



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.1 OF 2017

CYRUS WAITHAKA MWANGI CLAIMANT

VERSUS

EQUITY BANK LIMITED RESPONDENT

JUDGEMENT

The claimant is a male adult and the respondent a corporation incorporated in Kenya and carrying business under the provisions of the Banking Act.

The claim is that on 17th August, 2012 the claimant was employed as a Relationship manager – Operations by the respondent. On 30th December, 2014 the claimant was transferred to Equity Bank (Kenya) Limited as part of Equity 3.0 transformation.

On 25th August, 2016 the claimant received letter dated 9th August, 2016 from the respondent terminating his employment without notice and which was against the rules of natural justice. The termination of employment was unfair and had the respondent investigated and considered the claimants explanations the termination of employment should not have happened.

The claim is also that As a result of the termination of employment the claimant suffered loss and damage and his credibility and his chances of securing employment diminished. He is now not marketable as accountant and the unlawful termination of employment has affected him with diminished employment opportunity. The respondent breached the employment contract and acted contrary to the law by dismissing the claimant without due process, without any cause and without giving him a hearing.

The claimant is seeking for an order and declaration that he is an employee of the respondent, hold the respondent in barring him from accessing his office is unlawful, termination of employment contravened the law, and order of reinstatement to his capacity as Relationship manager –operations, bar the respondent from arbitrarily terminating employment; payment of damages including unpaid dues owing during employment and costs of the suit.

The claimant testified that upon employment by the respondent the was posted to Juba, South Sudan. He worked diligently and was promoted to Business manage and posted to the Swan Branch. By letter dated 30th December, 2014 the claimant was transferred to Equity Bank (K) Limited with effect from 1st January, 2015. On 29th June, 2015 he was transferred to Turi Branch and on 9th February, 2016 transferred to head office as relationship banking but in August, 2016 hi employment contract was terminated on the reasons that due to nationalisation strategies and having been recruited in south Sudan the respondent would not be able to absorb him in the Kenya office. At the time the claimant had been moved from the subsidiary company to the head office.

The claimant also testified that all the employees of the respondent were issued with the same letter of transfer and moved to the Kenya entity or retained but the claimant was terminated in his employment while on leave in Kenya when the human resource officer called him over the phone and communicated the same.

The defence that there was a mistake was not corrected. The human resource officer had communicated that in case of anything he claimant would be moved to the head office in Kenya. The last salary was paid on 13th September, 2016 at Ksh.50,000.00 and was issued with the certificate of service without notice pay or the owing terminal dues and thus seek reinstatement and or compensation.

Defence

The defence is that the claimant was not an employee of the respondent as alleged as all along her was employed by Equity Bank (S.S) Limited and termination of employment was not by the respondent on 25th August, 2016 as claimed. The contract of employment was entered into in Juba, south Sudan and letter dated 30th December, 2014 to the claimant was erroneously issued and the error was corrected thereafter.

The defence is also that the court has no jurisdiction to hear and determine the matter herein as the cause of action arose in Juba, South Sudan. The claims made are without basis and should be dismissed with costs.

Winfred Mwendu Kyalo testified that she is the human resource officer for the respondent, employee relations. She testified that parties herein had an employer and employee relationship and the claimant was based on South Sudan from 8th August, 2012 to 9th August, 2016 when termination was done by the subsidiary, Equity Bank, South Sudan Limited. The respondent and the subsidiary are two different entities under the same holding company.

In August, 2016 there was a political crisis in South Sudan which affected the subsidiary operations and the employment of the claimant and other employees. Due to the civil unrest the respondent incurred huge losses and a decision was taken to terminate the services of the claimant with a letter dated 25th August, 2016. The reasons were stated in the subject letter and there is no dispute about the same.

Ms Kyalo also testified that the remedy of reinstatement is not possible as there is no vacancy at the moment and hard to reinstate the claimant at the same position held in South Sudan subsidiary or a deployment in the respondent. The South Sudan business is still struggling as 6 branches closed. The claimant was issued with sufficient notice and has since been paid his dues.

At the close of the hearing the parties filed written submissions.

In a ruling of the court delivered on 11th October, 2018 the issue of jurisdiction was addressed. The respondent has however maintained this line of arguments in the written submissions. Such is since addressed.

It is not in dispute that by letter dated 17th August, 2012 the claimant was employed by the respondent as the Relationship Manager-Operations at the Equity Bank Sudan subsidiary and by letter dated 30th December, 2014 transferred from Equity Bank Kenya Limited to Equity Bank (Kenya) Limited. The defence that the letter of transfer was issued by error and that such error has since been corrected is without any material evidence.

The claimant's employment with the respondent subsisted in various capacities and working in the different branches in South Sudan until letter dated 9th August, 2016 when his employment was terminated while he was on leave in Kenya. The claimant received the subject letter on 25th August, 2016.

Termination of employment was on the grounds that;

As you are aware, South Sudan has gone through a serious political crisis which has negatively affected the economy of the country and as part of the on-going cost-rationalisation and nationalisation strategies, the subsidiary has had to release a number of foreign staff.

Having been recruited in South Sudan, this is to advise that Equity Bank (Kenya) Ltd is unable to absorb you at the moment since they have no suitable vacancies available. This is to advise you therefore that your employment contract with Equity Bank (SS) Ltd has regrettably been terminated with effect from 31st July, 2016. Consequently, you will be paid up to and including 31st July, 2016 which was your last day of service. In addition, the bank will pay you the following, as your final dues;

- One month's gross pay in lieu of notice. ...

The claimant testified that he recorded a call from the human resource officer while on leave in Kenya and was issued with letter dated 9th August, 2016. The letter attached to the Memorandum of Claim is indeed received and accepted by the claimant on 25th August, 2016.

The employer is allowed to terminate the employment of an employee due to operational reasons and such resulting from a redundancy as held in **Daniel Onsoror versus Christ the King Academy St. Mary's Café [2018] eKLR**. Where the employer has issued the requisite notice to the employee setting out the reasons for the intended redundancy and the notice being not less than a month prior, by application of section 43 there exists a genuine and valid reason leading to termination of employment and such meets the provisions of section 45

(2) That the same is as a result of operational reasons and therefore justified.

(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) That the reason for the termination is valid;

(b) That the reason for the termination is a fair reason—

(i) Related to the employee's conduct, capacity or compatibility; or

(ii) Based on the operational requirements of the employer; and

In addressing a similar matter the court in **Aviation and Allied Workers Union v Kenya Airways Limited & 3 others [2012] eKLR** The Court held that in a redundancy;

... The affected employees have done no wrong: neither their conduct, nor their capacity is in issue; it is only that in the circumstances, the employer feels the employees are considered to be surplus to the needs of the business. Courts have held that employers have the prerogative to determine the structures of their businesses and therefore make positions redundant. Positions may become redundant because there is a decrease in business, the operations have become mechanized, or there is a necessity to re-organize, to enhance operations and prevent closure. The employer has the prerogative to change job descriptions, duties and responsibilities. There may also be situations, where positions become redundant for technical reasons, such as the sale of a business, or relocation to a different geographical place.

In this case the claimant was issued with notice dated 9th August, 2016 on the grounds that due to operational reasons resulting from a political crisis in south Sudan and for the need to rationalise and nationalise the operations, some branches had closed and there was need to release a number of foreign employees. The court takes it that this was to address both the political crisis and also nationalise operations in south Sudan and which affected several employees and particular a number of foreign employees including the claimant.

Under section 2 of the Employment Act, 2007 read together with section 40(1) that amounted to a redundancy. As addressed above in the case of **Aviation and Allied Workers Union v Kenya Airways Limited & 3 others** a redundancy results from an operational requirement and not due to the fault of the employee. As such, section

40 of the Employment Act, 2007 contemplates a process of notices to ensure the employees are made aware of such matter and the affected employee is issued with individual notice leading to termination of employment.

In this regard where the claimant was on his annual leave in Kenya and not at the workplace in south Sudan, the notice dated 9th August, 2016 only reached him on 25th August, 2016.

The employer had the duty to cause such letter and notice to reach the claimant in good time even where he was on leave.

The notice suggests that the claimant last day at work was up and until 31st July, 2016. This is not the case from the evidence before court. The subject notice only came to the attention of the claimant on 25th August, 2016 and in any event the notice is dated 9th August, 2016. The respondent also attached the *Employee Clearance Form* signed at Equity Bank South Sudan on 15th September, 2016.

Where this was issued or dated by error, there is no effort to correct the same. Even where this is not issued in error, section 40 of the Employment Act contemplated a general notice and the individual notice even where the respondent was to make payment in lieu of notice. See **Caroline Wanjiru Luzze versus Nestle Equatorial African Region Limited [2016] eKLR**, the employer is supposed to give two (2) distinct notices on account of redundancy. Such must be in writing and in accordance with section 40 of the Employment Act, 2007.

In **Francis Maina Kamau versus Lee Construction [2014] eKLR** this Court held that where an employer declares a redundancy without observing the conditions set out under Section 40 of the Employment Act, the redundancy becomes an unfair termination of employment within the meaning of Section 45 of the Act. Despite having reasons to terminate employment due to the political crisis and nationalisation process, the respondent ought to have brought these matters to the attention of the employees and factor in that the claimant was on his annual leave at the time and therefore cause a notification to him. It is not just sufficient that there were good reasons existing to justify the termination of employment. It is imperative that procedural fairness be addressed within the meaning of section 45 (3) of the Employment Act, 2007.

The claimant is therefore entitled to a notice pay for the two distinct notices due and having been paid for one such notice as stipulated in the notice terminating his employment there is a notice pay due for one months. Also for the salary due and owing up and until the subject notice was received, the claimant is entitled to pay for 25 days worked in August, 2016 when he remained the employee of the respondent which is equivalent to one month pay.

On the remedies sought, reinstatement is not due where there is a finding that there existed a good reason to terminate employment on account of redundancy. Save for want of procedural fairness, reinstatement shall not issue. Compensation for the procedural lapse is hereby awarded at 3 months gross pay. Under the initial contract the claimant was earning ksh.110,000.00 per month. In his evidence he testified that he was last paid ksh.150,000.00 without clarification as to what such pay comprised of. The due salary shall therefore be addressed at the shop floor.

Accordingly, the court finds even where there was a justified reason(s) to terminate employment there lacked procedural fairness. Compensation is hereby awarded at 3 months gross salary; notice pay at one (1) months gross salary; and Salary due for August, 2016; and costs of the suit.

Without a given monthly salary to assess the same, parties shall attend at the shop floor and tabulate the same.

Delivered at Nakuru this 11th day of December, 2019.

M. MBAR?

JUDGE

In the presence of: