



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF**  
**KENYA AT NAIROBI**  
**CAUSE NO 716 OF 2015**

**ZACHARY NDUNGU GICHIA .....CLAIMANT**

**VERSUS**

**FAMILY BANK LIMITED.....RESPONDENT**

**JUDGEMENT**

1. By a memorandum of claim filed on 29th April, 2015 the claimant averred that he was employed by the respondent as a collection and recoveries Manager on 1st December, 2011. He worked for the respondent until 13th August, 2014 when the respondent suspended him from duty for a period of one week due to an alleged unprocedural auction process on 31st July, 2014 relating to one Ruth Waruiru Rionge over LR. No Limuru/Kamirithu/2836, Kiambu County.

2. The respondents complaint was that the subject piece of land was at the time of being offered as security in 2012 valued by the respondent's valuers at Kshs 3,500,000/= and in 2014 when the property was to be auctioned for default on the part of the borrower valued by respondent's valuer at Kshs 4,000,000/= being open market value.

3. The claimant was required to respond to the allegations which he did vide a letter dated 18th August, 2014. On the same day the claimant was invited by the respondent to attend a disciplinary hearing on the 21st August, 2014. On 22nd August, 2014 the claimant was issued with a termination letter. The termination letter stated that the explanations during the disciplinary hearing were unsatisfactory and questioned the claimant's integrity and that the respondent had lost faith in him. As at the time of termination the claimant's salary was Kshs 233,200/= and he had a loan of Kshs 7,000,000 which he took in 2013.

4. According to the claimant, the process of advertising and selling the subject property through auction was as set out in the law and there was no wrong that was committed by the claimant to warrant disciplinary action and termination of service.

5. In his oral evidence in court the claimant additionally stated that there was a case of property valued at Kshs 3.5 million in 2012 and at the time of auction in 2014, it was valued at Kshs 3 million. He was accused of not referring the matter to his lime manager. It was his evidence that he responded to the show cause letter and was later invited for a disciplinary hearing. The hearing was conducted and he was not absolved. It was further his evidence that the valuers were in the Banks panel and that he was not involved in appointment of valuers. He further stated that nothing in the valuation aroused any suspicion from him. He could not tell if there was either over or undervaluation. The valuation report was signed by a professional and according to him he followed all the procedures for loan recovery and updated the management. On termination, he was paid two months' salary in lieu of notice yet he was entitled to three months' notice.

6. In cross-examination he stated that his terms of service was also governed by the Human Resource Manual and code of conduct. He further stated that he did not seek clarification from his lime manager over the discrepancy in valuation and that the issue of valuation came after the auction.

7. Concerning the loan he stated that he was aware that the interest rate would change if he left respondent's employment. He further stated that he had never visited the respondent's premises to negotiate a repayment proposal. The respondent's witness Mr Elijah Kariuki stated that the claimant disregarded customer's interest and failed to adhere to employee's code of conduct. He further stated that the claimant has failed to comply with the order of the court to repay the loan at staff rates. He further stated that on termination the claimant was entitled to 3 months notice as per the letter of appointment. According to him the claimant was guilty of gross misconduct by acting on a valuation that was lower than original evaluation. He however admitted that the property value can go down.

8. In re-examination he stated that the termination notice period was received by the Board and a circular issued varying the same from three to two months. He further stated that the claimant ought to have consulted his line manager before proceedings with the auction. The claimant herein was accused of selling the property charged to the Bank at gross undervalue. According to the Bank, the claimant ought to have consulted with the Bank when he realised that the valuation for the property at the time of sale was lower than when the bank created a

charge over the same. The claimant in his evidence did not deny that he never consulted his line manager before going ahead with the same. The claimant further stated in his evidence that he was initially suspended and later issued with a Notice to showcause which he responded to. The claimant was further called to a disciplinary hearing which he attended. The respondent in conclusion of the process terminated the claimant's service. The termination was on account of loss of credibility and integrity of the claimant. According to the respondent the claimant instituted unprocedural auction process.

9. The reason or reasons for termination of employment are matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee. The court does not substitute its view of reasons for the termination of employment with that of an employer. The test is usually that of a reasonable employer. If such employer would for reasons given dismiss then the dismissal will be upheld. The respondent as a Bank accused the claimant of proceeding with the auction despite the fact that the valuation at the time of creating a charge over the subject property was higher than the time of sale.

10. According to the respondent this was unprocedural and the claimant ought to have consulted his line manager before proceeding with the sale. The claimant in his own evidence conceded that he did not consult his line manager prior to proceeding with the sale. The respondent therefore felt that the claimant must have colluded to have the property sold at undervalue. This led the respondent to lose confidence in the claimant. Employment contract is a personal service hence confidence is critical for the continuance of the relationship. Loss of confidence therefore is a valid ground for termination of employment relationship. The respondent in this regard has discharged the evidentiary burden placed on it by law.

11. Concerning the process followed before termination, the court is persuaded that the process of termination was procedurally fair as the claimant was granted an opportunity to answer to the charges against him and did so by responding to the show cause letter and attending the disciplinary hearing. Regarding prayer that the claimant services the loan at staff rate, the courts would not grant this prayer because the loan contract entered into by the parties provided that staff interest rate shall cease upon the termination of the employment relationship.

12. The court therefore cannot rewrite the contract for the parties. The claimant brought about the termination of his contract hence cannot pick and choose which consequences not to live with.

13. In conclusion the claim is found not merited and is hereby dismissed with costs.

14. It is ordered.

Dated at Nairobi this 25<sup>th</sup> day of January, 2019

**Abuodha Jorum Nelson**

**Judge**

Delivered this 25<sup>th</sup> day of January, 2019

**Abuodha Jorum Nelson**

**Judge**

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.