



**REPUBLIC OF KENYA**

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

**CAUSE NO. 2062 OF 2013**

**FREDRICK MULWA MUTISO.....CLAIMANT**

**VS**

**KENYA COMMERCIAL BANK LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. Fredrick Mulwa Mutiso, the Claimant in this case worked for Kenya Commercial Bank Limited for a considerable period of time holding several positions, the last one being Director, Internal Unit. Following the termination of his employment on 20<sup>th</sup> June 2013, the Claimant brought this action seeking relief for unlawful and unfair termination.

2. The Claimant's claim is contained in a Statement of Claim dated 23<sup>rd</sup> December 2013 and filed in Court on 24<sup>th</sup> December 2013. The Respondent filed a Response on 9<sup>th</sup> February 2014. At the hearing, the Claimant testified on his own behalf and the Respondent called its Head of Reward and Policy, Fredrick Maithya Kioko. Both parties also filed written submissions.

**The Claimant's Case**

3. The Claimant joined the Respondent's employment on 7<sup>th</sup> May 2001 in the position of Head of Change Programme in the Finance and Planning Division. He rose through the ranks to the position of Director, Finance in 2007. In May 2009, he was transferred to the Audit Division where he served as Director, Audit. Following a re-organisation program, the Claimant was reconfirmed in this position on 1<sup>st</sup> June 2011.

4. On 20<sup>th</sup> February 2013, the Respondent's Group Chief Executive Officer (CEO) wrote to all employees notifying them that the Group Board had approved a staff restructuring program. In this regard, employees wishing to leave the Bank under a Voluntary Early Retirement (VER) program were invited to submit their applications between 20<sup>th</sup> February 2013 and 31<sup>st</sup> March 2013. In this communication, the Respondent reserved the right to accept or decline any application.

5. The Claimant states that on 2<sup>nd</sup> April 2013, the Respondent advertised his position internally and externally. At a meeting held on 10<sup>th</sup> May 2013 between the Claimant and the Respondent's CEO, the planned restructuring was discussed. As a follow up, the Claimant wrote to the CEO giving options in the event of a separation. The Claimant also pointed out that the apparent downgrading of the position of Director, Audit had not been preceded by a job evaluation as required by the Respondent's Human

## Resource Policies.

6. On 13<sup>th</sup> June 2013, the CEO informed staff that the reorganization and restructuring process had been completed with 120 employees being released under the VER program. The Claimant did not take up the VER offer and on 20<sup>th</sup> June 2013, he received a letter from the CEO terminating his employment on account of redundancy.

7. The Claimant claims that the termination of his employment was unlawful and unfair for the following reasons:

- a) The separation was not voluntary as the Claimant had not expressed interest to leave the Bank under the VER Program;
- b) The redundancy was flawed in substance and process as the mandatory provisions under the Employment Act were not complied with;
- c) The redundancy did not have the requisite approval by the Respondent's Board of Directors and/or the Board Audit Committee as required under the Central Bank of Kenya Guidelines on Corporate Governance;
- d) The restructuring program did not abolish the Claimant's role as Director, Internal Audit nor did it significantly vary the terms of employment;
- e) The role of Director, Audit was retained in the revised structure with the Claimant's replacement being recruited at fairly similar terms as those applicable to the Claimant;
- f) The termination of the Claimant's employment on the basis of downgrading or falling away of his position did not comply with the Respondent's Human Resource policies which require that any such process be preceded by a job evaluation carried out in a transparent and consultative manner;
- g) The Respondent's Human Resource policy requires that any managerial position downgraded would result in the incumbent being entitled to hold the downgraded position for a period of six (6) months on obtaining terms. The Claimant was not given an option to serve in the downgraded position;
- h) The separation process was flawed, malicious, in bad faith and inconsistent with the Respondent's policies and the Employment Act in that whereas the employees exiting the Bank under the VER program had until 31<sup>st</sup> March 2013 to apply, the recruitment for the Claimant's replacement began on 2<sup>nd</sup> April 2013;
- i) The Claimant was required to leave the workplace on the same day he received the termination letter. He had to pick his personal belongings under the supervision of the Security Manager;
- j) The Respondent did not at any time explain to the Claimant that he was being considered for redundancy;
- k) The Claimant was not given a chance to be heard after his letter dated 13<sup>th</sup> May 2013 on what he termed as viable options of separation.

8. The Claimant now claims the following:

- a) A declaration that the termination of his employment on account of redundancy was unlawful and unfair;
- b) Reinstatement without loss of benefits and seniority or in the alternative:

- i. Compensation for loss of employment up to the retirement age of 60 years in the sum of Kshs.142,125,675/=
- ii. 12 months' salary in compensation for wrongful dismissal;
- iii. Costs plus interest.

### **The Respondent's Case**

9. In its response dated 3<sup>rd</sup> February 2014 and filed in Court on even date the Respondent admits that the Claimant was its employee until the termination of his employment on 20<sup>th</sup> June 2013 on account of redundancy.

10. The Respondent states that at the beginning of the year 2013, the Group Board approved a new organisation structure which resulted in some employee positions, including the one held by the Claimant, being declared redundant. According to the Respondent, majority of the employees to be affected were junior staff serving in various Branches.

11. In a meeting held on 19<sup>th</sup> February 2013, the Claimant being a senior management employee was advised by the Group CEO that the position of Director-Audit MLF that he held was to be scrapped under the new organisation structure.

12. By a letter dated 20<sup>th</sup> February 2013, all the Respondent's employees, including the Claimant were informed that the Respondent was in the process of restructuring. The new structure would result in the scrapping of the position of Director-Audit at Management Level F (MLF) which would then be replaced by a new position of Director-Audit at Management Level E (MLE). The Forensic Department was to be hived off from the Audit Division and be merged with the Risk Division with effect from 1<sup>st</sup> March 2013.

13. To mitigate the harsh effects of the redundancy, the Respondent's employees were informed that those in the affected positions could apply to be considered for separation under the 2013 restructuring program.

14. The Respondent pleads that upon receiving notice of the intended redundancy the Claimant had opportunity to engage with the Respondent's CEO on the restructuring that had seen the position he held of Director-Audit MLF being done away with. In this regard, the following took place:

- a) By a memorandum dated 7<sup>th</sup> March 2013 addressed to the Claimant, the Group CEO explained the changes that had been introduced in the Audit Function leading to the position held by the Claimant being declared redundant;
- b) On 10<sup>th</sup> May 2013, the Claimant held a meeting with the CEO where his termination on account of redundancy was discussed;
- c) By a letter dated 13<sup>th</sup> May 2013, the Claimant gave his views on the restructuring and asked for enhanced separation terms in the event that he was to leave employment;
- d) By a letter dated 14<sup>th</sup> June 2013, the CEO informed the Claimant that his letter of 13<sup>th</sup> May 2013 was under review and that he would get a response from the Respondent.

15. The Respondent further pleads that by its letter dated 2<sup>nd</sup> April 2013, all its employees, including the Claimant were informed that the newly established position of Director, Audit MLE was available to be filled. The position was advertised both externally and internally. The positions of Chief Finance Officer, Company Secretary and Chief Business Officer were also advertised.

16. The Claimant, though eligible did not apply for the position of Director, Audit MLE.

17. On 13<sup>th</sup> June 2013, the Respondent's Group CEO informed all staff that the restructuring exercise had been completed. Out of the 180 employees who had applied for VER under the restructuring program, 120 had been allowed to leave the Respondent's employment.

18. By a letter dated 20<sup>th</sup> June 2013, the Claimant was given notice of termination of employment on account of redundancy. The Claimant acknowledged receipt of the letter of termination and asked that he be allowed to work until 30<sup>th</sup> June 2013.

19. The Respondent states that the Claimant was paid all his dues which were above the statutory rates payable. He acknowledged receipt by executing an indemnity and discharge document.

20. It is the Respondent's case that the termination of the Claimant's employment was effected in accordance with the law as well as the Respondent's Staff Separation Policy and Staff Restructuring Program.

### **Findings and Determination**

21. There are two (2) issues for determination in this case:

- a) Whether the termination of the Claimant's employment by way of redundancy was justifiable and fair;
- b) Whether the Claimant is entitled to the remedies sought.

### **The Termination**

22. The Claimant states that the declaration of redundancy leading to the termination of his employment was not only unlawful but also malicious. In response, the Respondent maintains that the redundancy was lawful and fair.

23. The letter ending the Claimant's employment with the Respondent is dated 20<sup>th</sup> June 2013. It states *inter alia*:

*"Dear Fredrick,*

#### **REDUNDANCY: YEAR 2013 STAFF RESTRUCTURING PROGRAM**

*Pursuant to the implementation of the new high level KCB organisation structure with effect from February 20<sup>th</sup>, 2013 a number of senior management positions fell away or substantially changed due to the re-alignment and re-organisation of various divisions and departments of the Bank. As per the discussions between the undersigned and yourself post-implementation of the new structure, the job you held as the Director-Audit MLF Level fell away and was replaced by a new role of Director-Audit at MLE with the Forensic Department moving from the Audit Division to the Risk Division with effect from March 1<sup>st</sup>, 2013.*

*In view of the above, you have been separated from the Bank's service on account of role redundancy and your last day of service shall be June 20<sup>th</sup>, 2013. You will be paid dues as follows:  
.....*

*We take this opportunity to thank you for the services you have rendered to the Bank and wish you success in your future endeavors.*

*Yours sincerely,*

**JOSHUA OIGARA**

**KCB GROUP CHIEF EXECUTIVE”**

24. Prior to the Claimant’s termination, the Respondent had made a VER offer to its employees. The Claimant told the Court that he did not take this offer because he believed that his job was secure. In this regard, the Claimant testified that the position of Director-Audit which he held was provided for under the Prudential Guidelines issued to commercial banks by the Central Bank of Kenya.

25. While agreeing that the position of Director-Audit was required under the Prudential Guidelines, the Respondent submitted that the grading of the position was within its mandate, provided that the position was sufficiently senior within the grading structure.

26. The position held by the Claimant was at Management Level ‘F’. According to the evidence adduced in Court, the Forensic Services Unit was hived off from Audit to Risk Management effective 1<sup>st</sup> March 2013. It is the Respondent’s position that the movement of Forensic Services Unit had lowered the grade attached to the position of Director, Audit to Management Level ‘E’.

27. While disagreeing with the Respondent’s conclusion in this regard, the Claimant maintained that the downgrade was not preceded by any job evaluation as required by the Respondent’s Job Grading Policy and Job Grading Procedures Manual.

28. The Respondent’s witness, Fredrick Maithya Kioko challenged the applicability of the Job Grading Procedures Manual because it had no approval date. Kioko however told the Court that based on the written communication from the CEO, an evaluation had been done but no evaluation report was available.

29. The Court was therefore unable to establish the impact in job value of hiving off the Forensic Services Unit from Internal Audit. This is more so because it appears to have had no impact in Risk Management where it was domiciled from 1<sup>st</sup> March 2013. On the whole, the Respondent failed to prove that the decision to downgrade the position of Director, Audit from MLF to MLE was informed by any objective process.

30. The Respondent’s case is that the termination of the Claimant’s employment was occasioned by a declaration of redundancy which was carried out procedurally with the Claimant being paid terminal dues in excess of the statutory requirements.

31. While the law recognises redundancy as a legitimate mode of separation, it must not only be justifiable but must also be carried out in accordance with the mandatory procedure set out under Section 40 of the Employment Act, 2007.

32. Section 2 of the Employment Act and the corresponding section in the Labour Relations Act 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 the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.”***

33. Section 40 of the Act sets out the following conditions to be observed by an employer terminating employment on account of redundancy:

***a) Where the employee is a member of a trade union, the employer notifies the union of which the employee is a member and the labour officer in charge of the area where the employee is employed of the 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 the 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 to 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 an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.**

34. The law is now settled that in declaring redundancy, an employer is required to issue two separate notices of at least one month each. The first is a communication to employees generally notifying them of the impending redundancy. The second is a specific notice to the affected employees. The employer is further required to issue a one-month notice to the local Labour Officer (see **Thomas De La Rue v David Opondo Omutelema [2013] eKLR**).

35. Addressing the issue of redundancy notice in **Kenya Airways Limited v**

**Aviation & Allied Workers Union of Kenya & 3 Others [2014] eKLR Maraga JA** (as he then was) stated as follows:

**“.....when an employer contemplates redundancy, he should first give a general notice of the intention to the employees likely to be affected or their union. It is that notice that will elicit consultation between the parties”**

**“.....the requirement of consultation is implicit in the principle of fair play under Section 40(1) of the Employment Act itself and other labour laws. 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 the....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 minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.”**

36. In advancing its argument that the Claimant was given adequate notice of the redundancy leading to the termination of his employment, the Respondent referred the Court to several correspondence issued by its CEO as well as some correspondence from the Claimant.

37. I have looked at this correspondence in totality and find that although there were some discussions between the Claimant and the Respondent's CEO on the position of Director, Audit in the new organisation structure, there was no specific redundancy notice issued to the Claimant as required under Section 40(b) of the Employment Act.

38. In fact, the Court could not tell whether in these discussions, the CEO was engaging the Claimant in his position as a member of the Respondent's Senior Management Team or as an employee whose job

was on the line.

39. Even worse, the Respondent did not notify the Labour Officer of the redundancy until three days before the Claimant's departure. It was submitted on behalf of the Respondent that this notice shortfall was not a big issue because the notice to the Labour Officer was only meant to notify the government of reduction in the Respondent's workforce.

40. With much respect, I think this is a complete misapprehension of the law and practice. In my understanding, the notice to the Labour Officer serves a dual purpose. First, as held in ***Bernard Misawo Obora v Coca Cola Juices Kenya Limited [2015] eKLR*** the notice to the Labour Officer is meant to elicit advice to the employer on the modalities to be employed in the redundancy process. Second and more importantly, the notice acts as a control measure to curb against unlawful terminations clothed in redundancy language.

41. In this case not only did the Respondent fail to issue the redundancy notices as required, the Claimant was required to exit on the same day on which he was issued with a termination letter with his departure being witnessed by the Security Manager. The Court was unable to understand why an employee holding such a senior position would be required to leave in such haste and in such a manner.

42. In the absence of any credible explanation on these rather unusual happenings the Court reached the conclusion that the termination of the Claimant's employment on account of redundancy was a façade for an unlawful and unfair termination.

### **Remedies**

43. In light of the foregoing findings I award the Claimant twelve months' gross salary in compensation. In making this award I have taken into account the Claimant's length of service as well as the Respondent's conduct in the termination transaction.

44. With regard to the claim for compensation for loss of employment up to the retirement age of sixty (60) years, the only thing I will say is that this is a prayer for specific performance which is available in exceptional circumstances which were not proved in this case. This limb of the Claimant's claim therefore fails and is dismissed.

45. Ultimately I enter judgment in favour of the Claimant in the sum of Kshs.16,429,908/= (sixteen million, four hundred and twenty nine thousand, nine hundred and eight Kenya shillings). This amount which is subject to statutory deductions will attract interest at court rates from the date of judgment until payment in full.

46. The Claimant will have the costs of this case.

47. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 3<sup>RD</sup> DAY OF MARCH 2017**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Manyonge for the Claimant

Mrs. Kashindi for the Respondent