



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 337 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

PHILOMENA WANJIRU KIBE WAINAINA.....CLAIMANT

VERSUS

CREDIT BANK LIMITED.....RESPONDENT

JUDGMENT

The claim herein was instituted vide the claimant's memorandum of claim dated 14th February, 2014 and filed on 6th March, 2014. It is the claimant's averment in the memorandum of claim that she was employed by the Respondent herein on or about 15th February, 2011 in the position of General Manager with her last salary at the time of separation being Kshs.762,250.

The Claimant averred that during the subsistence of her employment with the Respondent she performed her duties diligently and to the Respondent's satisfaction until 17th June, 2013 when her services were unlawfully and unfairly terminated by the Respondent herein on account of redundancy.

The Claimant further averred that despite computing her terminal dues the Respondent failed to pay her the same together with her salary for the month of June 2013, which the Claimant maintained was contrary to the provisions of the Employment Act, 2007.

The Claimant maintained that the termination of her employment on account of redundancy was unlawful and unfair as the Respondent failed to comply with the mandatory provisions of Section 40 of the Employment Act and is therefore null and void ab initio.

The Claimant further contends that the Respondent altered the terms of a loan facility entered between herself and the Respondent herein which she terms as unfair as she always made payments prudently. She further avers that the demand by the Respondent that she clears the balance of the facility within a period of 3 months is unfair and unlawful.

Aggrieved by the foregoing, the Claimant filed the instant Claim seeking the following reliefs:-

1. A declaration that the Redundancy was unlawful and untimely;
2. An Order that the Claimant be paid her dues of Kshs.11,052,625 comprising of the following:
 - i. Severance pay $\frac{1}{2}$ (15 days) x 762,250 x 2 years 762,250
 - ii. One month's salary pay in lieu of notice 762,250
 - iii. Half salary for the month of June 2013 381,125
 - iv. Compensation for loss of earnings 9,147,000

Total Kshs.11,052,625

3. An Order that the Loan facility should be paid as per the terms agreed when being executed.

4. Costs of the Claim and interests.

The Respondent in its Reply to the Claimant's Memorandum of Claim and counterclaim dated 24th June, 2014 and filed in Court on 25th June, 2014 admitted having engaged the Claimant in the manner stated in the Memorandum of Claim. It however, maintained that the termination of the claimant's employment was not unlawful and wrongful as alleged by the Claimant.

The Respondent averred that the Claimant's terminal dues were tabulated to include 18 days worked in the month of June 2013, three months salary in lieu of notice and severance pay all totalling and Kshs.3,433,123.50 and Kshs.2,403,186.45 after statutory deductions. That following the Claimant's consent the amount was used to partially offset the outstanding loans and credit facilities that she had been granted by virtue of her employment with the Respondent.

It is on this basis that the Respondent denied that it is indebted to the Claimant as alleged in the Memorandum of Claim.

The Respondent contended that the Claimant was advanced various credit and loan facilities by virtue of her employment and that she continues to be indebted to the Respondent in the sum of Kshs.9,280,706.04 being the balance with respect to a Staff Development Loan A/c No. 00233033000049, which amount remains due and owing to the respondent.

The Respondent maintained that the Claimant is not entitled to the reliefs sought in her Memorandum of Claim and urged the Court to dismiss the claim with costs to the Respondent.

The Respondent further urged the Court to enter Judgment in its favour as follows:

- a) That the Plaintiff's suit against the Defendant be dismissed with costs.
- b) Special damages in the sum of Kshs.9,280,706.04 being the balance of the outstanding loan advanced to the Claimant by virtue of her employment.
- c) Interest on a) from 17th June, 2013 until payment in full.
- d) Costs.

The Claimant filed her reply to the Memorandum of Claim and Counterclaim on 23rd September, 2014 in which she termed the Respondent's assertion that she was only entitled to Kshs.692,250 and not Kshs.762,250 as her monthly salary as fallacious as she was entitled to the latter being her basic salary of Kshs.692,250 and together with a car allowance of Kshs.70,000 bringing her gross monthly salary to Kshs.762,250.

The Claimant further maintained that the termination of her employment on account of redundancy was unlawful and unfair as the Respondent failed to comply with the mandatory provisions of Section 40 of the Employment Act, 2007 as no evidence has been availed by the Respondent to confirm its compliance with the said provision of the Employment Act.

The Claimant further averred that the deduction of her terminal dues in totality to offset her outstanding loan obligations with the Respondent is tantamount to changing the terms and conditions of the Employment Act, 2007 and is thus null and void ab initio.

She maintained that the Respondent imposed upon and/or coerced her into consenting to her benefits being utilized in offsetting her loan obligations with the Respondent herein.

The Claimant contended that the repayment of her outstanding credit facilities owed to the Respondent as well as continued use of Medical Insurance was never part of her employment contract nor are they prescribed under the Employment Act and thus the Respondent's Counterclaim is filed in the wrong forum.

It is on this basis that the Claimant urged the Court to dismiss the Respondent's Counterclaim in its entirety and enter Judgment in her favour in terms of the reliefs sought in her Memorandum of Claim.

Parties agreed to dispose of the Claim by way of written submissions.

Submissions by the parties

The Claimant submitted that her employment with the Respondent was unfairly terminated without notice, justification or following procedure as provided under the mandatory provisions of Section 40 Employment Act and that the termination was unfair and unlawful. The Claimant relied on the case of **Charles Kambo Wamai v Bamburi Cement Limited (2013) eKLR** where the Court held that failure by the Respondent to comply with the set rules of procedure would render the redundancy invalid and therefore an unfair termination.

The Claimant further submitted that there was no evidence availed by the Respondent of service of notice to the area Labour Officer. She submitted that the letter dated 18th June, 2013 does not qualify to be a redundancy notice within the meaning of Section 40 of the Employment Act, 2007 as alleged by the respondent.

The Claimant further submitted that the termination was unfair as the reason was not genuine and that the statutory procedure under Section 40(1)(c) of the Employment Act was not followed. The Claimant relied on the judicial decision in the **Angela Shiukuru Ilondanga v Airtel**

Networks Kenya Limited (2018) eKLR.

The Claimant further submitted that the office she held at the bank is still in operation albeit under a new title and was never abolished or rendered redundant.

The Claimant submitted that she is entitled to the reliefs sought in her Memorandum of Claim and urged the Court to allow the same as pleaded. The Claimant relied on the case of **Anastacia Mutindi Kibutu v Liason Group (IB) Limited (2019) eKLR.**

The Claimant urged this Court to dismiss the Respondent's counterclaim with costs and allow her claim as prayed with costs to the Claimant.

Respondent's Submissions

The Respondent on the other hand submitted that the Claimant's termination by way of redundancy was fair, valid and procedural. The Respondent relied on the principles set out in the Court of Appeal decision in the case of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others (2014) eKLR** where the Court opined that redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer and the termination is in accordance with fair procedure.

The Respondent further maintained that it did comply with the mandatory provisions of Section 40 of the Employment Act, 2007. On the issue of notice the Respondent maintained that it did pay the Claimant three (3) months' salary in lieu of notice to the Labour Officer.

On payment of terminal dues the Respondent maintained that it did pay the Claimant above and beyond the statutory provisions of Section 40 of the Employment Act and the Claimant is therefore not entitled to the reliefs sought in her Memorandum of Claim.

On compensation for loss of earnings, the Respondent submitted that once a claim of unlawful redundancy fails, the claim for future earning equally fails. The Respondent cited the Court of Appeal decision in the case of **Kenya Ports Authority v Mary Sawu Mwandawiro (2017) eKLR.**

It is further contended the claim for future earnings is misplaced and is not tenable in the circumstances. The Respondent cited the case of **Fatma Ali Dabaso v First Community Bank Limited (2018) eKLR** where the Court held that a claim for loss of future earnings was not proved and proceeded to dismiss the same.

The Respondent submitted that it is entitled to its counterclaim against the Claimant as it emanates from a loan and credit facility advanced to the Claimant in the course of her employment with the Respondent and that the balance thereof remains due and owing to the Respondent. The Respondent relied on the case of **National Bank of Kenya Limited v Hamida Bana & 103 Others (2017) eKLR.**

In conclusion the Respondent submitted that the instant Claim is devoid of merit and urged the Court to dismiss the same with costs to the Respondent. It is the Respondent's submission that having proved its counterclaim the same ought to be allowed as prayed with costs to the Respondent.

Analysis and Determination

I have considered the facts of this cause, evidence adduced by the parties hereto, submissions and authorities cited by both the Claimant and the Respondent. The issues for determination are:-

1. Whether termination of the Claimant's employment by way of redundancy was lawful and fair
2. Whether the Claimant is entitled to the reliefs sought
3. Whether the Respondent is entitled to the Counterclaim

Redundancy is defined under Section 2 of the Employment Act as:-

“redundancy” means 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 practices commonly known as abolition of office, job or occupation and loss of employment;

Was procedure followed?

The respondent admitted not giving notification prior to redundancy to both the claimant and the County Labour Officer. It thus did not comply with the provisions of Section 40(1)(a) and (b) of the Employment Act, 2007 in terms of serving the various notices prior to the redundancy.

In the case of **Bernard Misawo Obora v Coca Cola Juices Kenya Limited [2015] eKLR**, it was held that the notice to the Labour Officer is meant to elicit advice to the employer on the modalities to be employed in the redundancy process. That this is an important process which not only ensures proper preparation for the affected employees but also acts as a control measure to curb against unlawful termination

clothed as redundancy.

Further in the case of **Margaret Mumbi Mwago v Intrahealth International (2017) eKLR** the Court held as follows:

“My understanding of the sequence in the issuance of notices under Section 40 (a) and (b) is that the first, which is the redundancy notice, goes out simultaneously to the employee or their trade union and to the Labour Officer and the second which is the termination notice, goes out to the employee in accordance with the subsisting employment contract”

In view of the foregoing, I find that the process of redundancy was flawed with the result that the redundancy of the claimant was un-procedural and therefore unfair.

Whether the Claimant is entitled to the reliefs sought

a) A declaration that the redundancy was unlawful and untimely

Having found that the Respondent failed to comply with the mandatory provisions of Section 40 of the Employment Act the Claimant is entitled to this relief. In the case of **Anastacia Mutindi Kibutu v Liason Group (IB) Limited (Supra)** the Court held that where a termination violates the mandatory provisions of Section 40 of the Employment Act such termination is unfair within the meaning of Section 45 of the Act.

b) An Order that the Claimant be paid her dues of Kshs.11,052,625

The Claimant contended that despite tabulating her dues, the Respondent did not pay the tabulated dues as stated and urged the Court to allow her claim for compensation.

The Respondent maintained that it paid the Claimant the following

as terminal dues at the time of her separation:

- i. Days worked in June 2013 (18 days)
- ii. Payment in lieu of leave
- iii. Three Months' salary in lieu of notice and
- iv. Severance pay as per the Employment Act.

The Respondent further maintained that the total amount itemized above of Kshs.3,433,123.50 (less Statutory deductions) was actually paid and was used to offset the outstanding debt owed to the Respondent by the Claimant.

Indeed, the Respondent annexed to its Memorandum of Response and Counterclaim appendix CB -2 being the Claimant's final dues compilation. Annexure 9B is a letter allegedly from the Claimant authorizing the Respondent to utilize the Claimant's terminal dues to pay off part of a loan owed by the Claimant.

From the evidence adduced by the respondent, I find that the tabulation of the claimant's terminal dues were in accordance with the law and her terms of service as per contract. The respondent however having failed to comply with the requirements for notification of the claimant and local Labour Officer, I award the claimant 3 months' salary as compensation in the sum of **Kshs.2,286,750**.

c) An order that the loan facility be paid as per the terms agreed

It is not clear exactly what the claimant was praying for as the loan agreement provides for interest to be charged at commercial rates upon separation. I have further noted from the evidence that the claimant being aware of the terms, made a request to the respondent vide her letter dated 20th June 2013 (Appendix 9c of the respondent's bundle) and was granted 3 months' interest at staff rate. Having been a subject of discussion between the parties and having agreed on the same, this court will not interfere with the interest on loan facility.

Whether the Respondent is entitled to the Counterclaim

The Claimant did not deny being indebted the respondent on account of loan facilities advanced to her during the subsistence of her employment with the Respondent.

I thus enter judgment for the respondent in terms of the counterclaim but hasten to add that in view of the time that has lapsed since the claim was filed, account be taken of any amounts paid by the claimant towards clearance of her loan facility since the

date of filing suit.

Taking into account that both parties have been somewhat successful in their claims, I order that each party shall bear its costs of the suit and

the counterclaim respectively.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF MAY 2020

MAUREEN ONYANGO

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 March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE