent before producing the same in court or otherwise sought discovery orders.

114. The respondent protested against the use of the said documents immediately it was served with the suit papers by the claimants and even pleaded in its defence that the claimants were using confidential information to support their case. However, it did not formally object to the use of the said documents immediately they were filed or during the pre-trial stage. It also did not apply for the documents to be expunged from the record before trial and it did not object to the production of the same during the trial. In fact the defence counsel went ahead to cross examine each claimants on the documents during the hearing and even led Rw1 to produce similar documents as exhibits. Consequently, I find and hold that the respondent acquiesced and/or condoned the use of the said confidential information as evidence in this case, and as such the claim for general damages for breach of confidentiality fails.

Whether the 1st claimant should pay the loan balance plus interest at commercial rates

115. The respondent produced its Operational Guidelines for its Staff Loans dated 15.8.2012 and the Revised Version dated 10.12.2013. The latter Guidelines provided on page 8 and 10 that:

“Once a staff exits from Faulu, Faulu will have the discretion to convert interest rate to the prevailing commercial rates or retain it at the staff rate.”

116. The claimants did not dispute the existence of the foregoing guidelines. Again the respondent produced its HR Manual which provided in clause 6.6 that:

“... it should be noted that the staff loan facility is a privilege and the final decision to approve, vary or grant additional loans within any of the categories is at the sole discretion of the Managing Director or anybody acting in that capacity.”

117. The foregoing clause, as observed herein above, forms part of the claimants' contract of service by dint of Clause 11 of the Appointment Letters. The claimants permitted the employer to vary their loan interest terms at any time by signing the Appointment Letters which provided that the provisions of the HR Manual formed part of their contract of service. The Court's mandate in the circumstances is to enforce the contract and not to rewrite for the parties.

118. At the interlocutory stage, the court made an order that the claimants continues to enjoy staff interest rate pending trial. Having found that the respondent violated the employment Act and the Constitution when it declared the claimants redundant, it is only fair that commercial interest rates on the outstanding loan, communicated to the 1st claimant vide the letter dated 19.11.2014, takes effect from the date hereof since this is the time when their fight for reinstatement has come to an end. In addition, I believe time has come when the innocent employee should be protected from an omnipotent employer who would want to reap a maximum benefit from its own unlawful and unconstitutional conduct.

119. I gather support from the decision of Mbaru J in **John Kinyanjui Gateru v The Family Bank[2016] e KLR** where she held that:

“The claimant shall therefore repay the loans due and owing to date at the current going staff/employee rate. To put the claimant at the commercial rate is to sanction the unfair procedure of his dismissal.”

Conclusion and disposition

120. I have found that the claimants' redundancy was unlawful and it amounted to unfair termination. I have also found that they are entitled to maximum compensation for unfair the termination by dint of section 49 of the Employment Act. I have further found that the claimants' fundamental rights under the Constitution were violated during the said unlawful redundancy. Finally, I have found that the 1st claimant is bound by her loan contract to pay the outstanding loan balance of plus interest at commercial rate as per the respondent's letter dated 19.11.2014 but effective the date hereof. Consequently, I now enter judgment for the Claimants and the respondent as follows:

1ST CLAIMANT (ANN WACEKE MAKORI)

Compensation 12 x Kshs. 870,400 Kshs.10, 444,800

General damages Kshs.1,000,000

Total Kshs. 11,444,800

2ND CLAIMANT (JAMES ASIBA)

Compensation 12 x Kshs. 740,000 Kshs.8, 880,000

General damages Kshs.1,000,000

Total Kshs. 9,880,000

3RD CLAIMANT (EMILY CHEMELI LANG'AT)

Compensation 12 x Kshs. 305,000 Kshs.3, 660,000

General damages Kshs.1,000,000

Total Kshs. 4,660,000

121. The above awards will be paid subject to statutory deductions, but they will attract interest at court rates from the date hereof. The claimants are awarded costs of the suit.

122. I further enter judgment for the respondent against the 1st claimant for the sum of **Kshs. 10,597,214 plus interest at commercial rates from the date hereof**. Since the suit was substantially occasioned by the respondent, I decline to award costs for the partially successful counter-claim.

Dated, signed and delivered in Nairobi this 23rd day of September, 2021.

ONESMUS N. MAKAU

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 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE