



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT MOMBASA

CAUSE NUMBER 386 OF 2017

BETWEEN

CLEMENT HARRISON KASENA.....CLAIMANT

VERSUS

HF GROUP LIMITED [formerly HOUSING FINANCE

COMPANY OF KENYA LIMITED].....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Wachira King'ang'ai & Company Advocates for the Claimant

Muriu Mungai & Company, Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 12th May 2017, which was subsequently amended via a Statement filed on 7th June 2018. He states, he was employed by the Respondent as a Relations Manager- Project Finance, on 17th February 2014. He was summarily dismissed on 27th February 2015, on allegation of poor performance. Previously, he had worked for Kenya Commercial Bank [KCB] for 24 years, retiring voluntarily in 2013. He was in charge of mortgages at KCB.

2. His performance while at the Respondent was regularly assessed. The Respondent failed to consider all prevailing circumstances, and rated the Claimant's performance below average. As a result of poor rating, the Respondent issued the Claimant a disciplinary notice. The Claimant opted to resign on 25th February 2015 under duress. He issued resignation notice. The Respondent instead, summarily dismissed the Claimant on 27th February 2015 for poor performance.

3. The Claimant states, dismissal was not based on valid reason. He was denied Certificate of Service, and could therefore not secure alternative work. As of the date of dismissal, the Claimant earned a monthly salary of Kshs. 220,360. He prays for Judgment against the Respondent for:-

- a. A declaration that the Claimant's dismissal was unfair and unlawful.
- b. 1 month salary in lieu of notice.
- c. General damages for unfair termination.
- d. Certificate of Service to issue.
- e. A declaration that the letter of dismissal dated 27th February 2015 was malicious.
- f. A declaration that the Respondent's letter dated 27th February 2015 smeared Claimant's reputation and character.

g. An order compelling the Respondent to expunge the letter of 27th February 2015 from their records and issue a written apology to the Claimant.

h. Interest.

i. Any other relief the Court may deem fit to grant.

4. The Respondent filed its Statement of Response on 23rd August 2017, subsequently amended through a Statement filed on 16th January 2019. It is conceded that the Claimant was employed by the Respondent as Relationship Manager, on 17th February 2014. It is denied, that he was summarily dismissed by the Respondent. He was placed on probation of 6 months on recruitment. Upon assessment, his performance was found to be underwhelming, and probation extended by 3 months from 7th October 2014. He was issued a letter to show cause dated 19th February 2015, on continued poor performance. There was no duress. He resigned through a letter dated 25th February 2015. He gave notice of 7 days, to take effect on 4th March 2015. Having resigned, summary dismissal of 27th February 2015 was null and void, attracting no remedy in unfair and unlawful termination. Alternatively, and without prejudice to the forgoing, the Respondent states, termination was on valid ground of poor performance. The Claimant was issued notice to show cause, and replied explaining poor performance. He admitted that his poor performance was also of concern to him. His Certificate was prepared on 10th March 2015, and has always been ready for collection. The Respondent prays for dismissal of the Claim with costs.

5. Parties gave evidence and closed their respective cases on 13th November 2019. The Claimant was his lone Witness, while Human Resource Manager, Raymond Mwangi, was Respondent's lone Witness. The Cause was last mentioned in Court on 6th February 2020, when Parties confirmed the filing of their Submissions.

6. The Claimant described himself as a hustler. He does freelance financial consultancies. He worked for KCB as Mortgage Manager, Coast Region. He left on early retirement, in 2013.

7. A colleague of his had crossed over to the Respondent some years back. He met with the Claimant at a business function, and enticed the Claimant to join him at the Respondent. This was in the year 2010. The Claimant therefore left KCB to join the Respondent, in January 2014. Commencement of employment at the Respondent, was on 11th February 2014.

8. The Claimant was on probation of 6 months, to end on 11th August 2014. The Respondent went silent until October 2014, when the Claimant was advised there would be an extension of 3 months. He was surprised as he expected to be confirmed at the end of 6 months. His colleagues had been receiving confirmations. There was no clause in his contract for extension. The period of extension was torture, the Claimant testified. He was constantly consulted his Line Manager David Matheka, who was his former colleague at KCB, and who enticed the Claimant to join the Respondent. The Claimant was asked frequently, to explain why he did not meet targets.

9. On 25th February 2015, the Claimant issued his letter of resignation. The Claimant's performance was good except in development projects. David had recommended the Claimant is trained in this area. The Claimant opted out before implementation of the recommendation. The Claimant had received notice to show cause, why he should not be dismissed. He opted to resign. He gave notice on 25th February 2015. It was received by David the same day. It was to take effect after 7 days. The Claimant received notice to attend disciplinary hearing through e-mail, on the same date- 25th February 2015. There was no specificity on what he was to discuss at the hearing. He felt prejudged. He did not avail himself. 2 days later, on 27th February 2015, he received a letter of summary dismissal. The reason justifying dismissal was that he performed poorly. He did not have a warning in his entire banking career. His career was soiled. Extended probation had expired in January 2015. He knew once he issued resignation notice, he had effectively terminated his contract. He did not expect the Respondent to issue another letter of termination.

10. Cross-examined, the Claimant told the Court he signed a contract on recruitment. He also signed Job Description and Staff Regulations. He was placed on 6 months' probation. He did not recall if there was review at the end. He recognized, shown page 24 of Respondent's documents, that indeed there was review. He commented in writing that appraisal was fair. He did not object to extension. He received letter to show cause, and replied on 20th February 2015, saying he was aware his performance was poor. He said he needed more time. He received invitation for disciplinary hearing. He then gave notice of resignation. He gave notice of 7 days in accordance with his contract. He did not pay 7 days' salary in lieu of notice to the Respondent, in accordance with the contract. He did not ask for additional time to prepare for disciplinary hearing. He was advised on his procedural rights. He did not have any job application letters, after he left employment, to establish his claim that he has not managed to secure fresh employment due to unavailability of the Certificate of Service. Redirected, he testified that he indicated in the appraisal form, areas of strength and weakness. He intended to source business worth Kshs. 2.6 billion in the near future, for the Respondent. He had settled well, and was a team player. His Line Manager confirmed that the Claimant had brought new Clients from KCB. The Claimant did not object to extended probation, because he expected he would meet his targets, in the fullness of time.

11. Raymond Mwangi adopted the contents of the Statements of Response and Witness, in his evidence in-chief.

12. Cross-examined, he testified that he worked as Human Resource Manager from 2010. He did not participate in Claimant's interview. The Claimant was interviewed by Senior Officers of the Respondent. There was no clause on extension of probation. Probation was for 6 months, to lapse on 18th July 2014. There was review in the end. The Line Manager could recommend confirmation, termination or extension. There was no communication to the Claimant between July and October 2014. Reviewer, at the end of probation, did not recommend disciplinary action. The Claimant issued resignation notice, with dismissal letter issuing 2 days later. The Claimant was still Respondent's Employee at the time disciplinary process ensued. The Respondent was not malicious in commencing disciplinary process. Redirected, Raymond told the Court that the Respondent went ahead with the disciplinary process because it had already commenced. Resignation notice had not taken effect. There was only one extension of probation for a period of 3 months. Review concluded the Claimant had not done well in project finance. This was his core area.

The Court Finds:-

13. The Claimant was employed by the Respondent as Relations Manager, Internal Operations Division, with effect from 17th February 2014. His consolidated salary was Kshs. 220,360 monthly.

14. He was placed on 6 months' probation to end in August 2014. The contract provided that during probation, there would be notice of termination of 7 days, or payment of 7 days' salary in lieu of such notice. There was no provision for extension.

15. However, Section 42 of the Employment Act 2007 allows for extension of probationary contracts after the initial probation of 6 months, in consultation with the Employee, and not for more than 6 months. The Claimant's probation was extended for 3 month, due to the fact that he was not posting good returns. It was extended in October with his participation, to end in January 2015. He did not complain about extension, or about lack of communication between July and October 2014 on extension. He did not even complain at the end of the extended period in January 2015, but went on working until February 2015 when he resigned.

16. He wrote a letter of resignation dated 25th February 2015, giving 7 days' notice of resignation. He considered he was still on probation, by issuing 7 days' notice of termination.

17. Having issued his notice of resignation, there was no need for the Respondent to continue with a purposeless disciplinary process. Probationary contracts or other contracts can be terminated by either Party upon the terms agreed in the contract. The notice of termination does not have to be accepted by the other Party to become effective. It was purposeless therefore, for the Respondent to have insisted on taking the Claimant through a disciplinary process, while he was still serving by his acknowledgment on probation, and while he had issued a notice of resignation.

18. In the view of the Court, that notice was valid, and would take effect at the end of 7 days, in accordance with Section 42 of the Employment Act 2007. The Claimant was right in his evidence, when he said that once he issued notice of resignation, he knew he had already resigned, and terminated the contract. He legitimately did not expect another termination letter to issue from the Respondent. The letter of 27th February 2014, while not shown to have been driven by malice, was definitely purposeless.

19. The dispute herein can be resolved, as the Court intends to do, by upholding Claimant's resignation over Respondent's purposeless summary dismissal decision.

20. Lastly, the Court must record that it has been compelled to release this Judgment from the confines of the Trial Judge's home at Chaka, Nyeri County, owing to covid-19 pandemic. Rule 28 of the E&LRC Procedure Rules, requires decisions of the Court are delivered in Open Court, a requirement which at the moment is not capable of enforcement, without risking the lives of the participants. Other modes of delivery are neither failsafe, nor safe. Online platforms are prone to interruptions and hackers, and do not guarantee seamless judicial discourse. The trial place has been identified by health authorities as a covid-19 hotspot, and while it is conceded that the wheels of justice must be kept rolling, protection of life is paramount. The Court adopts Rule 38 of its Rules, in release of this Judgment. The Judgment shall be accessible to the Parties from the Registry and as soon as practicable, from the Kenya Law Reports web portal.

IT IS ORDERED:-

- a. *The letter of summary dismissal of the Claimant issued by the Respondent, dated 27th February 2015 is declared null and void.*
- b. *Claimant's notice of resignation is upheld, and deemed to have taken effect 7 days after it issued.*
- c. *Other prayers in the Amended Statement of Claim have no foundation and are rejected.*

Dated, signed and released at Chaka, Nyeri County, for dispersal to the Parties this 29th day of May 2020.

James Rika

Judge