



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 2330 OF 2017**

*(Before Hon. Lady Justice Maureen Onyango)*

**BANKING, INSURANCE AND**

**FINANCE UNION (KENYA).....CLAIMANT**

**-Versus-**

**CONSOLIDATED BANK OF KENYA LIMITED.....RESPONDENT**

**RULING**

By application dated 22<sup>nd</sup> November 2017 filed under certificate of urgency, the applicant seeks the following orders –

1. That the Court lifts the suspension for all the aggrieved unionisable employees and reinstate them back to work since they committed no offence to warrant suspension and or termination.
2. That the Court to order the respondent to compute and pay to the aggrieved employees all the withheld salaries and allowances which the respondent did not pay due to the suspension.
3. The respondent should be ordered to carry out through investigations into introduction, opening and operation of this account and the real culprits be prosecuted in line law of the law.
4. Costs of the suit.

The application is supported by the grounds on the face thereof and the affidavit of Mr. JOSEPH OLE TIPAPE, the Deputy Secretary General of the claimant union/applicant.

The contention of the applicant is that the respondent suspended members of the applicant on 30<sup>th</sup> October 2017 without justifiable cause and carried out disciplinary hearings without union representation as provided in law, failed to avail documentary or physical evidence linking the same members to the accusations levelled against them and intended to terminate their services unfairly.

The claimant filed a further supporting affidavit of JOSEPH OLE TIPAPE sworn on 11<sup>th</sup> December 2017 in which he deposes that the failure to involve the union in the disciplinary proceedings against its members invalidated the proceedings, as there was no guarantee of fair hearing.

The respondent opposed the application and filed a replying affidavit of JACINTA LWANGA, the Head, Human Resources. She deposes that the parties have a Recognition Agreement and a Collective Bargaining Agreement. In the recognition agreement, the union undertakes not to interfere with the normal functions of management. The Recognition Agreement further recognises the right of an employee upon whom a penalty has been imposed in respect of a disciplinary matter to appeal to the Bank’s Management and to be assisted at the appeal by a co-employee of his choice, and if not satisfied to appeal further to the Joint Negotiating Council as established in the Recognition Agreement.

JACINTA deposes further that the Collective Bargaining Agreement permits an employer to summarily dismiss an employee if the employee commits or on reasonable grounds is suspected of having committed a criminal offence against or to the substantial detriment of the employer or the employer’s property. She deposes that the Collective Bargaining Agreement permits the employer to suspend an employee from work during investigations and to pay the employee half salary during suspension for a period of up to 90 days. She further deposes that the respondent also has a Human Resource Manual that provides for disciplinary process in conformity with the Employment Act and Collective Bargaining Agreement.

She further deposes that sometimes in July 2017, the respondent received information from Lavington Security Limited, that its cheques had been diverted to the account of Lavington Guard Services Limited, which has an account with the respondent, for clearing. This prompted the respondent to carry out investigations targeted at accounts opened by Lavington Guard Services Limited at the respondent's branches Koinange, Harambee and River Road.

The investigations established that one Simon Kipkorir Taiget and one Emmanuel Maswach Chelimo opened an account at Koinange Branch on 25<sup>th</sup> August 2015 as Directors of Lavington Guard Services Limited. Eugene Busolo, the Branch Manager introduced the walk-in customers after conducting an interview and receiving the necessary documents.

The investigations further revealed that at the point of receiving the cheques into the account, there is no evidence that exception was sought by the receiving bank officers at the branch from the Branch Manager despite the variation in Payee names and beneficiary account.

Upon receipt of the cheques by the individual tellers, the cheques were captured in the system, authorised at supervisory level and transmitted to Clearing Department for further processing.

The Investigator found that there were lapses for a period close to two years, which went unnoticed. The lapses were as follows: -

- (i.) All the tellers received the cheques with the anomaly and there was no evidence that they sought guidance from the branch authority. They disregarded the operational policy/procedure.
- (ii.) The MIPS teller received the cheques with the anomaly and equally did not follow the due process as per the standard operating procedure.
- (iii.) A review of the SQM for cheque deposits did not address the above mentioned issues under SQM checks.
- (iv.) The Call over Officer equally violated the due process through the entire process without any authorised exception to policy.
- (v.) All the transactions were below 1 million hence did not trigger account profiling for further engagement with the client by the branch authority.
- (vi.) Given the low transaction values, the transactions did not trigger independent query by the Risk and Compliance Department to initiate further engagement and review of the account operation.
- (vii.) Lavington Security Limited does not operate a bank account with the Bank.

The investigations established that Directors of Lavington Guard Services Limited fraudulently deposited 294 cheques stolen from clients of Lavington Security Limited and as a result, Kshs.74,553,263.25 belonging to Lavington Security Limited was lost. The bank is in an awkward position in terms of taking liability for the amount lost as its employees did not exercise necessary due diligence before accepting the 294 cheques.

The investigations at Harambee and River-Road Branches revealed that Daniel Leperes was the person who opened the account as a walk-in customer at Harambee Branch on 1<sup>st</sup> September 2001 after conducting an interview and receiving the necessary documents. The account was transferred to River Road Branch from where it was closed on 24<sup>th</sup> May 2014. Cashiers accepted cheques not properly drawn.

The Directors of Lavington Guard Security Limited stole cheques meant for Lavington Security Limited and diverted them to their account. As a result, 813 cheques worth Kshs.180,129,913.25 were stolen and diverted.

The respondent issued show cause letters to 16 employees who responded. The employees were subsequently suspended from duty on half pay on 30<sup>th</sup> October 2017. Having not been satisfied with the employees' responses to the show cause letters, the respondent invited them for disciplinary hearing on diverse dates between 13<sup>th</sup> and 17<sup>th</sup> November 2017. At the time the claimant filed the present suit the affected employees had already been taken through the disciplinary hearings and awaiting the decision of the respondent.

It is the respondent's position as deposed in the affidavit of JACINTA that though the court has the jurisdiction to intervene in a disciplinary process, such intervention must be in very exceptional cases where compelling reasons have been given to justify the court's intervention. That the compelling reasons would include the fact that grave injustice would be occasioned to the employee and that the employee had no alternative means of attaining justice or remedies. She deposes that the claimant has not demonstrated and/or explained the "very exceptional circumstances" to warrant the court's intervention. Further, that the affected employees have not exhausted all the internal remedies.

She deposes that the court in exercising the jurisdiction to intervene in disciplinary procedure must proceed with caution so as to protect the employer's right to fairly terminate the employment relationship. The employer is in law entitled to commence disciplinary proceedings against the employee and it is the duty of the employee to justify in the disciplinary process the continuation of his employment.

She deposes that there are two avenues available for an employee dissatisfied with the outcome of a disciplinary committee. Such an employee may appeal and or refer the matter to the Joint Negotiating Committee as per the Recognition Agreement covering relations between the claimant and the respondent.

At the hearing of the application on 13<sup>th</sup> December 2017, Mr. Tom Odere of the union represented the claimant/applicant while the respondent was represented by Mr. Kigata instructed by Wamae and Allen Advocates.

### **Applicant's Submissions**

Mr. Odere submitted that the respondent is a member of Kenya Bankers' Association, which has a Recognition Agreement with the claimant union. Clause 18 (d) of the Recognition Agreement provides for attendance by at least two officials of the Association and Union to any meeting involving grievances to assist the employer and employee representatives respectively.

He submitted that the clause echoes Section 41 of the Employment Act, which requires an employer to ensure that the employee is represented. He submitted that representation is a guarantee to fair hearing. He submitted that the letters inviting its members for hearing required them to be accompanied by a work colleague yet the Recognition Agreement provides for representation by a union representative. He submitted that the respondent's Human Resource Manual also provides that a complainant may be accompanied by a colleague or a shop steward and without representation by the union, a hearing will be invalid.

He relied on the decision in **Cause No. 95 of 2014 BIFU (Kenya -vs- Barclays Bank of Kenya & Another)**. In that case, the court observed that the union must be involved in the disciplinary hearing. He submitted that without the union, the whole process is rendered null and void.

Mr. Odere further submitted that there was no reason for action being taken against its members as the two reports on the fraud at the Bank identified the perpetrators of the fraud and recommended their arrest and arraignment in court. He wondered what the reason for suspension was if investigations had already been concluded between August and 14<sup>th</sup> October 2017. He submitted that the court can intervene in disciplinary process if it offends the rules of natural justice or is in breach of policy, law or procedure.

### **Respondent's Submissions**

For the respondent, Mr. Kigata opposed the application. He relied on the replying affidavit and list of authorities. He submitted that the respondent had detailed the process leading to the suspension of the employees in the replying affidavit. He further submitted that the respondent had particularised the process provided in the Recognition Agreement for discipline through to appeal, which he submitted the applicants had not complied with. He submitted that the grievants had opportunity to appeal and go all the way to the Joint Negotiating Council. He submitted that the Collective Bargaining Agreement confirms the grounds of the suspension, which are also provided for in the Employment Act.

Mr. Kigata submitted that the employees on suspension are on half pay and should suspension be lifted the withheld salary would be released to them. He submitted that this is as provided in the respondent's Human Resource Manual. He submitted that the respondent had annexed to the replying affidavit an appendix with names of all the employees who had been suspended.

Mr. Kigata submitted that the employees were suspended after initial investigation and that further in depth investigations were carried out before the employees were invited for disciplinary hearing. He submitted that the subject matter of the fraud was of magnitude proportions and the bank had already been threatened with suit.

Mr. Kigata submitted that show cause letters particularised the charges against the employees and they were given an opportunity to respond. They were then invited to a hearing before the suspension. He submitted that the employees have already undergone the disciplinary hearing and the prayers by the claimant have been overtaken.

Mr. Kigata submitted that some of the employees on suspension are not unionisable.

On the allegation that the applicant has not been involved, Mr. Kigata submitted that the applicant was informed of the suspension by letter dated 30<sup>th</sup> October 2017 in which all the suspension letters were attached and it is not true that the union was not informed.

Mr. Kigata relied on the decision of the court in **Aviation and Allied Workers' Union -vs- Kenya Airways Limited [2010] eKLR** in which the court observed that the intervention of the court must be in vary exceptional cases where reason has been given for the intervention. He submitted that the applicant has not proved exceptional circumstances. He submitted that the applicant has not exhausted the processes available to the parties.

He further relied on the **Ekla Jesang Kirop & 3 Others -vs- Kenya Ports Authority** in which it was stated that the claimants can enjoy themselves to the disciplinary process

and if they find it unfair, can sue the respondent.

Mr. Kigata further relied by the decision in the case of **Joseph Mutuura Mberia & Another -vs- Council of Jomo Kenyatta University of Agriculture and Technology (JKUAT) [2013] eKLR** and submitted that the claimant had not met the threshold for the orders sought.

Mr. Kigata further submitted that the averments in the further affidavit sworn on 11<sup>th</sup> December 2017 to the effect that the employer's disciplinary hearings had taken place or that the applicants were denied the opportunity to represent the grievants were not supported by any evidence. He submitted that although the union was sent copies of letters of suspension by the respondent, it did nothing.

He prayed that the application be dismissed.

## **Determination**

I have considered the application, the grounds and affidavit in support thereof as well as the replying affidavit and authorities cited by the parties. The facts of the case are fairly straightforward.

The fraudulent scheme started on 1<sup>st</sup> September 2009 and went on until 28<sup>th</sup> July 2017, when a report of the fraudulent account was made to the Bank by Lavington Security Limited. Simon Kipkorir Taiget, Emmanuel Maswach Chelimo and Daniel Lepere Kishoyan jointly with others conspired and stole cheques from clients of Lavington Security Limited clients and diverted them to the respondent Bank for clearing. The fraudulent scheme went unnoticed for eight years involving Harambee, River Road and Koinange Branches. As a result, 813 cheques worth a total of Kshs.180,129,913.25/= were stolen and diverted. As at 11<sup>th</sup> October 2017 the account available balance was Kshs1,497,222.25/=.

Upon discovery of the fraudulent activities, the respondent carried out investigations and subsequently sent show cause letters to all the employees who handled the accounts. A total of 16 employees were involved out of which 15 are unionisable while one (1) was not unionisable.

The employees all responded to the show cause letters following which they were all suspended from work for 30 days by letters dated 30<sup>th</sup> October 2018. The respondent wrote to the claimant on 1<sup>st</sup> November 2017 informing it of the incident and forwarded copies of the letters of suspension.

Subsequently the employees were invited for disciplinary hearing and the hearings took place on 8<sup>th</sup> and 9<sup>th</sup> November 2017.

The letters inviting the grievants for disciplinary hearing informed them of the right to be accompanied to the disciplinary hearing by a work colleague of the employee's choice.

The applicant was aggrieved by the disciplinary process and has come to court claiming that there is no justifiable cause for disciplining the employees and secondly that the respondent failed to comply with the disciplinary procedure in the agreement between the applicant and Kenya Bankers Association. The respondent is a member of Kenya Bankers' Association, which has a Recognition Agreement and negotiated Collective Bargaining Agreements with the applicant on behalf of its members.

The issue for determination is therefore whether the applicant has met the threshold for the grant of the orders sought.

The law permits employers to take disciplinary action against employees. Section 12 of the Employment Act requires employers with more than 50 employees to establish a statement of disciplinary rules as follows: -

### **12. Statement on disciplinary rules**

#### **(1) A statement under section 10 shall—**

**(a) specify the disciplinary rules applicable to the employee or refer the employee to the provisions of a document which is reasonably accessible to the employee which specifies the rules;**

**(b) specify the person to whom the employee may apply—**

**(i) if dissatisfied with any disciplinary decision relating to the employee; and**

**(ii) for the purpose of seeking redress of any grievance relating to his employment and the manner in which an application shall be made; and**

**(c) where there are further steps to be taken consequent to any such application, explain the steps or refer the employee to the provisions of a document which is accessible to the employee which explains the steps.**

**(2) Subsection (1) shall not apply to rules, disciplinary decisions, grievances, or procedures relating to health or safety at work.**

**(3) This section shall not apply where as at the date the employee starts work the employer has employed less than fifty employees.**

Section 41 provides for the procedures to be complied with before an employee's services may be terminated on grounds of gross misconduct, poor performance or physical incapacity while Section 43 provides for proof of reason of termination.

In the case of **Kenya Plantation and Agricultural Workers' Union -vs- Finlays Horticulture Kenya Limited [2015] eKLR**, the court held that: -

*“... It is clear that the court has the jurisdiction to intervene in a disciplinary process, but such intervention must be in very exceptional cases where compelling reasons have been given to justify the court's intervention. The compelling reasons would include the fact that grave injustice would be occasioned to the employee and that the employee has no alternative means of attaining justice or remedies.”*

The same sentiments were expressed in the case of **Aviation and Allied Workers' Union** where the court stated that in exercising the jurisdiction to intervene in an administrative disciplinary procedure, the court must proceed with caution to protect the employers' right to fairly terminate the employment relationship. Again, in the case of **Alfred Nyungu Kimungui -vs- Bomas of Kenya**, it was stated that the court should not take over and exercise the managerial prerogatives at the workplace. In the case of **Rebecca Ann Maina & 2 Others -vs- Jomo Kenyatta University of Agriculture and Technology (JKUAT) [2014] eKLR**, the court stated that in cases where an employee facing disciplinary action legitimately feels that the process is marred with irregularities or is stage managed towards their dismissal, the court will intervene not to stop the process altogether but to put things right.

In the case of **Miguna Miguna** the court held that the employer was entitled to commence disciplinary proceedings against the employee and it was the duty of the employee to justify the continuation of this employment in the administrative process.

The general consensus as may be observed from the court decisions reviewed above is that an employer has the right to discipline an employee and the courts should not intervene unless the process is either so flawed as to compromise the right of the employee to fair hearing, or there is a departure from the laid down disciplinary procedure as to deny the employee a fair hearing.

In the present case the complaint by the applicant is first that the union was not involved in the disciplinary hearing and secondly that there are no valid reasons to take disciplinary action against the employees.

As is evident from the facts above, there was fraud and a total sum of Kshs.254,683,176.50/= was lost. The loss occurred because the employees of the bank, among them the grievants, encashed cheques stolen from Lavington Security Limited in the account of Lavington Guard Services Limited. The level of culpability of each of the employees may not be the same. Some may even be innocent but it is a duty and responsibility of the respondent as the employer to determine this through the disciplinary proceedings. I therefore find valid reason to take disciplinary action against the employees.

I however agree with the applicant that the Recognition Agreement, the respondent's Human Resources Policies and Procedure Manual all provide for union members to be represented by the union at the disciplinary hearing. Section 41 of the Employment Act also provides for representation by a union shop floor official should the employee so desire.

In the present case, the employees were not given an option for such representation. The letters inviting them for disciplinary hearing only gave the employees the option of accompaniment by a fellow employee and not a shop steward as provided in the Manual. The letters inviting the employees for disciplinary hearing were also not copied to the union.

To this extent, I find the disciplinary process by the respondent to have not met the procedure set out in the law, the Recognition Agreement and the Human Resource Policies and Procedures Manual of the respondent.

The question I now have to address is whether this justifies the prayers sought by the applicant being that the Court orders the respondent to compute and pay to the aggrieved employees all the withheld salaries and allowances, which the respondent did not pay due to the suspension;

That the respondent should be ordered to carry out thorough investigations into introduction, opening and operation of this account and the real culprits be prosecuted in line law of the law.

I do not think it would be responsible for the court to stop the disciplinary process merely because the applicant was not involved in the disciplinary hearing. As was stated in the case of **Rebecca Ann Maina & 2 Others -vs- Jomo Kenyatta University of Agriculture and Technology**, the court should only intervene not to stop the process altogether but to put things right.

For these reason, I set aside the disciplinary hearings that was held in respect of the 15 members of the applicant and order that the respondent carries out fresh hearings involving the applicant. The employees shall however remain on suspension until the respondent makes a determination on their disciplinary cases.

These orders shall only affect the grievants who are members of the applicant. The hearings involving non-union members shall not be affected.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9<sup>TH</sup> DAY OF FEBRUARY 2018**

**MAUREEN ONYANGO**

**JUDGE**