



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NYERI**

**CAUSE NO. 213 OF 2017**

**PETER MACHARIA GAKURE.....CLAIMANT**

**VERSUS**

**AMICA SAVINGS & CREDIT LIMITED.....RESPONDENT**

**(CONSOLIDATED WITH CAUSE NO. 214 OF 2017)**

**MARTHA WANGARI GICHANA.....CLAIMANT**

**VERSUS**

**AMICA SAVINGS & CREDIT LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimants sued the Respondent for unfair termination of employment. Peter Macharia Gakure averred that he was employed as a junior clerk on 15<sup>th</sup> June 1998 and was the Thika Branch manager by the time his employment was terminated on 19<sup>th</sup> April 2017. He was earning a salary of Kshs. 72,000/- per month. The other Claimant Martha Wangari Gichana was employed as a bookkeeper and was the officer in charge of SME's, Groups and Chamas at the time her employment was terminated on 19<sup>th</sup> April 2017. She earned Kshs. 89,018.12 a month. The Claimants sought a declaration that their termination was unlawful as the same was without following the laid down procedure. They each sought to be reinstated and in the alternative and without prejudice to the prayer for reinstatement, an order for damages. They also prayed for costs of the suit.

2. In the defences filed, the Respondent averred that the Claimants were given a fair hearing and that a written explanation was sought, due process followed and the defence of each of the Claimants was considered and having found it not convincing thereafter terminated their services and processed the terminal dues. A counterclaim was filed on 16<sup>th</sup> August 2017 against the Claimant Peter Macharia Gakure in which the Respondent sought Kshs. 1,484,867.82 advanced to him as a loan as well as the sum of Kshs. 7,000,000/- the amount estimated to have been lost as a result of the unlawful acts of the Claimant making a total of the sums claimed to be Kshs. 8,484,867.82 as well as interest on the sums claimed. The Respondent also sought costs on the counterclaim. In regard to Mary Wangari Gichana, the Respondent claimed Kshs. 1,997,281.38 which was advanced as a loan and Kshs. 260,000/- advanced to a close relative through an act construed as abuse of office as well as the sum of Kshs. 7,000,000/- which was the estimated loss. The total sum claimed from her was Kshs. 9,282,281.38 together with costs and interest thereon.

3. The Claimants were heard as were the witnesses for the Respondent James Kamau Gachau the current general manager of the Respondent, Pius M. Hira who was a credit manager of the Respondent, Daniel Mungai Njoroge the chair supervisory committee of the Respondent and Dorcas Wanjiku Njuguna an auditor with the Respondent. Peter Macharia Gakure stated that he is a banker from Thika and that he had accepted responsibility at the Thika branch to take action in regard to the issue at the branch. He confirmed there were irregularities in disbursements at the branch and that he was communicating the same in the letter. The other Claimant Martha Wangari Gichana testified that she was a former banker and was presently a farmer. She stated that she was a member of the Respondent and she held shares in the Respondent. She stated that she had not seen the report before the dismissal and that she had no role to play in the approval and disbursement of loans. She denied granting a loan to her daughter in-law Irene Wangechi Kariuki who is married to her son. She stated that being a relative does not deny one a chance to get a loan. She testified that the report was only availed in the counterclaim. The Respondent's witness James Kamau Gachau testified that he was aware of the letter issued to the Claimants and that according to the letter details were provided. He said that they attended the staff disciplinary meeting and that they were called by the HR Bob Maru. He stated that the details of this can be verified with Safaricom. He was cross-examined and he said that the 5 staff were summoned and they all came for the hearing and they were ultimately dismissed for the wrongdoing. The second witness Pius Hira testified that he was present at the meeting of April 2017 and that out of the 5 staff members 3 managed to attend. He said that loans not issued in accordance with the credit policy of the Respondent are illegal loans. If they are not repaid the person who disbursed them is responsible. He stated that Peter owed Kshs. 1,484,867.82 and that Martha had

a loan of Kshs. 1,987,281.08. He produced the loans statement and in cross exam stated that the Claimants were present at the meeting on 19<sup>th</sup> March 2017. He said they were invited by HR though he admitted he was not there when they were invited to attend. He confirmed that the minutes were not signed and that the sums fluctuated due to interest. In re-exam he stated that he signed the minutes and Maru signed on 26<sup>th</sup> July 2017. He stated that he new Lydia Magiri and that they had made efforts to recover the loan from her. The next witness for the Respondent Daniel Mungai Njoroge testified that the report was necessitated by the third quarter inspection of the Thika branch which revealed anomalies from the internal auditor. He admitted that Lydia Magiri Mungai was his wife and that she was a tea farmer. He said that he was the chair of the supervisory committee of 3 and that he was honest as he had included the issue of his wife in the report. He was cross-examined and stated that when they went to the branch they collected information and they blamed the branch manager Mr. Gakure (Claimant) and that the report was sent to the chair of the SACCO. He was not aware if the Claimants got a copy. He confirmed that Lydia was his wife and that she had a loan with the SACCO and has cleared it. He stated that he had not checked to see how many of the loans in the report had been repaid. The final witness for the Respondent Dorcas Wanjiku Njuguna testified that she was an auditor with the Respondent from 2010 and that she had prepared the audit report before court. She stated that loans should be secured and the issues she identified at the branch included insider loans and approvals above the sums permitted without sanction by the head office. She said there were incomplete processes such as missing appraisals and approvals and some loans were not secured as the securities had not been taken through the perfection process. In cross-exam she stated that there were some approximations.

4. The parties filed submissions in which the Claimants submitted that the case hinged on whether the Respondent had followed the laid down legal procedures in dismissing the Claimants from employment. The Claimants submitted that it was not disputed that they were given the letters suspending them with half pay which also conveyed that details of the allegations against them would be availed and an opportunity availed for a response. The Claimant stated that the letter had been emailed while the Respondent asserted that it had been hand delivered. The Claimants submitted that in the absence of proof by way of testimony by the person who hand delivered it, there was a presumption that the Claimants version of delivery by email was credible. The Claimants submitted that there was no fair hearing as they were not invited to defend themselves. The Claimants assert that the person who is alleged to have called them for the disciplinary hearing was Bob Maru yet he was not called to testify and that the evidence regarding the summons for the meeting were therefore hearsay. The Claimants submit that the allegations against them were phony as no report was given to them and they wondered what they were defending themselves against at the meeting if the report was not availed to them prior to the meeting. The Claimants assert that the proceedings were made up as the minutes were a ploy to sanitize an unlawful and irregular dismissal. They submitted that no cogent reason was availed why one of the members who presided over the meeting signed the minutes days later after the alleged meeting. The Claimants sought to be reinstated with full pay and in the alternative grant full compensation for the unlawful termination. As regards the counterclaim, the Claimants submitted that the loans issue is a matter outside the jurisdiction of this court as the Respondent has the liberty to follow up the defaulters as they are known to it. The Claimants submit that Section 76 of the Co-operatives Act ousts the jurisdiction of this court and therefore because jurisdiction is everything the counterclaim should fail and be dismissed with costs.

5. The Respondent submitted that the issues for determination were as follows:-

- i. Whether the Claimants were given a fair hearing before their termination;
- ii. Whether the Respondent made a good case against the Claimants before dismissing them from employment;
- iii. Whether the Respondent followed due process in terminating employment;
- iv. Whether the Respondent has proved its counterclaim;
- v. Whether the claims are merited.

The Respondent submitted that the Claimants had astonishingly asserted that they were not given a hearing yet the disciplinary board minutes held on 19<sup>th</sup> April were clear. They had not refuted the minutes and the Respondent submitted that the only conclusion left is that they were given a chance to be heard. The Respondent submitted that it was the responsibility of the Claimants to ensure the issuance of loans was transacted securely and in accordance with the credit policy of the Respondent. The Respondent submitted that any deviation from the credit policy amounted to gross misconduct and that the Claimants authorized the issuance of loans without security which was blatant disregard for the SACCO policies and in breach of their duties. The Respondent relied on the case of **Samuel Nyeso Masha v Silver Holdings Limited & Another [2018] eKLR** where the court held that failure to perform duties carefully and properly showed the claimant to have acted carelessly and improperly. The case of **Karisa Charo Kiraga v Nakayima Hauliers (K) Limited [2016] eKLR** where the court held the failure to comply with the instructions to drive the vehicle to Port Reitz was a fault on the part of the claimant in that case. The Respondent submitted that it followed due process in the termination in terms of Section 41 of the Employment Act. The case of **Samuel Kigima Kamau v Invesco Assurance Company Limited [2018] eKLR** was cited for the submission that an employer is required to have an internal process of undertaking administrative investigations and verify the occurrence of misconduct before the decision to terminate is arrived at. The Respondent submitted that the internal auditors and its supervisors conducted an internal audit which was comprehensive and the report showed the SACCO was at the brink of losing about Kshs. 7,000,000/- due to gross misconduct of the Claimants. It submitted that the Claimants admitted that they had the control of the credit system of the Respondent and that they allowed transactions to be made without adherence to the credit policy. The Respondent submitted that they were given a hearing before dismissal. The Respondent argued that the auditor's report found a sum of Kshs. 6,744,971/- was at risk of being lost while the supervisory committee found a sum of Kshs. 7,000,000/- at risk of being lost. The Respondent submitted that these two reports were made through independent investigations and that even though the amounts did not tally they were very close to each other. The Respondent submitted that the report of the auditor should be relied on as this was from a professional and that Peter Macharia Gakure had in his letter of 6<sup>th</sup> March 2017 accepted his role in the loss. The Respondent proposed the sharing of the loss equally between the 2 Claimants. The Respondent relied on the case of **Nahason Njogu Njoroge v Murata Co-Operative Savings and Credit Society Limited [2015] eKLR** where the court allowed a set off on the sum owed to the co-operative from the sum awarded to the claimant. The Respondent thus sought the dismissal of the Claimants' claims and entry of judgment in terms of the counterclaim.

6. The Claimants were dismissed from employment and assert that the dismissals were not in keeping with the dictates of the law on

procedural and substantive fairness. The Claimants were not heard by the board as the minutes of the joint board/supervisory meeting held on 19<sup>th</sup> April 2017 show. The Claimants are not indicated as being present though the minutes reflect they were part of the discussion and were subject of the management disciplinary committee report. The Claimants however were noted to have been invited for questioning by the staff disciplinary committee meeting of 19<sup>th</sup> April 2017. The report recommended summary dismissal. As far as the issue of hearing under Section 41 goes, the Claimants were heard. Despite the fact that they were not issued with a copy of the audit report they were given the allegations against them and they had opportunity to respond hence the 'admission' letter by Peter Macharia Gakure of 6<sup>th</sup> March 2017. In my view the hearing was substantively and procedurally fair. The Claimants failed to prove their claims.

7. The loss subject of the audit are matters beyond the jurisdiction of this court in an employment dispute. The provisions of Section 76 of the Co-operative Societies Act are clear.

76. (1) If any dispute concerning the business of a co-operative society arises—

- (a) among members, past members and persons claiming through members, past members and deceased members; or
- (b) between members, past members or deceased members, and the *society, its Committee or any officer of the society; or*
- (c) between the society and any other co-operative society, it shall be referred to the Tribunal.

(2) A dispute for the purpose of this section shall include—

- (a) a claim by a co-operative society for any debt or demand due to it from a member or past member, or from the nominee or personal representative of a deceased member, whether such debt or demand is admitted or not; or
- (b) a claim by a member, past member or the nominee or personal representative of a deceased member for any debt or demand due from a co-operative society, whether such debt or demand is admitted or not;

.....

8. The dues therefore on account of the loan are also matters for the Tribunal established under Section 77 of the Act. I would therefore not even set off the sums due to the Respondent in view of Section 76 as read with Section 77 of the Co-operative Societies Act. The counterclaims would also equally fail. In the final analysis I dismiss the suits by the Claimants and the counterclaims by the Respondent. Each party to bear their own costs.

It is so ordered.

**Dated and delivered at Nyeri this 26<sup>th</sup> day of March 2019**

**Nzioki wa Makau**

**JUDGE**

I certify that this is a true copy of the Original

**Deputy Registrar**