



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**CAUSE NO. 113 OF 2013**

**(FORMERLY CAUSE NO.1488 OF 2011 AT NAIROBI)**

**DAVID MAUKI KITHAKA..... CLAIMANT**

**-VERSUS-**

**THARAKA NITHI TEACHERS SACCO SOCIETY LIMITED..... RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 24<sup>th</sup> April, 2015)

**JUDGMENT**

The claimant filed the memorandum of claim on 6.09.2011 through Masika & Koross Advocates. The respondent filed the memorandum of response on 19.09.2011 through Nyamu Nyaga & Company Advocates. The claimant filed the amended memorandum of claim on 18.12.2013 through Nchoe, Jaoko & Company Advocates and prayed for judgment against the respondent for:

- a. A declaration that the termination was un-procedural, unfair and unlawful.
- b. The respondent to pay the claimant the outstanding payment for unlawful and unfair termination and or breach of contract of employment as tabulated here below:
  - i. Basic salary Kshs.65, 000 x 12 months x 12 years totaling to Kshs. 16,380,000.00.
  - ii. Responsibility allowance Kshs.65, 000 x 12 months x 21 years x30/100 totaling to Kshs.4, 914, 000.00.
  - iii. One month salary in lieu of notice Kshs.65, 000.00.
  - iv. Medical allowance Kshs.7, 247 x 12 months x 21 years totaling Kshs.4, 478, 292.00.
  - v. Owner occupier allowance Kshs. 17, 771 x 12 months x 21 years totaling to Kshs. 4, 478, 292.00.
  - vi. Total **Kshs. 27,663,536.00.**
- c. Costs of the suit.
- d. Any other or further relief that the court may deem just and fit to award to the claimant in the circumstances.

The respondent filed the amended response and counterclaim on 11.11.2013. The respondent prayed for the claimant's claim to be dismissed and for declarations and orders:

- a. That the claimant was legally and lawfully summarily dismissed from his employment as per the provisions of the law and the respondent was justified in arriving at the said decision and the claimant cannot be reinstated to the said employment, and in any event the prayer for reinstatement is time barred.
- b. That the claimant was employed under permanent and pensionable terms and is not entitled to any

- payments or compensation from the respondent being allegedly payments for breach of contract, or unfair termination or for loss of earnings as sought for by the claimant at all.
- c. A declaration that the claimant having been paid his terminal benefits as per demand, calculations and requirements of the Retirement Benefits Authority, there are no more payments due to the claimant from the Respondent herein.
  - d. That an order be made for payment of the costs of the proceedings to the respondent.
  - e. A declaration that in actual fact, it is the claimant who is indebted to the respondent in terms of the decree in Co-operatives Tribunal Case No. 36 of 2009.
  - f. In event of any financial award being made to the claimant herein, the honourable court do make an order for a set-off to be applied to ensure satisfaction of the decree issued in favour of the respondent against the claimant in Co-operative Tribunal Case No. 36 of 2009 and which amount as at 6.11.2013 stood at Kshs.4, 514, 099.75 plus accruing interest on the said amount at the rate of 12% from the said date until payment in full.
  - g. Any other order or relief that this honourable court may deem fit and just to grant.

It is not in dispute that the claimant was employed by the respondent as a loans clerk in accordance with the letter of appointment dated 07.11.1994. The appointment took effect on 1.12.1994. The claimant was subsequently promoted to the position of a loans officer whose duties entailed receiving loan application forms, verifying documents to support the loan application and as attached on the loan forms, confirming proper completion and signing of the loan forms by the applicant for loan and the relevant guarantors, tabling loan applications for approval before the relevant respondent's committee, and posting the loan applications in the computer loans' system. The duties essentially placed the claimant at the core of respondent's loan processing function as the most dependable officer for a properly run loaning system. In other words, the integrity of the respondent's loaning system and its successful implementation relied upon the claimant's proper discharge of the duties vested in him as the respondent's loans officer.

The claimant's employment was terminated by the letter dated 9.07.2009 and with effect from the same date. The letter stated that some of the reasons for the termination included dishonesty and irregularities in the loan department under the claimant's watch. The letter identified 9 cases as follows:

1. The case of Hemis C. Leonard who was irregularly refunded Kshs. 21,000.00 on 20.02.2009.
2. The case of Ngaruni Jennifer Kamunda who was irregularly refunded Kshs. 3,500.00.
3. The case of Andrine K.Njeru who was granted two loans beyond the acceptable limit and his pay slip showed that he could not support the repayment of the two loans.
4. The case of Kenneth M. Njeru who was given a loan of Kshs. 850,000.00 on 31.10.2008, his shares could not support the loan, the loan application form was not signed and approved by the loans committee as prescribed and the form was not filed.
5. The case of Mutegi Everyn who was given a loan of Kshs. 750,000.00 at repayment rate of Kshs. 10,000.00 for over 72 months, the maximum loan repayment period.
6. The case of Daniel Oyugi Nyanchoka who was given a loan of Kshs. 1, 800,000.00 on 2.07.2008 without security or guarantors to repay over a period of 120 months but the loan form indicated 60 months.
7. The case of Muthengi Njeru who applied for a loan of Kshs. 110,000.00 and gave the claimant Kshs. 100,000.00 out of the loan cash with the claimant's promise to refund in 2 weeks but as at the date of dismissal, the claimant had repaid only Kshs.50, 000.00.
8. The claimant off set Kshs. 50,000.00 emergency loan when his normal loan of Kshs.2, 160, 000.00 was approved on 13.11.2008 and the claimant subsequently on 30.11.2008 processed and withdrew the Kshs. 50,000.00 without approval.
9. The claimant advised one Archangelo Micheni Kaugi to deposit on 31.12.2008 Kshs. 100,000.00 as shares so that he could earn more dividends against rules not permitting last minute deposits to earn dividends. Upon realizing the mistake, the claimant refunded the same money to the said Kaugi on 12.02.2009 against the respondent's rule against part withdrawal of shares.

The termination letter concluded by stating that the claimant was to note, that he owed the society a sum of Kshs. 5,063,479.52.

The **1<sup>st</sup> issue** for determination in this case is whether the termination was unfair. The court has revisited the pleadings, evidence and the submissions. Termination would be unfair if the due process prescribed in section 41 of the Employment Act, 2007 or as agreed between the parties was not followed; or if the reason for termination was not genuine as provided for in section 43 of the Act.

The claimant received the suspension letter dated 11.03.2009 signed by Gabriel M.Njagi, the respondent's acting general manager. The respondent's by-laws exhibit DK5 on the claimant's further list of documents at clause 14.2(x) provides that the general manager had the power to suspend a member of staff where necessary and to report to the management committee for further action. Accordingly, the court finds that the suspension letter was regular because it complied with the by-law. The claimant testified that he knew that on 13.03.2009 the management committee sat and might have been informed about his suspension. The claimant testified that he was called to some meetings in relation to his suspension such as the meeting of 18.05.2009. The claimant in his testimony admitted that he wrote the letter of apology dated 18.05.2009 being exhibit 6B on the amended response and he did so before he entered the meeting of 18.05.2009. In that letter he apologized to the respondent's management committee for every malpractice in the loan's department, which the claimant headed, and whether the malpractice had been committed directly by the claimant or not. By reason of that letter, the court finds that the claimant knew the allegations of the malpractices that had been leveled against him because without that knowledge, it would not have been reasonable and possible to make the formal apology. The claimant further attended the meeting of 3.07.2009. The court has taken that evidence cumulatively and finds that the claimant was given notice of the alleged misconduct, he was given a hearing by the respondent and the suspension was handled in accordance with the respondent's applicable by-laws. Accordingly, the court finds that the claimant was accorded the due process of notice and a hearing as envisaged in section 41 of the Act.

As for the validity of the reason for termination, the claimant admitted in his evidence that in the case of Daniel Oyugi Nyanchoka who was given a loan of Kshs. 1, 800,000.00 on 2.07.2008, the loan was without security or guarantors to repay, it was for repayment over a period of 120 months, but the claimant had stated on the loan form 60 months as the repayment period. The claimant testified that the form had been improperly completed because it lacked guarantors; in part E the date was wrong because it should have been 1.08.2008 and not 2.07.2008; the claimant had failed to ensure that parts A to G of the form had been properly completed by the loan applicant; he failed to take the form to the relevant committee for approval; and though that loan was paid to the applicant, the payment was contrary to prevailing respondent's policy on processing and disbursement of loans to loan applicants.

The claimant admitted in his testimony that in a private arrangement, Muthengi Njeru who applied for a loan of Kshs. 110,000.00 gave the claimant Kshs. 100,000.00 out of the loan cash and the respondent showed that the said Njeru had written to complain that the claimant had failed on the promise to refund in 2 weeks. The court finds that as at the date of dismissal, on a balance of probability, the claimant had repaid only Kshs.50, 000.00 as per the respondent's case and the claimant's conduct undermined the claimant's integrity as the respondent's loans officer.

The claimant admitted in his testimony that he initiated the loan process for Kenneth M. Njeru who was given a loan of Kshs. 850,000.00 on 31.10.2008. The claimant alleged but did not show in his evidence that the said Njeru was a preferential member so that he could be given the loan even if his shares could not support the loan. The loan application form was not signed and approved by the relevant loans' committee as prescribed and the form was not filed as required. The court finds that in that case the claimant failed on his duties as the respondent's loans officer responsible for verifying the details in the loan application form.

The court has considered the cited admissions of misconduct on the part of the claimant. The court has further considered the apology as written by the claimant during the administrative disciplinary proceedings. The cumulative effect is that the claimant knew the allegations as leveled against him, he apologized though in general terms, and he admitted to specific acts of misconduct in his testimony before the court. Accordingly, the court finds that at the time of the termination, the respondent had genuine or valid reasons to terminate the claimant's employment as envisaged in section 43 of the Act.

Thus, the court finds that the termination was not unfair because the claimant was accorded notice and hearing, and, the respondent had valid reasons for termination.

The **2<sup>nd</sup> issue** for determination is whether the claimant is entitled to the remedies as prayed for. The court considers that the remedies as prayed for could only begin to crystallize and stand for consideration if the finding of unfair termination was made by the court. The court has found that the termination was not unfair and the remedies will therefore evaporate and the court finds that the same will fail.

The **3<sup>rd</sup> issue** for determination is whether the respondent is entitled to the remedies as prayed for. First is the prayer for a set off if the court made a pecuniary award in favour of the claimant. The court has not made such a pecuniary award and therefore the prayer for a set off does not arise. The Co-operative Tribunal has already made specific findings in case No. 36 of 2009 and it would be, in the opinion of the court, superfluous to repeat what has been conclusively determined by the tribunal in exercise of competent jurisdiction. The court finds that the respondent is entitled to a declaration that the termination was not unfair and to dismissal of the claimant's claim with costs.

In conclusion, judgment is entered for the respondent against the claimant for:

- a. The declaration that the respondent's termination of the claimant's employment by the letter of termination of employment dated 9.07.2009 was not unfair.
- b. The claimant's claim is dismissed with orders that the claimant will pay costs of the suit.

**Signed, dated and delivered** in court at **Nyeri** this **Friday, 24<sup>th</sup> April, 2015**.

**BYRAM ONGAYA**

**JUDGE**