



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 205 OF 2012**

**BANKING, INSURANCE & FINANCE UNION (KENYA).....CLAIMANT**

**VERSUS**

**EQUITY BANK (KENYA) LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant union brought this suit on behalf of Mr. Stephen Olopoi Sairo (herein after referred to as the grievant) alleging unfair termination of employment contract and seeking reinstatement without loss of benefits or break in the years of service. In the alternative the claimant prayed for terminal benefits under the contract of service plus compensation for the unfair termination.
2. The respondent denied the alleged unfair termination of the grievant employment contract averred that the termination was fairly and lawfully done for gross misconduct after following due process. In addition the respondent objected to the suit contending that the claimant union lacks *locus standi* to bring this suit on behalf the grievant who was not her member.
3. The suit was heard on 3.10.2017 when the grievant testified and on 17.5.2018 when the respondents Assistant HR Manager testified on behalf of the respondent as Rw1. Thereafter only claimant filed written submissions but the respondent did not.

**Claimant's Case**

4. The grievant testified that he was employed by the respondent on 3.7.2008 as a Bank clerk and later became Relation Officer. His duties included custody of ATM PINS. He was also the Technical Field Officer (TFO). He worked without being served with any warning until 7.5.2011, when he was suspended after blowing the whistle about theft of money by his colleagues from Kajiado Branch ATM. He was suspended for 10 months without being served with a show cause letter and later dismissed without being accorded any disciplinary hearing. The dismissal was done 9.2.2011 but its effective date backdated to 5.5.2010, 2 days before his suspension. That the suspension letter gave him half salary during the period of the suspension but the same was never paid.
5. He contended that the termination was unfair because the Kshs.5.8 stolen from the ATM was not in his custody but in the custody of Nelson Ndungu (Branch Manager) Farid Wangara (Cash Officer) and Catherine Waithera Ndungu (Operation Manager). He however admitted that on 3.5.2010 he assisted in loading Kshs.5.8m but after one hour of the said loading some Technicians were introduced to him by

Mr. Bernard and Kiriti but he declined to open the ATM machines. Later when he went to check and he found one ATM machine safe door open. He immediately notified his immediate supervisor who him sent to check whether the Technicians were still there but he found that they had already left. After checking the money they discovered that Kshs.2.1m was missing and they notified the OPS management M/s Catherine Waithera Ndungu. He contended that there was no valid reason for his dismissal and prayed for compensation. He however admitted that he was never a member of the claimant union.

## **Defence Case**

6. Rw1 testified that the grievant was employed by the respondent as Bank Clerk on 3.7.2008 and worked in various Branches, the last one being Kajiado where his last position was Relations Officer - Operation Section. That the bank lost money while the grievant was on duty and for that reason he was suspended to pave the way for investigations. That the investigation found that the grievant failed to detect loss of the said bank money while on duty between 29.4.2010 and 5.5.2010 or report the loss until a customer complained that there were no funds at the Kajiado Branch ATM. In her opinion the grievant ought to have detected the lack of funds in the ATM because of his seniority in the Bank operations.

7. Rw1 contended that the termination of the claimant's services was fair although the claimant was not served with show cause letter or accorded a prior hearing. She further contended that reinstatement of the grievant was not possible because the termination was done more than 7 years ago. She prayed for the suit to be dismissed because the grievant was in management and not unionisable staff. She however admitted that the grievant had an accrued leave of 20 days.

8. On cross examination Rw1 stated that the suspension letter was dated 7.5.2010 but it was effective 8.5.2010, while the termination letter was dated 9.2.2011 but took effect from 5.2.2010. She further contended that the grievant never detected loss of money yet he was a custodian by virtue of being the Technical Field Officer. She however admitted that Farid Wangara (Cash Officer) and Catherine Waithera (Operations Manager) were the custodians of the keys to the safe and the ATM. She further admitted that the investigations Report found that Catherine Waithera was the Architect of the theft but it never implicated the grievant with the offence. She however clarified that the report recommended for his dismissal for the failure to detect the theft. She further admitted that Catherine Waithera was not dismissed but Farid was charged in court and dismissed.

## **Analysis and determination**

9. After careful consideration of the pleadings, evidence and submissions presented to the court, the following issues arose for determination:

- (a) Whether the suit is fatally incompetent.
- (b) Whether the grievant was unfairly dismissed.
- (c) Whether the reliefs sought should be granted.

## **Incompetent Suit**

10. The respondent submitted that the claimant union lacks *locus standi*, to institute the suit on behalf the grievant who was no a member of the union. She observed that the grievant admitted under oath that he was never a member of the union and he never paid any subscription to the union during his service. She therefore contended that the claimant is a busy body who lack the legal capacity to sue on behalf of the grievant who was a stranger to her.

11. In addition, the respondent contended that there was no Recognition Agreement between her and the claimant and as such, the union had no basis for instituting this suit. In the respondent's view, the claimant remains a bystander in the employment dispute between her and the claimant. She fortified the foregoing submission by citing *Kenya Shoe & Workers Union Vs Modern Soap Factory Ltd*

**[2017]eKLR** and **Communication Workers' Union vs Safaricom Ltd [2014]eKLR** where this court held that without a Recognition Agreement, a Trade Union lacks the *locus standi* to act on behalf of its members leave alone strangers like in this case. The respondent therefore urged the court to dismiss this suit on that ground alone. She acknowledge that her Preliminary Objection (P.O) on the same issue was dismissed earlier for non attendance.

12. The claimant on the other hand submitted that the suit was competent because she represents the unionisable employees in the Banking Sector which include the respondent herein. She further contended that she has a Recognition Agreement and Collective Bargaining Agreements (CBA) with The Kenya Bankers Association (KBA). That the respondent herein is listed as number 19 in the CBA and as such, she is bound by the CBA. She further contended that the respondent raised the same P.O but the same was dismissed.

13. I have carefully considered the evidence and the rival submissions. It is true that the claimant filed a notice of Preliminary Objection on 19.11.2012 challenging the suit on same issue of lack of standing and that it was dismissed on 11.4.2013 for non attendance on the part of the Respondent. The same cannot therefore be said to have been determined on the merits and it remained an issue for determination during trial since it was pleaded in the defence. In fact it is my considered view that objection could not be determined affectively without calling evidence.

14. The court has now received evidence from the claimant and the respondent. The grievant has admitted under oath that he was never a member of the claimant union. For that reason alone, the claimant is stripped of all legal capacity to represent the grievant or to act on his behalf. It follows therefore that the claimant lacked the *locus standi* to institute this proceedings on behalf of the grievant and the suit is therefore fatally incompetent *ab initio*. Even if the claimant had a Recognition Agreement and CBA with the KBA in which the respondent is a member, that state of affairs does not aid the claimant's otherwise incompetent suit because the grievant admitted that he was never a member of the claimant union. In my view, common sense dictates that Recognition Agreement and CBAs will lose value without union membership which is the chain which firmly links the employer and union.

15. Having found, as I have herein above, that the suit is fatally incompetent, I see no need to determine the issue of unfair dismissal and the reliefs sought.

### **Conclusion and Disposition**

16. I have found that on his own admission, the grievant was never a member of the claimant union and as such, the union lacked the legal capacity to institute the suit herein on behalf of the grievant or at all.

Consequently, the suit herein is struck out for being fatally incompetent in law. No order as to costs.

**Dated, Signed and Delivered in Open Court at Nairobi this 12th day of October 2018**

**ONESMUS N. MAKAU**

**JUDGE**