REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 198 OF 2017

FATMA ALI DABASO .....CLAIMANT

VS

FIRST COMMUNITY BANK LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This dispute arises from an employment relationship between the Claimant, Fatma Ali Dabaso and First Community Bank Limited, a Sharia compliant bank. A corollary issue arises from a *Musharaka* (partnership) Financing Agreement between the parties, by which the Claimant was granted a loan facility by the Respondent Bank.

2. The Claimant's claim is documented by a Memorandum of Claim dated 8th March 2017 and amended on 8th June 2017. The Respondent's defence is contained in a Statement of Response dated 15th September 2017.

3. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Manager-Human Resources, Aisha Mohamed.

The Claimant's Case

4. The Claimant was employed by the Respondent Bank on 2nd January 2010, as a Management Trainee. She rose through the ranks to the position of Financing Officer. On 30th November 2016, her employment was terminated on account of redundancy.

5. The Claimant states that in effecting the termination of her employment, the Respondent ignored the provisions of Section 40 of the Employment Act, 2007. The Claimant also takes issue with the termination letter dated 30th November 2016 which though addressed to her, carried the salutation *'Dear Madina'*.

6. The Claimant avers that there was no genuine case of redundancy because after her exit, the Respondent continued to recruit more employees. She terms her termination as malicious, ill intended and unfair. The Claimant adds that as a result of the termination, she has suffered tremendous pain and loss as a result of which she had been treated for a psychiatric related illness.

7. The Claimant pleads that she had a loan facility of Kshs. 3,950,000 with the Respondent which she was servicing prior to the termination of her employment. Through this facility, the Claimant had purchased a residential house on Plot No. 8463 Section 11 Mainland North on which the Respondent had taken a first legal charge.

8. Prior to her termination, the Claimant was paying monthly instalments of Kshs. 30,288.25 in respect of the aforesaid loan facility. After her termination, the Respondent agreed to give her a six (6) months' grace period up to May 2017. On 6th May 2017, the Respondent unilaterally varied the terms of the facility by demanding monthly installments of Kshs. 51,830.

9. The Claimant states that it was a term of the loan facility that no variation would be made thereon on account of termination of employment through no fault of the Claimant. She adds that it is morally wrong, unfair and unjust for the Respondent, which prides itself on Sharia banking to charge her 300% interest.

10. The Claimant now claims the following:

a) Notice pay…….....Kshs. 84,000

b) Unpaid salary for November 2016…….....84,000

c) Unpaid salary for 4 days in December 2016…….....12,923

d) Severance pay for years worked …….....294,000

e) 12 months' salary in compensation for unfair termination.……..1,008,000

f) Loss of future earnings…….....25,200,000

g) General damages for pain and suffering

h) An order declaring the decision to vary the Claimant's loan terms unlawful and unjust

i) An order directing the Respondent, its employees, agents , servants, assigns and/or any other person acting under its authority to review the altered loan terms back to the original terms

j) Costs plus interest

The Respondent's Case

11. In its Statement of Response dated 15th September 2017 and filed in court on 18th September 2017, the Respondent admits having employed the Claimant on 2nd January 2010, at a monthly salary of Kshs. 83,232.

12. The Respondent states that the Claimant's employment was lawfully terminated on account of redundancy. The Respondent adds that there was a salutation error on the termination letter dated 30th November 2016. The error was subsequently explained and clarified in the Respondent's letter dated 19th December 2016.

13. The Respondent maintains that there was a genuine case of redundancy

occasioned by hard economic conditions, necessitating reduction of operational and other recurrent costs. In this regard, the Respondent avers that the decision to terminate the Claimant's employment was inevitable and informed by factors outside its control.

14. The Respondent contents that proper notices were issued to the Claimant and the termination was lawfully executed. Further, the Claimant was paid all her dues in accordance with the law. The Respondent denies responsibility for any illness suffered by the Claimant.

15. Regarding revision of the Claimant's loan terms, the Respondent states that at the time the Claimant took out a mortgage, she was well aware of the terms of her employment and was also aware that her service could be terminated if a situation arose that necessitated such action.

Findings and Determination

16. From the pleadings, evidence and submissions provided by the parties, the following issues emerge for determination by the Court:

a) Whether the termination of the Claimant's employment was lawful and fair;

b) Whether variation of the Claimant's loan terms was lawful and fair;

c) Whether the Claimant is entitled to the remedies sought.

The Termination

17. The termination of the Claimant's employment was communicated by letter dated 30th November 2016, stating as follows:

*"**Termination of employment with First Community Bank Limited on the Grounds of Redundancy***

This is with reference to my letter dated Friday 4th November that informed you of the Bank's intent to implement a restructuring exercise in order to reduce staff costs. In the same communication, you were advised that an external consultancy firm was employed to undertake a detailed analysis of the business requirements and staffing levels, and the impacted staff would be advised individually as soon as the exercise was completed. Regrettably, you are one of the employees who are to be declared redundant effective 4th December 2016.

In accordance with the provisions of Section 40 of the Employment Act, you will be paid terminal dues comprising: your salary including and up to 4th December 2016; notice pay equivalent to one months salary; accrued and unutilized leave as at that date, severance pay computed at the rate of 2 weeks' pay for every completed year of service. This payment will be effected via bank

transfer by close of business on Monday 5th December.

Note that your final dues will be payable after deduction of all taxes, other statutory deductions and outstanding Bank loans. Please note that your retirement benefits shall be dealt with separately in accordance with the Bank's scheme rules.

You will by close of business today, be required to undertake the clearance process as guided by the CEO and the Branch Manager. A computation schedule for your terminal dues, including the deductions made thereof and your Certificate of Service will be available for collection from your Branch/Head Office after December 15th.

On behalf of the Board of Directors we thank you for your service to the Company and wish you all the best in your future endeavours.

Should you have queries regarding the redundancy process, please contact Sally Mukwana, Eva Kariuki or Daniel Karori of Adept Systems. They can be reached on Tel. Nos. 3744430; 3752568 or 0723 028383.

Please sign the acknowledgment below and return to us a copy of this letter.

Yours sincerely

(Signed)

Fazal M Saib

Chief Executive Officer"

18. From this letter, it is evident that the Claimant's employment was terminated on the ground of redundancy. Section 2 of the Employment Act,2007 and the corresponding section in the Labour Relations Act, 2007 define redundancy as:

" the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment."

19. By definition, redundancy bears two significant factors; first, it is undertaken at the instance of the employer and second, the conduct of the employee is not in issue (see ***Jane I Khalechi v Oxford University Press E.A. Ltd [2013] eKLR***).

20. It follows therefore that although the law allows an employer to bring an employment relationship to an end through declaration of redundancy, a heavy responsibility is misplaced on the employer, not only to secure the rights of the affected employee but also to ensure that the redundancy exercise is undertaken fairly and objectively.

21. In this regard, Section 40 of the Employment Act provides as follows:

40. (1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions –

(a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

(b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

(c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and the skill, ability and

reliability of each employee of the particular class of employees affected by the redundancy;

(d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

(e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

(f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

(g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each

completed year of service.

22. The first two conditions have to do with notice to the affected employee, their trade union (where one exists) and the local Labour Officer. The Court of Appeal in ***Thomas De La Rue v David Opondo Omutelelma [2013] eKLR***

and ***Kenya Airways Limited v Aviation & Allied Workers Union of Kenya&3 others [2014] eKLR*** decisively declared that in every redundancy situation, two separate and distinct notices, of not less than a month each, are required.

23. The first is general notice to employees within the targeted establishment, the relevant trade union and the Labour Officer. By definition, this notice should set out the reasons and extent of the intended redundancy. The second notice is a termination notice addressed to each departing employee individually.

24. The third condition under Section 40 of the Employment Act deals with the selection criteria, including seniority in time, skill, ability and reliability of each employee within the affected establishment. The last four conditions set out the statutory benefits to be paid to an employee declared redundant.

25. The Respondent produced an internal memo dated 4th November 2016 from the Chief Executive Officer to all staff. The memo under the subject *'Business Re-alignment'* states inter alia:

> *"Over the past 3 months the board and myself have been closely monitoring our implementation of the transformational agenda and we have concluded that operating costs need to be further reduced. Unfortunately this means that the bank will have to reduce staff costs going forward.*
>
> *Given this we have decided to employ an external firm to review and identify those areas where staff reductions can be made without negatively affecting the banks' operations. This is also to ensure a fair and equitable selection process of redundant staff. The selection process will take cognizance of the number of staff per function, employee skill levels and overall attitude. The list of staff that will be impacted will be finalized within the next two weeks and communication will be made to them individually.*
>
> *Further communication will be made once the consultants are on board and once the assignment is complete."*

26. On the same day, the Respondent Bank wrote to the Labour Offices in Nairobi and Mombasa communicating the need to take urgent action towards reducing costs and enhancing productivity. This would include reduction of staff numbers. The two identical letters state *inter alia*:

> *"In accordance with the provisions of section 40 of the Employment Act, the Bank hereby gives one (1) months' notice of the intended redundancies. During the notice period, the Bank will comply with its statutory obligations on consultations."*

27. The Claimant told the Court that she did not see the staff memo from the Chief Executive Officer until the Respondent filed it in court and there was no evidence that it was brought to her attention. This is an important point to consider. I think however, the more fundamental question is whether the staff memo and the two letters to the Labour Offices in Nairobi and Mombasa constitute the statutory notices envisaged under Section 40 of the Employment Act.

28. In the ***Kenya Airways Case*** (supra) **Maraga JA** (as he then was) stated the following:

> ***"The notices under this provision are not merely for information. The purpose of the notice under Section 40(1) (a) and (b) of the Employment Act, as is also provided for in….ILO Convention No. 158-Termination of Employment Convention, 1982, is to give the parties an opportunity to consider 'measures to be taken to avert or to minimize the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.' The consultations are therefore meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it is unavoidable."***

29. The substance of the finding by the learned Judge of Appeal, with which I fully associate myself is that the notices required under Section 40 (1) of the Employment Act carry an imperative for consultation. Regarding the notice to the Labour Office, I add that it is intended to elicit advice to an employer considering redundancy in addition to proving a safeguard against abuse of redundancy processes and procedures (See ***Bernard Misawo Obora v Coca-Cola Juices Kenya Limited [2015] eKLR*** and ***Fredrick Mulwa Mutiso v Kenya Commercial Bank Limited [2017] eKLR***).

30. Having established the nature and import of the notices required under redundancy, the question remains whether the Respondent complied with the law in this respect. I will first deal with the staff memo issued by the Respondent's Chief Executive Officer. In my understanding, the purpose of the memo was to notify staff that an external consultant had been hired to review and identify areas where staff reduction could be made. The memo promised further communication upon completion of the exercise. In the notices to the Labour Offices in Nairobi and Mombasa, the Respondent undertook to comply with its statutory obligations on consultations.

31. Even assuming that the Claimant had notice of the staff memo of 4th November 2016, there was no evidence of any consultation with her prior to the issuance of the termination letter dated 30th November 2016. The Respondent's Human Resource Manager, Aisha Mohamed told the Court that the redundancy exercise was conducted by the external consultant, Adept Systems. Mohamed was not privy to the details of the process undertaken by Adept Systems. The Court was at a loss as to why the Respondent chose to surrender such a sensitive management duty to a third party.

32. If indeed there was a genuine case of redundancy, the Respondent ought to have assumed the responsibility of walking with its staff through the difficult journey of redundancy. By nature and definition, redundancy ought to be a mutually painful mode of termination of employment. I say so because in such cases, the employee has done no wrong and in the normal scheme of things, the employer is losing a good employee.

33. The Claimant testified and the Respondent did not disagree that the Claimant was a star performer. The Claimant painstakingly explained to the Court her career progression in the Bank and her expectations for growth as a banker. To such an employee, the Bank owed a duty to mitigate the pain of exit from the comfort of employment into the unknown world of joblessness. The Bank failed in this duty and literally placed the Claimant at the mercy of a third party, with whom the Claimant had no relationship. This was sealed by the instruction contained in the termination letter referring any queries to officers of the third party.

34. It also did not escape the attention of the Court that the Claimant was required to hand over and leave the Bank on the same day she received the termination letter. The Claimant told the Court that her life was turned upside down and by the time she was testifying, she was being treated for a psychosocial disease.

35. In the final submissions filed on behalf of the Claimant on 30th April 2018, reference was made to the decision by my brother, **Radido J** in ***Stephen Karisa Jefwa v Elsek & Elsek (K) [2014] eKLR*** where it was held that an employer who wishes to invoke redundancy to terminate employment must prove that the reasons for redundancy are valid and fair.

36. The Bank did not file a single report from Adept Systems, who admittedly undertook the redundancy process on behalf of the Bank. The Court could not therefore tell the selection criteria employed in this case. Once again, the Respondent ignored another mandatory condition under Section 40 of the Employment Act.

37. Taking the circumstances of this case in their totality, the Court has reached the conclusion that by its action or lack thereof, the Respondent so mismanaged the redundancy process, that any *bona fides* in the reasons for redundancy was totally eclipsed. Consequently, the Court finds and holds that the termination of the Claimant's employment was substantively and procedurally unfair and she is entitled to compensation.

Loan Facility: Reducing Musharaka

38. In the course of her employment with the Respondent, the Claimant applied for and was granted a loan facility of Kshs. 3,950,000 through which she purchased a residential house on Plot No. 8463 Section 11 Mainland North. The facility is secured by a first legal charge on the property. Being a Sharia compliant Bank, the Respondent offered the Claimant a product in the nature of a reducing *Musharaka* as evidenced by *Musharaka* Financing Agreement referenced Staff/001/80284/03/NI/NM.

39. Under the *Musharaka* Financing Agreement, the Respondent and the Claimant would own the subject property in common starting at 99% to 1% in units. Over time, the Claimant would purchase the Bank's units by monthly installments, the ultimate objective being to completely buy out the Bank by the end of the loan period. This is what is commonly known as a reducing *Musharaka*.

40. The Claimant's complaint under this head is that upon termination of her employment, the Respondent unilaterally reviewed the loan terms by hiking her monthly repayment from Kshs. 30,288.25 to 51,830. On its part, the Respondent states that it acted within its right to vary the repayment rate upon the Claimant's exit from the Bank. From the evidence on record, the loan terms availed to the Claimant were preferential.

41. Reference was made to Sections 84 and 131 of the Land Act, 2012 which require a chargee in a variable lending contract to notify the chargor on any change in interest rate. This position was confirmed by **Mabeya J** in ***Christopher Ndolo Mutuku & another v CFC Stanbic Limited [2013] eKLR***.

42. This is the law on variation of interest rates generally. I think however, the Financing Agreement in this case is somewhat unique. My understanding of the import of the *Musharaka* Financing Agreement is this; that at the commencement thereof, the parties assigned a value to each unit in the subject property. Over time, the Claimant would purchase the Respondent Bank's units and finally extinguish the Bank's stake at completion in payment. In light of this, the question before the Court is whether the Respondent could automatically hike the value of its units in the property upon the Claimant's exit from the Bank.

43. I think not. In its official website, the Respondent declares the following:

> *"First Community Bank (FCB) was established in 2007 according to Sharia law by private Muslim investors in Kuwait, Kenya and Tanzania."*

44. The legal regime for Sharia banking seems to be in its nascent stages and in its final submissions, the Respondent asked the Court not to lose sight of the fact that it is regulated by the Central Bank of Kenya. This fact is not in dispute and the Court is under no illusion that the Respondent Bank could make any decision apart from the prudential guidelines issued by the Central Bank.

45. I do not think this is the issue here. It seems to me that the *Musharaka* Financing Agreement adopted by the parties operates on the basis of a partnership incorporating mutuality of interests. To my mind, there is no room for unilateral variation of terms. By adjusting the Claimant's monthly installments without consultation and due notice, the Respondent Bank effectively hiked the value of its units in the subject property without any known justification. This action was in violation of the letter and spirit of the *Musharaka* Financing Agreement between the parties and the Court must intervene.

Remedies

46. In light of my finding that the termination of the Claimant's employment was substantively and procedurally unfair, I enter judgment in her favour in the sum of Kshs. 998,784 being twelve (12) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service coupled with the Respondent's mismanagement of the termination process.

47. In addition, the Respondent's decision to vary the Claimant's monthly loan repayment installments is hereby reversed. The Claimant is directed to continue servicing the said loan at the rate obtaining prior to the termination of her employment.

48. From the evidence on record, the Claimant was paid notice and severance pay as well as salary for days worked. These claims are therefore without basis and are dismissed. The claims for loss of future earnings and general damages for pain and suffering were not proved and are dismissed.

49. The award amount will attract interest at court rates from the date of judgment until payment in full.

50. The Claimant will have the costs of the case.

51. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 26TH DAY OF JULY 2018

LINNET NDOLO

JUDGE

Appearance:

Mr. Anaya for the Claimant

Miss Khan for the Respondent