



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 1755 OF 2014

NYANGIRY O'KAMBAGA BWONDITI...CLAIMANT

VERSUS

ECOBANK (K) LIMITED.....RESPONDENT

RULING

1. By a motion dated 27th May, 2015 the claimant seeks an order of this Court directed to the respondent to produce and serve the claimant with a copy of an email dated 3rd February, 2014 by one Mr. Kassi Ehouman and that the claimant be granted leave to produce copies of documents set out and numbered (c) (d) and "Appendix A" to document numbered (e) in the notice to produce documents dated 18th January, 2015.
2. The application was based on grounds among others that the claimant needed the documents to establish his claim for wrongful or unlawful termination of employment by the respondent and that the claimant was a member of the Board of Directors of the respondent and was privy to all deliberations of the Board, and had access to the respondent's documents.
3. In support of the application, Mr. Chiuri Ngugi for the claimant submitted that the application was brought in exercise of the claimant's right to access information under article 35(1) (b) of the Constitution. In this respect counsel cited the case of **Cape Metropolitan Council v. Metro Inspection Services Western Cape & 9 Others (2001) ZASCA 56** where the Court held that information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right. In order to make out a case for access to information an applicant has to state what the right is that he wishes to exercise or protect, what is the information required and how that information would assist him in exercising or protecting that right. According to counsel the claimant had satisfied the first threshold for enforcement of article 35(1) (b).
4. Mr. Ngugi further submitted that the replying affidavit deposed to on 23rd June, 2015 did not make out any facts on non-existence or lack of custody of the email dated 3rd February, 2014. The respondent had in the converse made argumentative averments which are not subject matter of the affidavit.
5. The respondent through Mr. Wilson submitted that going by the case of **Oluoch v. Chargu (2003) EALR 649**, the application stood to fail because an order for discovery of particular documents could only be made where;

(a) there was sufficient evidence that the documents exist which the other party has not disclosed.

(b) the documents relate to the matter in issue in the action.

(c) there is sufficient evidence that the documents are in possession, custody or power of the party.

6. Further, when it is established that these prerequisite exists, the Court still has discretion whether or not to order disclosure. According to the respondent, none of these requirements have been met.

7. Mr. Wilson further submitted that paragraph 9 of the claimant's affidavit in support of the motion indicated that a confidential source notified him of the purported existence of the email of 3rd February, 2014. This confidential source is not evidence of anything and could not be held to amount to sufficient evidence of the existence of the email sought to be produced. According to counsel by relying the "confidential source" the claimant is attempting to make the respondent prove a negative, that is, to prove that the said email does not exist which is an impossible burden to be met by anyone. In this respect counsel relied on the case of **Ezekiel Misango Mutisya v. National Land Commission & 6 Others (2014) eKLR.**

8. Regarding the documents the claimant sought to produce, Counsel submitted that these are highly confidential Bank documents which if produced could hurt the Bank's strategy in a highly competitive market place. Furthermore, the claimant did not demonstrate that the documents were relevant to the issues at hand. The claimant in his affidavit did not demonstrate how the audit report and the Bank's minutes were relevant to the issue of his summary dismissal. Citing the case of **Weinberger v. Inghis (1916-1917) All ER** counsel submitted that as a general rule, the Court never orders a defendant to give particulars of facts and matters which the plaintiff has to prove in order to succeed and this is especially the case where a defendant has confined himself to putting the plaintiff to the proof of allegations in the statement of claim.

9. In his memorandum of claim filed on 8th October, 2014 the claimant avers as follows;

a. The claimant faithfully, and diligently, performed his duties as Executive Director and Head of Domestic Bank for Kenya, and EAC Cluster, until his services were summarily terminated by the respondent by a letter dated 31.3.2014.

b. The summary termination of the claimant's contract of service without service of a 3 months' notice was in breach of his contract of service, and unfair under the governing provisions of the Employment Act, 2007.

c. Notwithstanding the service on the claimant by the respondent of a Notice to Show Cause ("NTSC") why disciplinary action should not be taken against him dated 10.1.2014, and second NTSC dated 28.3.2014, to the effect that the respondent was "considering terminating" his employment, no disciplinary hearing was convened for the claimant.

d. By a letter dated 2.7.2013, the Managing Director of the respondent in breach of the law, the Ecobank Group Human Resources Policies and the claimant's terms of service, unilaterally placed the claimant on a purported 3 months' Performance Improvement Plan ("PIP").

e. Further or in addition to being wrongfully placed on a 3 month's PIP, the claimant was not offered any training, guidance and evaluation by the respondent to improve his alleged poor performance.

f. At a meeting held on 3.12.2013, between the MD of the respondent and the claimant, the MD informed the claimant that he intended to change the personnel working with the Domestic Bank, inclusive of the claimant, in order to engage personnel he could work with. The MD made an offer of amicable or harmonious separation of the claimant from the respondent.

g. By an e-mail dated 4.12.2013, the claimant reduced into writing the discussions held with the MD and accepted the offer of amicable separation, save that “the separation had to be done as if he had worked to the end of his contract with the bank”.

h. The MD of the respondent in his reply to the claimant’s email dated 4.12.2013, admitted the occurrence of the aforesaid meeting, and that the discussion “was not around changing the DB people including the claimant as alluded in his mail, for the sake of changing them but only based on the poor performance of the Domestic Banking and the necessity to make changes to improve productivity in that business unit and the bank”.

i. The claimant after the fact of accepting the offer of amicable separation with the respondent, and the disclosure by the respondent of its intention to change him and personnel working with the Domestic Bank, reasonably declined to undergo the performance evaluation or assessment that the MD demanded.

j. When the claimant attended a Conference for Domestic Banks in Abidjan on 5.2.2014, the Group Executive Director, and the Group Human Resource Manager, exerted pressure on him to undergo a performance evaluation or assessment at Abidjan. The claimant reasonably refused to undergo a performance assessment since he had already accepted the offer of amicable separation made by the MD of the respondent, and the disclosure of the respondent’s intention to remove him from office.

k. On 18.2.2014, the MD of the respondent summoned the claimant to his office, and in the presence of the Head of Human Resources, expressly told the claimant to accept an amicable separation under the terms offered by the respondent or have his services terminated.

l. On account of the aforesaid developments, and having valid complaints or grievances against the MD of the respondent, the claimant invoked the respondent’s grievance redress procedure by filing an Appeal with the Board of Directors of the respondent by letter dated 19/2/2014.

m. At a special meeting of the Board of Directors of the respondent held on 5.3.2014, the Board heard the grievances of the claimant, and proceeded to appoint an Adhoc Committee comprised of two (2) directors to negotiate an amicable or mutual settlement. The said committee held a meeting with the claimant on 14.3.2014, but did not agree on an amicable separation or settlement.

n. The Board of Directors of the respondent failed or neglected to determine claimant’s Appeal. The claimant was instead served with a NTSC why his services should not be summarily terminated dated 28/3/2014.

o. The claimant by his letter dated 29.3.2014, gave elaborate replies to, and explanations on, all issues raised in the NTSC dated 28.3.2014. The claimant was not given an oral hearing as required by section 41 of the Employment Act, 2007, to make his representations. The respondent responded to the claimant’s letter dated 29.3.2014.

p. The respondent’s termination of the claimant’s contract of service was unfair, unlawful, and in breach of section 41 and 45 of the Employment Act, 2007. The

claimant claims for reinstatement; and payment in compensation under section 49 of the Employment Act, 2007, for unfair dismissal.

10. The essence of these averments are that the claimant was dismissed from employment for unjustifiable or invalid reasons and that the procedure followed in dismissing him did not conform to the Employment Act and or the respondent's Human Resource Manual.

11. The claimant as a consequence is seeking from the Court an order for reinstatement or in the alternative a compensation for unfair dismissal. He further seeks a declaration that the "ex gratia" payment equivalent to 3 months pay given to him by the respondent was a gift and that he be paid a similar amount on account of salary in lieu of notice of termination.

12. In employment claims the onus is usually cast on the employer to prove the validity of reasons for terminating the claimant's services and failure to do so would lead to a finding that termination was unfair.

13. In readiness to justify the reasons for terminating the claimant's services, the respondent has averred in the main as follows:-

a. In further response to paragraph 4 of the claim, the respondent states that:-

5.1. The claimant was dismissed summarily as his performance was consistently below par as he continually failed to meet clear deliverables which had been agreed upon previously, resulting in substantial loss and damage to the respondent.

5.2. Through his self-assessment sent to the respondent in October 2013, the claimant rated his own performance at 2.33, which was significantly below the average score of 3.

5.3. The claimant blatantly refused, without any lawful cause, to abide by the Bank's Performance Management Policy, thereby fundamentally breaching the obligations arising under his contract of service.

5.4. The claimant knowingly failed and/or refused to obey lawful and proper commands/instructions which was within the scope of his duty to obey, issued to him by persons placed in authority over him by the respondent.

b. In response to paragraph 6 of the claim, the respondent avers as follows:-

8.1. Due to the claimant's repeated insubordination on failing to submit himself for self-assessment for the year 2013 and for not attending the required scheduled appraisal session, a query was issued to the claimant as to why disciplinary action should not be instituted against him for insubordination.

8.2. Following the claimant's appeal to the Chairman vide the claimant's letter of 19th and 21st February 2014, a Special Board Meeting was convened on 13th March 2014 where the claimant was given ample opportunity to explain to the Board of Directors the issues he had raised in his aforementioned letters.

8.3. From the meeting of 13th March, 2014, two members of the Board were appointed to serve as delegates of the Board in negotiating with the claimant regarding amicable separation. The said delegation met with the claimant but was unable to agree on separation.

8.4. Having regard to the claimant's representations to the Board during the aforesaid meeting, and having regard to all the pertinent facts, the Board ultimately resolved on 26th March 2014 that the claimant's employment with the respondent be terminated on the

grounds of poor performance, refusal to engage in the respondent's mandatory performance process and refusal to take instructions from the claimant's superiors.

8.5. In furtherance of this resolution, a Notice to Show cause was issued on 28th March 2014.

8.6. In the said Notice to show cause dated 28th March, 2014, the claimant was, inter alia, informed of the following:-

- i. The grounds on which termination of the claimant's employment was being considered.
 - ii. The claimant's right to choose another employee of the respondent to be present during his explanation in response to the said Notice to Show Cause.
 - iii. The right of the claimant and the other employee he chose to accompany him to make representations, both verbally and in writing, in respect of the contents of the said Notice to the Cluster HR Head Kenya & EAC of the Respondent on Monday 31st March 2014 at 9 a.m. in the Respondent's HR Boardroom.
- c. The claimant responded to the Notice to show cause on 29th March 2014
- d. The claimant consciously chose not to attend the scheduled hearing on 31st March 2014 at 9.00 a.m. The allegation that no disciplinary hearing was convened was therefore without any merit.

14. In essence the onus will be mainly on the respondent to show that it was justified in dismissing the claimant. It will be expected of the respondent to produce evidence to support these allegations contained in its memorandum of defence failure to which the claimant's allegations will become vindicated and a finding of unfair dismissal made.

15. The Court has perused through the "NOTICE TO PRODUCE" dated 28th January, 2015 and does not think the documents sought to be produced are critical to the claimant in showing that the respondent had no valid reason to terminate his services. In any event as already said the burden of proof that the reasons for termination were justifiable and valid rests with the respondent. If these documents be key to proving this, it is the respondent who should deem it necessary to produce them.

16. As a result the Court declines to make the orders sought in the motion dated 27th May, 2015 for the reason that it has not met the threshold required for making the orders sought therein.

17. It is so ordered.

Dated at Nairobi this 18th day of March 2016

Abuodha J. N.

Judge

Delivered this 18th day of March 2016

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge