



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO 1755 OF 2014**  
**NYANGIRY OKAMBAGA BWONDITI....CLAIMANT**  
**VERSUS**  
**ECOBANK (K) LIMITED.....RESPONDENT**

**J U D G E M E N T**

1. The Claimant in his Memorandum of claim filed on 8<sup>th</sup> October, 2014 averred in the main that:

- a. At all material times, the claimant was employed by the respondent as an Executive Director and Head of Domestic Bank for Kenya and EAC Cluster, under a letter of offer of employment dated 9.11.2011.
- b. The claimant faithfully, and diligently, performed his duties as Executive Director and Head of Domestic Bank for Kenya and EAC Chester, until his services were summarily terminated by the respondent by a letter dated 31.3.2014.
- c. The summary termination of the claimant's contract of service without service of a 3 months' notice was in breach of his contract of service and unfair under the governing provisions of the Employment Act, 2007.
- d. Notwithstanding the service on the claimant by the respondent of a Notice to Show Cause ("NTSC") why disciplinary action should not be taken against him dated 10.1.2014 and a second NTSC dated 28.3.2014 to the effect that the respondent was "considering terminating "his employment, no disciplinary hearing was convened for the claimant.
- e. By a letter dated 2.7.2013, the Managing Director of the respondent in breach of the law, the Ecobank Group Human Resources Policies and the claimant's terms of service, unilaterally placed the claimant on a purported 3 month's Performance Improvement Plan ("PIP").
- f. Further or in addition to being wrongfully placed on a 3 month's PIP the claimant was not offered any training guidance and evaluation by the respondent to improve his alleged poor performance.
- g. At a meeting held on 3.12.2013, between the MD of the respondent and the claimant the MD informed the claimant that he intended to change the personnel working with the Domestic Bank, inclusive of the claimant in order to engage personnel he could work with. The MD made an offer of amicable or harmonious separation of the claimant from the respondent.
- h. By an e-mail dated 4.12.2013, the claimant reduced into writing the discussions held with the MD and accepted the offer of amicable separation, save that "the separation ha(d) to be done as if(he) had worked to the end of (his) contract with the bank".
- i. The MD of the respondent in his reply to the claimant's e-mail dated 4.12.2013, admitted the occurrence of the aforesaid meeting and that the discussion " was not around changing the DB people including (the claimant) as alluded in (his) mail, for the sake of changing them but only based on the poor performance of the Domestic Banking and the necessary to make changes to improve productivity in that business unit and the bank.
- j. The claimant after the fact of accepting the offer of amicable separation with the respondent, and the disclosure by the respondent

of its intention to change him and personnel working with the Domestic Bank reasonably declined to undergo the performance evaluation or assessment that the MD demanded.

k. When the claimant attended a Conference for Domestic Banks in Abidjan on 5.2.2014 the Group Executive Director, and the Group Human Resource Manager, exerted pressure on him to undergo a performance evaluation or assessment at Abidjan. The claimant reasonably refused to undergo a performance assessment since he had already accepted the offer of amicable separation made by the MD of the respondent, and the disclosure of the respondent's intention to remove him from office.

l. On 18.2.2014, the MD of the respondent summoned the claimant to his office, and in the presence of the Head of Human Resource expressly told the claimant to accept an amicable separation under the terms offered by the respondent or have his services terminated.

m. On account of the aforesaid development and having valid complaints or grievances against the MD of the respondent, the claimant invoked the respondent's grievance redress procedure by filing an Appeal with the Board of Directors of the respondent by letter dated 19.2.2014.

n. At a special meeting of the Board of Director of the respondent held on 5.3.2014 the Board heard the grievances of the claimant and proceeded to appoint an Adhoc Committee comprised of two (2) directors to negotiate an amicable or mutual settlement. The said Committee held a meeting with the claimant on 14.3.2014, but did not agree an amicable separation or settlement.

o. The Board of Directors of the respondent failed or neglected to determine claimant's Appeal. The claimant was instead served with a NTSC why his services should not be summarily terminated dated 28.3.2014.

p. The claimant by his letter dated 29.3.2014, gave elaborate replies to, and explanations on, all issues raised in the NTSC dated 28.3.2014. The claimant was not given an oral hearing as required by section 41 of the Employment Act, 2007 to make his representations. The respondent responded to the claimant's letter dated 29.3.2014, by service on him of the letter of summary dismissal dated 31.3.2014.

q. Following his unfair and unlawful dismissal the respondent paid to the claimant a pro-rated leave allowance in the sum of Kshs. 36,986.24 outstanding leave days in the sum of Kshs. 1,200,000.00 and made a gift in "ex gratia payment equivalent to three (3) months' pay in the sum of Kshs. 5,639,250.00.

r. Under the terms of his contract of service the claimant was entitled to be issued with a 3 months' notice prior to termination of his services. The claimant claims payment of the sum of Kshs. 5,639,250.00 in lieu of notice.

s. The respondent's termination of the claimant's contract of service was unfair, unlawful, and in breach of section 41 and 45 of the Employment Act, 2007. The claimant claims for Reinstatement and payment in compensation under section 49 of the Employment Act 2007 for unfair dismissal.

2. The respondent on the other hand responded to the claimant's averments in the main as follows: \_

a. In further response to paragraph 4 of the Claim, the Respondent states that:

5.1 The Claimant was dismissed summarily as his performance was consistently below par as he continually failed to meet clear deliverables which had been agreed upon previously, resulting in substantial loss and damage to the Respondent.

5.2 Through his self-assessment sent to the Respondent in October, 2013, the Claimant rated his own performance at 2.33, which was significantly below the average

(b) In response to paragraph 6 of the Claim, the Respondent avers as follows: -

8.1 Due to the Claimant's repeated insubordination on failing to submit himself for self-assessment for the year 2013 and for not attending the required scheduled appraisal session, a query was issued to the Claimant as to why disciplinary action should not be instituted against him for insubordination. The Respondent's letter dated 10<sup>th</sup> January, 2014 is produced at pages 10 to 13 of the Respondent's bundle of documents.

8.2 Following the Claimant's appeal to the Chairman vide the Claimant's letters of 19<sup>th</sup> and 21<sup>st</sup> February, 2014 a Special Board Meeting was convened on 13<sup>th</sup> March 2014 where the Claimant was given ample opportunity to explain to the Board of Directors the issues he had raised in his aforementioned letters. An extract of these minutes is produced at page 14 of the Respondent's bundle of documents.

8.3 From the meeting of 13<sup>th</sup> March 2014, two members of the Board were appointed to serve as delegates of the Board in negotiating with the Claimant regarding amicable separation. The said delegation met with the Claimant but was unable to agree on separation.

8.4 Having regard to the Claimant's representations to the Board during the aforesaid meeting and having regard to all the pertinent facts, the Board ultimately resolved on 26<sup>th</sup> March, 2014 that the Claimant's employment with the respondent be terminated on the

grounds of poor performance, refusal to engage in the Respondent's mandatory performance process and refusal to take instructions from the Claimant's superiors.aving Ha

8.5 In furtherance of this resolution, a Notice to Show Cause was issued on 28<sup>th</sup> March, 2014, which Notice is produced at pages 15 to 16 of the Respondent's bundle of documents. The Respondent shall crave leave of the Court to refer to this letter for its full meaning and purport.

8.6 In the said Notice to Show Cause dated 28<sup>th</sup> March,2014, the Claimant was, inter alia, informed of the following.

8.6.1. The grounds on which termination of the Claimant's employment was being considered.

8.6.2. The Claimants right to choose another employee of the Respondent to be present during his explanation in response to the said Notice to Show Cause.

8.6.3. The right of the Claimant and the other employee he chose to accompany him to make representations, both verbally and in writing in respect of the contents of the said Notice to the Cluster HR Head Kenya & EAC of the Respondent on Monday 31<sup>st</sup> March 2014 at 9am in the Respondent's HR Boardroom.

8.7. The Claimant responded to the Notice to Show Cause on 29<sup>th</sup> March, 2014 which response is produced at pages 17 to 19 of the Respondent's bundle of documents.

8.8. The Claimant consciously chose not to attend the scheduled hearing on 31<sup>st</sup> March 2014 at 9.00 am. The allegation that no disciplinary hearing was convened is therefore without any merit.

9. In response to paragraph 7 of the Claim the Respondent avers that:

9.1. Due to the extremely poor performance of the Claimant and after discussions with the Managing Director who was his immediate supervisor, the Claimant agreed to be placed on a three (3) months Performance Improvement Plan from 2<sup>nd</sup> July to 30<sup>th</sup> September, 2013. The Respondent's letter dated 2<sup>nd</sup> July 2013 is produced at pages 20 to 22 of the Respondent's bundle of documents.

9.2. The Claimant duly acknowledged receipt of the Performance Improvement plan by indicating that he was willing to abide by the said plan and he proceeded to avail his plan in implementation of the same.

9.3. The Respondent avers that the said Performance Improvement Plan was procedural and complied with the Bank's HR Policies. The allegations by the Claimant that the Performance Improvement Plan breached the law and that the same were in breach of the Respondents HR Policies and the Claimant's terms of service are baseless, without merit and the Claimant is put to strict proof thereof.

17. In response to paragraph 14, of the Claim, the Respondent avers that :

17.1. n or about 19<sup>th</sup> February,2014, the Claimant together with the Managing Director of the Respondent and the Cluster HR Head had a meeting with the Claimant where the Claimant's amicable separation from the Bank was discussed.

17.2 The allegations regarding termination are denied and the Claimant put to strict proof thereof.

18. In further response to paragraph 14 and in response to paragraph 15 of the Claim, the Respondent reiterates the contents of paragraph 8 above. Further, the Respondent avers that, instead of responding to the issues raised during the meeting of 19<sup>th</sup> February,2014 the Claimant resorted to writing to the Chairman of the Bank's Board of Directors wherein he proceeded to make wild, unsubstantiated allegations against the Managing Director of the Bank.

21. In response to paragraph 19, the Respondent denies that the Claimant's dismissal was unlawful or unfair and further states that after his dismissal, the claimant was paid his dues in full, namely:

a) The prorated leave allowance of 36,986.30

b) Outstanding leave days (24) 1,200,000.00

c) An ex-gratia payment of 5,632,250.00

Total 6,876,236.30

3. At the hearing the claimant informed the Court that he was adopting his witness statement as evidence in Chief and further that he was relying on the documents filed with the claim.

4. It was his evidence that while working for KCB-Uganda he was approached by Manpowel Services and recruited as the CEO of the Credit Bank in 2010. The MD Ecobank (respondent) then approached him to join them which he agreed and joined as an Executive Director.
5. In cross-examination he stated that he appreciated the valued of appraisals in employment. It was further his evidence that he was the executive Director in charge of EA- Cluster and that it was a Senior position. His department, domestic banking was about 60% of the Bank and that he sat at the respondent Board.
6. According to him, it would not be bad to refuse appraisal if such appraisal is unprocedural or against the law. Appraisal is however important if within the procedures set in the organization. He further conceded that appraisal was mandatory for the respondent's staff. It was further his evidence that if he refused appraisal he would have to renegotiate with his employers. He also stated that CBK required appraisal of Senior Managers. The appraisals were initially annual but later they became bi-annual. Before appraisal one was given adequate notice. He was given two weeks' notice and that he was given a notice of appraisal but no figures.
7. It was the Claimant's evidence that the appraisal was to be on 7<sup>th</sup> January, 2014 and that he attended and told the MD the reasons why he should not be appraised. According to him he never did a self-assessment and there were other Senior Manager to be appraised around the same time and further that his circumstances were different and he explained to the MD. It was further his evidence that he did not participate in the appraisal because he thought the MD would not be fair to him. They had a relationship difference. Further the MD had already suggested he separates with the Bank.
8. The Claimant denied hiding behind historical issues and stated he was appraised in 2012. He further stated that he was of the view that he should leave the Bank because he felt the respondent was not ready to work with him. He asked to be paid salary for the remaining 21 months.
9. The Claimant appealed to the Board and the Board offered to appraise him but he also objected since the Board were his peers. It was his evidence that he came to learn later that the MD had written to the Board advising that I should separate with the Bank.
10. He denied the invitation to Abija also included appraisal. He further stated that there was no need to appraise him since exit was already on the table.
11. In cross-examination he stated that he did not refused to attend appraisal meetings. According to him, he had been offered an exit option so there was no need for appraisal. He further stated that he did not expect to continue working because he had accepted the exit option.
12. According to him he performed well and in 2012 he was appraised and scored 'B'. He admitted signing performance improvement plan for domestic banking. He did so on behalf of the department. It was not individual appraisal but group appraisal. He further stated that he was asked to do a performance appraisal for 2013 but said no need since he had opted to leave. He admitted to an email stating separation and appraisal were two different issues but he did not agree with the position.
13. It was his evidence that he was given two notices to show cause and responded to both. The second notice to show cause invited him for oral hearing on 31<sup>st</sup> March, 2014 at 9.00 am. He appeared and delivered his response to the Show Cause letter. He further stated that he did not mind of he was reinstated however he had written to the MD acknowledging the option of separation since he did not want to impose himself on the Bank.
14. The Claimant further stated that he received the 3 months' pay but this according to him was ex gratia. He further stated that he received all his salary upto termination and paid for leave not taken. He was further given a certificate of service.
15. The respondent's witness Ms Gloria Byamugisha stated in the main that she was the HR Professional for the respondent and that she was the cluster head for Kenya and rest of East Africa. She relied on her further witness statement filed 24<sup>th</sup> May 2018 as her evidence in Chief and also on the documents filed with the response to the claim.
16. In cross-examination she stated that the Claimant was issued with a notice to Show Cause on 28<sup>th</sup> March, 2014 and the Claimant was reporting to the MD but the HR had no power to terminate his services. The Board was responsible for dismissing the Claimant. The Board was however guided by the HR Department.
17. It was her evidence that the Claimant was asked to respond to the Show Cause letter n which he did to the Board. A committee of the Board sat over the Claimant's issue and resolved to summarily dismiss the claimant.
18. According to her, the Claimant was dismissed for repeated non- compliance with respondent's policies and guidelines and underperformance. She stated that the factory performance based on performance appraisal is a ground for termination of contract.
19. In 2011 the Bank made a loss and also in 2012 and 2013. When the Claimant left the loss became smaller. The claimant in his memorandum of claim sought from the Court among others, a declaration that the termination of his service was unfair, unlawful and promised on invalid grounds. The claimant further sought a declaration that the 'ex gratia' payment equivalent to three months' pay was a gift made by the respondents to the claimant. The claimant further sought Kshs. 5,639,250/= as payment in lieu of notice and finally compensation for unfair dismissal.
20. Under section 45 of the Employment Act, a termination of employment is unfair if the employer fails to prove-
  - a. That the reason for the termination is valid;

b. That the reason for the termination is a fair reason.

i. Related to employees conduct, capacity or compatibility, or

ii. Based on operational requirements of the employer; and

(c) That the employment was terminated in accordance with a fair procedure.

21. Further under Section 47(5) for any complaint of unfair termination of employment or wrongful dismissal the burden of proving that unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

22. The claimant's summary dismissal letter dated 31<sup>st</sup> March, 2014 gave a raft of reasons why it became necessary to terminate the claimant's service through summary dismissal, these include under performance of domestic bank which the claimant was in charge of, refusal by the claimant to undertake key business continuity process (performance management) and refusal to take instructions from his superiors without any lawful cause.

23. Both the claimant and the respondent do not dispute that the claimant refused to submit himself to performance appraisal. Further they both did not deny that performance appraisal was a necessary management tool in the current business world and more so in banking sector where the respondent was where it was a requirement by the Central Bank.

24. The claimant informed the Court that despite the fact that he acknowledged that performance appraisal was important and necessary especially for a Bank where he worked, he refused to subject himself to the process before his MD because he had relationship issues with him and that he was not given adequate time to prepare.

25. Further, he stated that there was no point undergoing an appraisal yet the MD had offered a separation arrangement and had accepted the same. The claimant appealed to the Board over the issue and the Board offered to appraise him in place of the MD but once again he refused to be appraised stating that the Board members were his peers and once again suggested the appraisal would not be fair since a separation arrangement was already on the table,

26. As observed earlier in the judgement, the reason for the termination should be a fair reason related to employees conduct, capacity or compatibility and also based on operational requirements of the employer.

27. Both the claimant and the respondent as noted earlier acknowledged the importance of performance appraisal especially for a Bank considering it was a requirement by CBK. The refusal by the claimant to submit to performance appraisal therefore created a very awkward situational relationship between the two parties especially for the respondent who ran the risk of not meeting one of the policy requirements of CBK as a regulator. This in the court's view constituted a fair reason for termination since it was based on claimant's conduct which stood in the way of the respondent in meeting its operational requirements.

28. Regarding the procedure followed in terminating the claimant's services, the Court has carefully considered the documents filed by both claimant and the respondent and as summarized earlier in the judgement and is persuaded that a fair procedure was followed in terminating the claimant's service.

29. Upon termination, the claimant was paid some Kshs. 5,639,250 which the respondent called ex gratia payment. The claimant now wants the Court to order the respondent to pay him a similar amount being three months' salary in lieu of notice.

30. The claimant was summarily dismissed under section 44 of the Employment Act, a summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term. The court having found that there existed valid ground for termination of the claimant's service it follows that termination by way of summary dismissal was justifiable hence no notice or pay in lieu thereof was necessary.

31. Perhaps it was for this reason that the respondent opted to call the sum of Kshs. 5,639,250/= paid to the claimant as 'ex gratia' payment. On the issue of reinstatement, the Court has considered the circumstances immediately before and at the time of termination of the claimant's service and also the lapse of time since termination and is of the view that an order for reinstatement would be appropriate and the circumstances.

32. In conclusion the Court finds the claim without merit and the same is hereby dismissed with costs.

33. It is so ordered.

Dated at Nairobi this 13<sup>th</sup> day of March, 2020

**Abuodha Jorum Nelson**

**Judge**

**Delivered this 13<sup>th</sup> day of March, 2020**

**Byram Ongaya**

**Judge**

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.