



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 255A OF 2013

BANKING, INSURANCE AND FINANCE UNION (KENYA).....CLAIMANT

v

UKULIMA CO-OPERATIVE SAVINGS & CREDIT SOCIETY LTD.....RESPONDENT

JUDGMENT

1. The Banking, Insurance & Finance Union, Kenya (the Union) commenced legal proceedings against Ukulima Co-Operative Savings & Credit Society Ltd (Respondent) on 22 May 2014 and the Issue in Dispute was stated as Wrongful summary dismissal/termination from employment of Dickson M. Mwanje. It is not clear why the Cause was listed as a 2013 Cause.
2. On the same day, the Union filed Nairobi Cause No. 255 of 2013, *Banking Insurance & Finance Union v Ukulima Co-Operative Savings & Credit Society Ltd (Peter Musakali)* and 255B of 2013, *Banking Insurance & Finance Union (K) v Ukulima Co-Operative Savings & Credit Society Ltd (Patrick Kipchumba)*.
3. Although the Causes were not consolidated, the files were listed together through the course of litigation.
4. Nduma J took the parties cases in Cause No. 255 of 2013 on 12 March 2014 and 13 March 2014 when he noted that the causes of action in the files were different and should be determined separately.
5. The Judge took the Respondent's case in Cause No. 255 of 2013 on 18 June 2014 when the hearing was closed.
6. On 24 June 2014, the Judge commenced hearing of Cause No. 255B of 2013 and the hearing continued on 31 July 2014 when the hearing was adjourned for Respondent's case on 10 November 2015.
7. Nduma J was transferred before he could conclude the hearings.
8. This Court took the parties case in this particular file on 25 July 2018 , 17 October 2018 and 18 December 2018 (because of the separation orders already referred to directs that the file 255 of 2013 be transmitted to Nduma J to enable him prepare judgment.
9. The Union filed its submissions on 7 February 2019 while the Respondent filed its submissions on 13 February 2019.
10. The Court has considered the pleadings, evidence and submissions and identified the Issues for determination as
 - (i) Whether the termination of the Grievant's employment was unfair and
 - (ii) Appropriate remedies/orders.

Unfair termination of employment

Procedural fairness

11. Dickson Mwanje (Grievant) was transferred to Mombasa on 1 March 2010 as Chief Cashier.
12. On 30 December 2010, the Respondent suspended the Grievant who was then the acting Branch Accountant from work on allegations of being involved in fraudulent transactions leading to the loss of Kshs 1,300,000/-.

13. The suspension letter asked the Grievant to show cause before 12 January 2011 why disciplinary action ought not to be taken against him.
14. The Grievant responded in writing on 6 January 2011 and on 21 January 2011 appeared before the Respondents Board of Directors to make oral representations.
15. On 3 May 2011, the Respondent wrote to inform the Grievant that he had been found culpable for failing to perform his duties with care and diligence but that the suspension was being lifted on condition that he paid Kshs 471,250/- being the loss attributed to him.
16. The Grievant was requested to give proposals on how he intended to pay the surcharge of Kshs 471,250/-.
17. On 21 May 2011, the Grievant gave an undertaking to pay the surcharge and applied for a top up loan of Kshs 1,300,000/- on 6 June 2011 which was approved.
18. The Grievant despite receiving the loan did not pay the surcharge and on 12 January 2012, the Respondent wrote to him expressing disappointment with the failure and seeking a commitment before 17 January 2012 that he would pay the surcharge.
19. The Grievant replied on 17 January 2012 indicating that he had deposited Kshs 10,000/- in the FOSA account and that he would pay Kshs 5,000/- before 25 January 2012 and thereafter Kshs 4,000/- per month.
20. On 17 February 2012, the Respondent invited the Grievant to appear before the Staff Management Sub-Committee on 20 February 2012 accompanied by Union officials to deliberate on the issue of surcharge.
21. The meeting took place but the Respondent found the explanations by the Grievant unsatisfactory and on 21 February 2012 it issued a show cause notice to the Grievant to explain before 28 February 2012 why he should not be dismissed for failing to obey a lawful order in respect to pay the surcharge.
22. The Grievant responded to the show cause on 28 February 2012 re-echoing the commitment made through his letter of 17 January 2012.
23. The Respondent was not satisfied and on 12 March 2012, it wrote to the Grievant informing him of dismissal from employment prompting the Union to move the Court on 22 May 2014.
24. The primary allegation against the Grievant was involvement in fraud leading to losses of which Kshs 1,300,000/-.
25. The Grievant was given both written and oral opportunity to make representations and he did. During the oral hearing, the Grievant was accompanied.
26. At the conclusion of the process, the Grievant was found culpable and a penalty of surcharge was imposed. The Grievant applied for and was granted a loan to meet the surcharge.
27. The Grievant did not fully meet the commitment.
28. The Respondent gave further opportunities to the Grievant to explain the failure to make up the commitment but his response was found wanting.
29. The Court is satisfied that the Grievant was at all the times afforded an opportunity to confront the allegations against him and finds that the process by the Respondent met the threshold for both statutory and contractual procedural fairness.

Substantive fairness

30. The initial allegation against the Respondent was involvement in fraud. It was alleged that the Grievant had bypassed the operating procedures in place for opening and processing of loans/accounts.
31. The allegations were subject of a hearing and the Grievant was found liable and penalised with surcharge.
32. The Grievant did not make good the penalty despite being afforded time and a loan facility. This led to a second show cause notice and was the immediate cause of the dismissal.
33. In Court, the Grievant contended that he had expected the Respondent to directly debit from his account the surcharged amount.
34. The Grievant sought a loan to meet the surcharge and other commitments. The loan was approved and was credited to the Grievant's FOSA account. The Grievant, by virtue of his position must have known of the transactional procedures of FOSA accounts at the Respondent.
35. Without any express agreement to the contrary, it would have been in breach of contract for the Respondent to debit the account. Instructions had to come from the Grievant, or the Grievant could have taken a positive move and transferred to surcharge to the Respondent.

36. It appears to the Court, and the Court finds that the Grievant did not intend to make good the penalty of surcharge which he did not appeal against as a sanction.

37. An employee has a common law obligation to cooperate with the employer. He should act in good faith during the duration of the contract (*Facenda Chicken Ltd v Fowler* (1986) IRLR 69)

38. The Court therefore concludes that the Respondent has not only proved but proved as valid and fair the reasons for dismissing the Grievant.

Conclusion and Orders

39. With the conclusion that the dismissal of the Grievant was fair, the remedies of reinstatement and/or compensation and *actual pecuniary loss* resulting from the dismissal are not available.

40. The Cause is dismissed with no order as to costs.

Delivered, dated and signed in Nairobi on this 4th day of April 2019.

Radido Stephen

Judge

Appearances

For Union Mr. Mwaura, Chief Organiser, Banking Insurance & Finance Union (K)

For Respondent Mr. Kilonzo, Legal Officer, Federation of Kenya Employers

Court Assistant Lindsey