REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 269 OF 2016

STEPHEN KIVANDI KAMULA.....CLAIMANT

-VERSUS-

BARCLAYS BANK OF KENYA LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday 9th April, 2020)

JUDGMENT

The claimant filed the memorandum of claim on 24.02.2016 through Achola Jaoko & Company Advocates. The respondent filed the memorandum of defence on 29.03.2016 through the Federation of Kenya Employers. The claimant filed a reply to the memorandum of defence on 06.04.2016. Subsequently the claimant filed the amended memorandum of claim on 27.12.2017 through Manyarkiy & Company Advocates. The claimant changed advocates to Muma & Kanjama Advocates. The claimant prayed for judgement against the respondent for:

a) The respondent bank to be restrained by a permanent injunction from subjecting the claimant to incessant capability and or disciplinary hearing wilfully designed to portray the claimant as an underperforming staff.

b) The respondent bank to be restrained by a permanent injunction from purporting to suspend, interdict and or summarily dismiss the claimant from employment.

c) The respondent bank be compelled by a mandatory order to revise the claimant's performance capability ratings for 2014 and 2015 and 2016 to reflect the claimant's excellent performance.

d) The respondent bank is compelled by a mandatory order to grant the claimant salary increment with effect from 01.04.2014 for the year 2014, 01.04.2015 for the year 2015, 01.01.2016 for the year 2016 and with effect from 01.04.2017 for the period 2017 to 2018 when salary increments were effected for members of staff in the department the claimant was heading.

e) The respondent bank be compelled by a mandatory order to grant the claimant annual bonus in excess of Kshs.2, 147, 305 and Kshs.3, 092, 117.00 for the years 2014 and 2015 respectively, Kshs.3,092, 117.00 for the year 2016 and prorated bonus for year 2017.

f) The respondent be compelled to pay the claimant 12 months' salary compensation for breach on the part of the respondent under section 49 of the Employment Act (Kshs.470, 884.00 x 12months = Kshs.5, 650,608.00).

g) The respondent be compelled to pay the claimant 31 years' service pay (Kshs.791, 112 x 31 years = Kshs.24, 524,472.00).

h) The respondent be compelled by the Honourable Court to reinstate the claimant back to his position as the Head of Mortgage Sales under the same terms prior to wrongful termination.

i) The Honourable Court grants damages to the claimant for unfair and unlawful termination.

j) The costs of the claim be borne by the respondent.

k) The Honourable Court to grant any other damages and orders as it deems just and fit to grant.

l) Interest on d, e, f, and g at Court rates (14% per annum) with effect from the date of filing the suit.

The respondent filed the amended memorandum of defence on 03.08.2018. The respondent prayed that the claimant's suit be dismissed with

costs to the respondent.

To answer the **1st issue** for determination, the Court returns that there is no dispute that the parties were in a contract of service. The claimant was employed by the respondent as a clerk in the respondent's Hurlingham Branch with effect from 10.10.1986. The claimant's last monthly salary was Kshs.470, 884.00 having been promoted through the ranks in his service of over 30 years. The last position held was as Assistant Vice President – Mortgage Department.

To answer the **2nd issue** for determination the Court returns that the claimant's employment was terminated by the respondent. The termination followed a capability hearing on 05.09.2017. The termination letter dated 05.09.2017 stated that the claimant's performance rating for full year 2016 was underperforming (UP) and his performance rating for H1 2017 was underperforming (UP). The termination letter signed by George Laboso, Head of Mortgage continued as follows,

> "**We thus have reasonable grounds to conclude that you have consistently failed to meet the agreed performance standard and objectives contrary to the business expectations.**
>
> **In view thereof, your services are hereby terminated on grounds of poor performance with effect from 05 September 2017 in accordance with your terms and conditions of employment by the payment of one month's salary in lieu of notice.**
>
> **Your outstanding 2017 leave accrued up to 05 September 2017 will be paid out to you as part of your final dues.**
>
> **Where applicable, if you are a member of the Defined Benefit (DB) Fund/Defined Contribution (DC) Scheme, you are entitled to access your current Pension benefits in line with the rules of the Fund. To enable the Trustees provide you with the retirement options, please complete the attached claim form and return back to Human Resources Division.**"

The letter further advised the claimant about the outstanding loans in the sum of Kshs.8, 304, 628.21 and the applicable interest rates. The letter required the claimant to complete and return the exit interview form. The claimant was advised of the right to appeal against the decision by writing to the HR Director, stating clearly the reason for the appeal within 10 working days of receiving the letter.

The **3rd issue** for determination is whether the termination was unfair or unlawful. The claimant's case is as follows. That her performance throughout her service was excellent. As Vice President Head of Mortgages she performed successfully and per instructions. In August 2013 she designed a strategy to boost mortgage sales with a view to moving the respondent from the 8th position to the top three positions in the industry by the end of 2018. The claimant designed the strategy covering a new organisational structure, product enhancements, and improvement of end to end mortgage process and establishment of a mortgage centre. The claimant with the team in mortgage department presented the strategy in a paper which was approved and known as Crexco Mortgage Lending Enhancements and thereafter a workshop followed on 16th and 17th September 2014. Between September 2013 and the workshops in September 2014 the claimant's milestone initiatives included a new organisational strategy approved in February 2014; provided for product implementation and enhancement; end to end mortgage process review aimed at Turn Around Time (TAT) on loan processing; collateral security management; establishing a mortgage centre of excellence; recruitment of staff in newly proposed roles in the mortgage centre; and job profiles for staff in the new organisational structure.

The claimant's further case is that with that background of her considered superb performance, on 19.02.2015 her line manager informed her that her rating for 2014 was moved "**Under Performing – UP**". The claimant received the rating letter and endorsed that he was proceeding to appeal. The claimant's case is that he appealed in March 2015 and despite reminders the appeal had not been considered and decided.

The claimant's further case was that in March 2015 he received a "**Notification of Interview Arrangement for a Capability Hearing**". The claimant attended the hearing and later received his line manager's closure letter as the outcome of the hearing – thanking the claimant for attending the disciplinary hearing and that, that was the end of the matter. The claimant's case was that by the letter dated 30.04.2015 he reminded the Human Resources and Employee Relations Manager (HRERM) that he had not received any response regarding the pending appeal. The claimant verbally requested the HRERM to correct his rating and to have his rating reviewed. Instead, the claimant's case is that he was invited for Half year 2015 (H1 2015) "**Performance Capability Hearing**" and despite his superb performance as pleaded and stated earlier in this judgment. The claimant in the amended memorandum of claim states, "**27.It is apparent that the claimants superiors are were inclined to constantly engage the claimant to capability hearings to taint his performance record yet the said hearings failed to address and dispose of issues conclusively while subjecting the claimant to intimidation and diversion from his core functions.**"

The respondent's case is as follows as per the amended memorandum of claim. That previously in his service the claimant had attained good performance and earned salary increments and annual bonuses but in 2014 and 2015 his performance was raked as "**underperforming**" and "**improvement needed**" respectively. For 2014 the claimant failed to achieve his key performance indicators (KPI) as per the 2014 performance review and 2014 performance year-end consolidated summary and as per the stand letter from Maria Ramos at page 2 on the claimant's performance in 2014.The respondent denied that the claimant lodged an appeal against his 2014 performance ratings and that the claimant only made a verbal intention to so appeal but failed to appeal as per the respondent's Disciplinary Capability and Grievance Toolkit. In view of the UP ranking for 2014 the claimant was subjected to a capability hearing on 06.03.2015 and the process and hearing was fair. After the hearing the respondent's Head of Mortgage wrote to the claimant a closure letter on 10.04.2015 thus, "**I write further to the capability hearing held on Friday, 6th March 2015. I confirm that this is the end of the matter and thank you for attending the disciplinary hearing**." The claimant acknowledged receipt of that letter on 14.04.2015 and endorsed, "**Happy with the outcome on the capability hearing, based on evidence provided. I await for the rating to be changed or my appeal heard as promised that this was to take effect from 16th March 2016.**"

The respondent's further case was that the claimant knew that he was supposed to object to the hearing in view of his alleged appeal but failed to do so and as per the Disciplinary Capability and Grievance Procedures. Thus, it is the respondent's case that the letter of 10.04.2015

brought the issue of the claimant's UP ranking for 2014 to a final close. Further the claimant was misguided in ranking his performance as excellent in that regard. Further in H1 2015 the claimant had improved his performance from UP to "**Improvement Needed**" (as per the 2015 Mid-Year Performance Review and 2015 Mid-Year Consolidated Summary) and on the respondent's ranking scale of Outstanding Performance; Very Strong; Strong; Good; Improvement Needed; and Underperforming. After the 2015 mid-year ranking the claimant was invited to a capability hearing by notice dated 08.09.2015; the claimant attended on 29.09.2015 and his performance discussed per minutes of 29.09.2015; and the hearing panel recommended a final warning letter because the claimant's performance was clearly below the business expectations and the claimant's expected performance drivers and outcomes for the mortgage sales. The respondent's further case is that the capability hearings addressed the pertinent issues and were not calculated to intimidate the claimant or to divert him from his core functions.

The respondent further pleaded as follows:

a) The claimant's 2015 end year performance did not meet business expectations per agreed KPIs and he was rated "**Improvement Needed –IN**" as per the 2015 end year consolidated summary and standard letter on 2015 performance. The claimant was invited for a capability hearing by notice dated 25.02.2016 and on 25.02.2016 he moved to court by filing the present case and in view of interim court order the capability hearing that had been scheduled for 01.03.2016 was not held.

b) The respondent put the claimant on Performance Acceleration Plan (PAP) as exhibited and by letter of 06.06.2016.

c) By reason of interim orders the claimant failed to co-operate with his supervisors and refused to meet his KPIs or to participate in performance management processes and procedures. Further the claimant failed on his basic work ethic like punctuality and respecting lawful instructions by his supervisor.

d) The respondent applied and the interim orders of 25.02.2016 were vacated on 18.07.2017 and thereafter the claimant refused to participate in the performance management system.

e) The claimant's 2017 half year review (H1 2017) was carried out. The claimant's supervisor indicated that the claimant failed to sign for relevant PAP and casually attended the H1 2017 review and provided no evidence about his half year performance.

f) The disciplinary issued leading to the claimant's termination and it was not a cosmetic exercise. A show cause letter dated 18.08.2018 issued asking explanation for reasons hindering the claimant's performance for 2016 and half 2017.By letter dated 22.08.2017 replied to the show cause letter and he failed to answer to the issues as requested in the show cause letter. Instead he challenged the modalities of the review process and ratings given. By letter dated 24.08.2017 his supervisor explained the modalities of the review process.

g) The claimant offered no evidence to challenge his UP ratings and he was invited to a disciplinary hearing on 05.09.2017. The claimant attended and the panel found that he had no reports to support his performance position, he declined to own the performance development process, he disagreed with every decision by his line manager and could not substantiate his assertions with evidence, and the panel recommended his termination.

h) The claimant was therefore terminated for UP rating for 2016 and H1 2017 for consistently failing to meet the agreed performance standards and objectives contrary to the business expectations. The letter of termination was dated 05.09.2017 (as already referred to earlier in this judgment).

i) The claimant failed to appeal within 10 days as was advised, he failed to attend exit interview and he failed to clear as was expected.

The Court has carefully considered the pleadings and the evidence. The claimant was terminated by the letter dated 05.09.2017 on account of UP rating for 2016 and H1 2017. The amended memorandum of claim has made no pleadings with respect to the procedure and reasons for termination as conveyed in that letter. In so far as parties are bound by their own pleadings, in relation to that termination, the Court finds that the claimant made no pleadings. The account as pleaded by the respondent has not been rebutted by way of evidence and it is upheld. The respondent's evidence in that regard is as well upheld by the Court.

In particular the claimant received a show-cause letter, he replied in writing, he attended the disciplinary hearing, the termination letter issued, and he failed to take up the administrative appeal process. The Court returns that the procedure was fair as per notice and hearing under section 41 of the Employment Act, 2007 as read with section 45 of the Act. Further, the respondent by the documentary evidence on record has established that the claimant's rating was UP for 2016 and H1 2017 and the claimant never challenged that rating in accordance with the established grievance management procedure set out in the Disciplinary, Capability and Grievance Toolkit and which provides for appeal procedure thus, "**Employees have a right of appeal against any formal action under the Disciplinary or Capability Procedure. The appeal should be lodged within 10 working days after receipt of the decision in writing. The appeal letter must state the full grounds on which the appeal is being made. It is likely that grounds for appeal would fall into one of the following areas:**

- **The action/sanction was too harsh;**
- **The action/ sanction was inconsistent with the Disciplinary/Capability action taken in a similar case;**
- **The investigation was not complete;**
- **The employee was not given a fair hearing at the disciplinary/capability meeting;**

- **New evidence is now available;**

- **The employee did not have all the information or documentation which was relied upon;**

- **The procedure was nor followed**

The appeal will be heard within 10 working days of receipt of the appeal letter. Managers are under a duty to ensure the appeal meeting is arranged and held without unreasonable delay…."

Accordingly the Court returns that the reasons for termination were valid and fair as per the respondent's evidence and pleadings and as envisaged in sections 43 and 45 of the Employment Act, 2007.

To answer the 3rd issue for determination the Court returns that the termination was not unfair and the prayers for damages in compensation or reinstatement in that regard will collapse.

The **4th issue** for determination is whether the claimant is entitled to the other remedies as prayed for. The Court has considered the pleadings, the evidence and the submissions on record. The Court makes findings as follows.

1) With respect to the claimant's ratings for 2014 and 2015 that the claimant's performance was wanting, did the claimant appeal against that ranking as per the grievance management procedure in the Disciplinary, Capability and Grievance Toolkit? The evidence is that after the capability hearing the respondent's Head of Mortgage wrote to the claimant a closure letter on 10.04.2015 thus, "**I write further to the capability hearing held on Friday, 6th March 2015. I confirm that this is the end of the matter and thank you for attending the disciplinary hearing**." The claimant acknowledged receipt of that letter on 14.04.2015 and endorsed, "**Happy with the outcome on the capability hearing, based on evidence provided. I await for the rating to be changed or my appeal heard as promised that this was to take effect from 16th March 2016.**" There was no evidence of the rating being changed or there being appeal against the UP rating for 2014. Accordingly for 2014 UP rating the Court returns that the claimant never appealed and the rating never changed so that the claimant is thereby bound by the 2014 UP rating within the respondent's said appraisal and grievance procedures. While making that finding, the Court returns that while alleging in his evidence that he had appealed, the claimant failed to show the written appeal in that regard. With respect to 2015, the claimant testified as follows, "**In 2015 my rating is Appendix R11. I was given warning letter. Para 1 read. Is about half year rating. Is below expectation. For full year 2015 exhibit R14 end year result was "Improvement Needed" again…After 2015 rating I was invited to capability hearing (Exhibit R16). I was invited for performance acceleration programme exhibit R17. I did not participate in performance acceleration programme. I did not attend the capability hearing for 2015. Same was on 24.02.2016. Line manager told me not to attend. It was oral. He called me to his office and told me not to attend. Court order was 24.02.2016….I had a court order and line manger advised me not to attend. Order restrained the proceedings.**" The Court returns that after the interim Court order the parties thereafter did not vary the claimant's rating for 2015 within their agreed procedures and they are bound by the rating. In particular the rating was not varied by way of appeal as was agreed between the parties.

2) The Court holds that parties are bound by their contract of service and they agreed upon the procedure for performance review including appeal procedure by the employee and the parties exhausted the procedure or the claimant failed to appeal as was agreed and the Court cannot intervene and impose a rating and award salary increment and bonuses as claimed and prayed for. The salary increment and the bonuses being based on the performance rating and there being no basis for the Court to interfere in the rating, the prayer for injunctions, bonuses and salary increments will fail.

3) In cases seeking to interfere with the employer's human resource powers, the court follows its opinion in the ruling in **Geoffrey Mworia-Versus- Water Resources Management Authority and 2 others [2015]eKLR** thus, **"The principles are clear.**

The court will very sparingly interfere in the employer's entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of the Constitution or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process."

In the present case the parties agreed upon the performance review system with an appeal procedure in event the claimant was dissatisfied with the rating but the evidence is that for 2014, 2015 and 2016 claimant's rating, the claimant failed to exhaust the appeal procedure or review or to effectively participate in a conclusive performance review process or the performance review was duly concluded as per rating results on record. Even if the interim order was in place, there is no prayer before the Court that the appeal procedure for 2014 or appraisal review for 2015 be concluded and the Court has found that in any event, there was no such prayer. If the claimant had appealed against the 2014 rating as was alleged for him, then the appropriate remedy would be that the appeal be determined within the parties' agreed procedure but no such claim and prayer was made in the instant case. Prayer (c) in the amended memorandum of claim was that the respondent bank be compelled by a mandatory order to revise the claimant's performance capability ratings for 2014 and 2015 and 2016 to reflect the claimant's excellent performance. The Court considers that the prayer is that the Court orders a purported revisiting of the appraisals with the Court's imposed outcome of a rating of the claimant's excellent performance. The Court has found that there was no established basis for the Court to impose excellent performance for 2014, 2015 and 2016 in disregard of the clear agreement between the parties on the performance review and rating process and procedure. In any event there was no rating known as "**Excellent**" in the respondent's scale of rating of performance and which scale was well known to the claimant. The Court finds accordingly and the remedies will fail.

4) As submitted for the respondent, the claimant belonged to a pension scheme and was a member of the NSSF and is not therefore entitled to gratuity or service pay as claimed and prayed for in view of section 35 (5) and (6) of the Employment Act, 2007.

The Court has revisited the parties' pleadings, evidence and submissions and considers that the Court has determined all the issues that were in dispute in the present suit. The Court has considered that prior to the circumstances of the termination the claimant had served the respondent with a clean record for over 30 years. Further the Court has considered that after the termination the claimant continues to repay loans owed to the respondent at a commercial interest rate whereas they had been advanced at a preferential staff interest rate. The claimant has lamented that after the termination he has been unable to secure alternative employment and there is no reason to doubt that lamentation. The Court, in that consideration, returns that each party shall bear own costs of the suit.

In conclusion judgment is hereby entered for the respondent against the claimant for dismissal of the memorandum of claim as amended with orders that each party to bear own costs of the suit.

Signed, dated and delivered in court at Nairobi this Thursday, 9th April, 2020.

BYRAM ONGAYA

JUDGE