



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1906 OF 2016

FAROUK SULTAN HIRANI.....CLAIMANT

VERSUS

NATIONAL BANK OF KENYA.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 25th October, 2019)

JUDGMENT

The claimant filed the statement of claim on 15.09.2016 through MJD Associates Advocates and Mr. Davis Mulani Advocate appeared in that regard. The claimant urged the Court to find that the respondent contravened the provisions of the Employment Act, 2007 and to award him:

- a) Notice pay.
- b) 12 months' salary compensation for the unfair and wrongful termination of contract.
- c) 12 months medical cover for self and family.
- d) Certificate of service.
- e) Preservation of the interest rate on the facility the claimant has at 4.5% p.a until payment in full.
- f) Damages for breach of the right to fair hearing.
- g) Damages for loss of reputation and earning potential.
- h) An apology letter withdrawing the allegation of impropriety on the claimant's part.
- i) Costs of the suit.

The respondent filed the memorandum of response on 02.06.2017 through KTK Advocates and Mochama Advocate appeared in that regard. The respondent prayed that the suit be dismissed with costs.

To answer the **1st issue** for determination the Court returns that there is no dispute that parties were in a contract of service.

The respondent employed the claimant effective 01.07.2013 as Head of Products and Transactional Banking. The claimant was confirmed in employment by the letter dated 10.01.2014 and effective 02.01.2014. By the letter dated 17.11.2014 the claimant's salary was improved. By the letter dated 15.07.2015 the respondent appointed the claimant to the position of Director, Business Banking. The appointment was approved by the Central Bank by the letter dated 25.02.2016.

To answer the **2nd issue** for determination there is no dispute that the respondent dismissed the claimant from employment by the letter of summary dismissal dated 22.06.2016. The letter stated that following the disciplinary hearing he attended on 08.06.2016 the letter communicated the respondent's decision to dismiss him from its employment on account of gross misconduct and loss of confidence arising from:

- a) Non-adherence to the bank's policies and procedures as well as the prudential guidelines in the restructure or rebooking of loans for respective customers under his portfolio whose full particulars were well within the claimant's knowledge. That constituted

reckless lending as highlighted in special investigations report by Deloitte and Touche' and occasioned loss to the bank as outlined in the audited accounts.

b) Careless and improper performance of his role as Director, Business banking which it was the claimant's duty to have performed carefully and properly in accordance with his job description.

The letter stated that upon return of the respondent's property the claimant's terminal benefits including unutilised accrued leave would be computed and paid to the claimant less debts owing to the respondent. The dismissal was effective the date of the letter, 22.06.2016.

The claimant appealed against the dismissal by his letter dated 28.06.2016. The claimant stated that at no time did he not adhere to the respondent's policies and procedures and prudential guidelines. He explained that he was away from duty in December 2015 and he had handed over his duties as per the human resource policy of the respondent. The internal memos availed to him generated during that period he was on leave showed that the proposal for restructuring or rebooking of loans in Business Banking was done as per the approved credit policy of the respondent and the underwriting standards whereby memos were proposed and supported by the business to credit risk division. His case was that business proposes extension of facilities as long as there was justifiable evidence and supporting documentation which was done in the instant case. Further it was the sole discretion of credit approvers to decline or approve facilities hence he could not be held liable. If further approvals were required, it was credit that sought approvals and then relayed the final decision to business. Further there had been no lending in December 2015 because the facilities had already been approved by the Executive Credit Committee and Board Credit Committees in previous years. The memos in issue only sought extension of repayment dates and hence he was questioning how the same constituted reckless lending if the funds had been lent in 2013, 2014, and 2015. He denied that as a Director he had been careless and provided improper performance whereas his focus was business growth and portfolio health. By issuing a memo to follow up on the facilities, he had acted as per his job description and he had not been shown what he breached in his job description.

Further, he stated that in 2015 the Bank had reported losses for various reasons and other business units had as well sought extensions and were also responsible for overall respondent's position (including Retail, Islamic Banking and Corporate Banking divisions) so that it could not be due to few clients' facilities in business banking being restructured that the respondent had made loss as the audit report was not his fault as he had no authority to approve credit facilities. Thus there were no established reasons to warrant his dismissal.

By the letter dated 22.07.2016 the respondent conveyed to the claimant that his appeal had raised no new grounds to warrant reversal of the respondent's decision to dismiss the claimant from employment.

The **3rd issue** for determination is whether the dismissal of the claimant from employment was unfair.

First is whether the reasons for dismissal were valid as envisaged in section 43 of the Employment Act, 2007. The show-cause notice dated 26.05.2016 stated the allegations against the claimant as follows:

“Upon review of the audited accounts for the year 2015, it came to the bank's attention that financial information including non-performing loans appear to have been misrepresented. The bank has reason to believe that you were involved in causing this misrepresentation.

This is to inform you that the bank is considering terminating your contract of employment for gross misconduct occasioned by the misrepresentation referred to above and particularly in the following manner;

1. You were aware that Dennis Chumbe asked four relationship managers namely Edwin Kipchumba, Peter Sabila, Abed Lelgo and Beatrice Mwangi to originate the restructuring, consolidation and extension of facilities for various loan accounts. This request by Dennis Chumbe was made by an email of 17th December 2015 a follow ups of which were made in emails dated 18th December 2015, 29th December 2015 and 30th December 2015 all copied to you.

2. By emails dated 29th December 2015, you sought to confirm whether the restructuring had been approved and further stated that “Confirm it's done today, cannot afford provisions on this name”

The email correspondence suggest that the restructuring/rebooking of the loans was intended to avoid making provisions for non-performing loans as a result of which the financial results were grossly misrepresented. This was a fundamental breach you became aware of yet you did not take action to stop it but instead proceeded to assist in executing the restructuring the loans contrary to credit procedures and policy.”

The claimant replied by his letter dated 30.05.2016 that he was on leave when the emails were issued by Dennis Chumbe on 17.12.2015 and 18.12.2015 and was not accessing his emails. He requested to be provided details of the accounts in issue and documents referred to in the show-cause letter to enable him reply effectively. At the disciplinary hearing of 31.05.2016, the accounts involved were disclosed as Juja Coffee; KEL Enterprises; KAAB Investment; TSS Grain Millers; General Mills East Africa; Transafric Timber; Virgin Packaging; Mountain Mall; Benvar Limited; Githere Kahura Investments; and Best Buys Limited. The claimant explained that the emails had been generated by Dennis while he was on leave and returned to the office on 29.12.2015. He requested to be provided emails for 17.12.2015 to 07.01.2016; approval memos for various loan accounts; and the list of the loan accounts. The Committee accepted to supply the documents and adjourned the disciplinary hearing. The documents were forwarded by the letter dated 31.05.2016 and the claimant required to submit the response to the show cause letter by 02.06.2016, 9.00am. The response dated 06.06.2016 was effectively as follows:

a) The claimant was on leave on the dates of the emails on 17.12.2015 and 18.12.2015 and he could not access his emails.

b) The documents show acting ME Head Dennis Chumbe was asking the ME team to seek approvals from credit based on discussions and requests from specific clients to allow for extension of payment as they were not able to settle the debts obligations

on due dates due to their respective unique reasons and challenges of sector or industry of operation. The emails were supported by the Executive Director CIBB who was the overall in charge of the division hence he was not needed to be made aware while away on leave as he had handed over his duties. Credit approved all requests proposed and that was in line with the policy of the bank. All procedures and turnaround timelines had been complied with.

c) Further on 28.12.2015 he returned to the office and the Executive Director CIBB gave him handover notes to follow up various actions including transactions that were already approved. Thus he issued his memo of 29.12.2015 to the relationship team as a follow up. That was within his role as Director to ensure he drives the overall bank's strategy and transformation agenda and following up on already approved transactions as part of his deliverables.

d) He was not aware of any fundamental breach he made during the period in the show-cause notice.

e) Lastly non-performing loans and provisions taken by the respondent was a joint function of Credit and Finance with input given from business. It was clear that the bank had taken necessary provisions on the accounts of listed customers and he was not sure how he had not taken measures to stop that if it was provided for in the bank's published audited accounts for 2015.

f) A few days prior to the show-cause notice he had received a letter that his performance for 2015 was satisfactory and received a rating of 3 and given a salary increment.

The disciplinary meeting was held on 08.06.2016. The minutes show as follows on pertinent issues:

a) Regarding Bever Ltd the instructions Dennis had outlined on the email differed from the approval granted and the instructions by Dennis had not been in line with the credit policy and that customers were not to be advised about the restructures. The claimant stated that he had asked Dennis about the request not to advise the customer and thought that it was a typo.

b) The committee found it contradictory that approvals were sought to extend the maturity date while at the same time the customer had been given demand letters. The claimant stated that in exceptional cases support could be given to a customer.

c) The committee asked whether it was normal to recommend and support a request and the claimant stated that he could do so under exceptional circumstances. The Committee observed that the TSS Group had since denied making the request for or receiving the facility and it was difficult to hold the RM responsible.

d) For Best Buys account, the Committee observed that there was no sign off by the Executive Director, CIBB or citing of ECC minutes as per the delegated authorities. The claimant stated that he had not signed the memos in issue under duress.

e) The claimant confirmed that all the above accounts fell within his responsibility as the Director, Business Banking.

The claimant testified that in December 2015 he reviewed two accounts pushing dates from 31.12.2015 to 31.12.2016 for documents to be availed by the customer. The loans for the 2 accounts were not performing well and it was not his role not to allow time for documents to be availed.

The respondent's witness (RW) was Reuben Koech, Director for Corporate Division. His evidence was that a forensic audit had unearthed emails which showed that the respondent's top officers had restructured loans and designed that the customers would not be advised about such restructuring. That was from about mid-2015. One such client was the late TSS who visited RW's office and declared that he'd not take responsibility of debts because it was a scheme by bank employees and his employees to enrich them-selves. RW testified that prior to approval of restructuring of a loan the claimant had to support the approval. RW testified that the claimant's culpability was that he supported restructuring in circumstances whereby he ought not to have supported. RW relied on folio 33 to 49 of the respondent's documents to show that staff colluded to get loan facilities extended without involving the delegated authorities for approval of such extensions. RW testified that forensic audit report relied on to dismiss the claimant had not been filed. RW stated that 6 top managers involved had been charged in criminal proceedings but the claimant had never been charged in a criminal case about the alleged misconduct. He had not read the report to tell if the claimant was criminally implicated. He further stated that fraud had not been alleged against the claimant in the notice to show cause. RW further testified that the claimant supported the approvals for loan extension and restructuring but was not responsible for approvals and which had not been given in the material before the Court. In cross-examination RW stated that TSS visited his office in May 2016 when the claimant had already left the respondent and was on suspension.

The Court has reviewed the evidence and makes findings as follows. **First** it is clear that the claimant's role was to support applications for facility restructuring and extension. The evidence is that the role was discharged and the respondent's concern is that after that, the necessary approvals were not obtained. The Court finds that the role to approve was outside the claimant's job description and he cannot be held culpable in that regard. **Secondly**, the claimant cannot be held culpable for support of approvals that was done in his absence while on official leave because there was no established reason to doubt the authority and capacity of the officer who stepped in while the claimant was on leave. **Third**, there may have been fraud at the respondent bank and RW confirmed that 6 top managers had been charged in criminal proceedings in that regard. The Court returns that in absence of the forensic report to establish if the claimant was culpable and in view that the claimant was not charged in criminal proceedings, the Court returns that the claimant was not culpable of fraud as was alleged against him. **Fourth**, the Court therefore returns that the reasons for dismissal of the claimant have not been shown to have existed as at the time of the dismissal decision and as per section 43 as read with section 45 of the Employment Act, 2007. It was submitted that the claimant failed to subject staff working under him to serious scrutiny but in absence of the forensic report to establish each officer's role in the alleged fraud that led to great losses to the respondent, the Court returns that the respondent failed to establish the alleged failure against the claimant.

On procedure, there were no submissions and evidence for the claimant to suggest that he had not been accorded a fair procedure as per sections 41 and 45 of the Act. The evidence is that the claimant was accorded a show-cause notice; given relevant documents; he responded

in writing; he was given a disciplinary hearing, and a right of appeal. The Court returns that he was accorded a fair procedure accordingly.

The **4th issue** for determination is whether the claimant is entitled to the remedies as prayed for. The Court finds as follows:

- a) The claimant prays for 12 months' compensation for unfair dismissal. The Court has considered the factors in section 49 of the Act. The Court finds that the claimant desired to continue in employment and his performance had been ranked 3 and satisfactory for 2015. He had a clean record of service and had enjoyed promotions and pay rise. Such factors work to his favour. However, the Court finds that he significantly contributed to his termination when he admitted at the disciplinary hearing that regarding Bever Ltd the instructions Dennis had outlined on the email differed from the approval granted and the instructions by Dennis had not been in line with the credit policy and that customers were not to be advised about the restructures – and the claimant stated that he had asked Dennis about the request not to advise the customer and thought that it was a typo. Further the claimant had at disciplinary hearing contributed to his dismissal when the committee asked whether it was normal to recommend and support a request and the claimant stated that he could do so under exceptional circumstances. He further contributed when at the hearing the committee found it contradictory that approvals were sought to extend the maturity date while at the same time the customer had been given demand letters – and the claimant stated that in exceptional cases support could be given to a customer. In view of that serious contribution by the claimant he will be awarded only **3 months'** salaries in compensation under section 49 of the Act.
- b) The claimant is awarded **one month** pay in lieu of the termination notice as the summary dismissal was sudden and unfair.
- c) The basis for the claim for 12 months' medical cover for self and family was not established and is declined.
- d) The claimant is entitled to a certificate of service per section 51 of the Act.
- e) The claimant did not establish the basis of preservation of interest at 4.5% on the facility and the same is declined.
- f) The claimant made no evidence and submissions to guide the Court on the prayers for loss of reputation and earning potential and apology and the same are deemed abandoned.
- g) The claimant has succeeded and is awarded costs of the suit.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- 1) The respondent to pay the claimant 4 months' salaries (less PAYE) by 01.12.2019 failing interest to run at Court rates till full payment.
- 2) The respondent to deliver the certificate of service by 01.12.2019.
- 3) The computed amount in order (1) above to be part of the final decree.
- 4) The respondent to pay the claimant's costs of the suit

Signed, dated and delivered in court at **Nairobi** this **Friday 25th October, 2019**.

BYRAM ONGAYA

JUDGE