



**REPUBLIC OF KENYA**

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

**CAUSE NO. 119 OF 2014**

**JASPER MWENDA IKIARA..... CLAIMANT**

**VERSUS**

**HOUSING FINANCE LIMITED..... RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 12<sup>th</sup> June, 2015)

**JUDGMENT**

The claimant filed the memorandum of claim on 15.09.2014 through Ongicho-Ongicho & Company Advocates. The claimant changed his advocates to G.V. Mumia & Company Advocates by the notice filed on 01.12.2014. The claimant prayed for judgment against the respondent for:

- a) An order declaring that the respondent's actions towards the claimant amounted to constructive termination.
- b) An order that the respondent's conduct amounted to discrimination of the claimant.
- c) An order that the claimant's termination was unfair and unlawful.
- d) An order that the claimant was underpaid for the 20 months he served.
- e) An award of Kshs. 310,246 being the underpayment in house allowance for 20 months and interest at commercial rates on the same amount from date of employment.
- f) An award of 12 months' salaries compensation for unfair and unlawful termination.
- g) Salary for the days worked in the month of June 2014 from 1<sup>st</sup> to 25<sup>th</sup> of June 2014.
- h) Notice period as per the appointment letter.
- i) Accrued leave days as at 25<sup>th</sup> June 2014 which stand at 25 days.
- j) Certificate of service.
- k) Costs of the suit.
- l) Any other relief that the court may deem fit to grant.

The respondent filed the memorandum of defence on 31.10.2014 through Muthoga Gaturu & Company Advocates. The respondent prayed that the memorandum of claim be dismissed with costs. The reply to defence was filed on 01.12.2014.

The hearing was fixed for 5.03.2015 and counsel for the claimant informed the court that after filing of the suit the respondent paid the claimant notice period, days worked and leave days as claimed.

On the hearing date it turned out that part of the claim had been settled between the parties and by consent of the parties' respective advocates the court recorded the issues for determination as follows:

- 1) Whether the termination was unfair.
- 2) Whether the claimant is entitled to 12 months' salaries as compensation for unfair termination.
- 3) Whether the claimant is entitled to compensation for discrimination.
- 4) Whether the claimant is entitled to house allowance.

The claimant was employed by the respondent in December 2012 in the position of branch manager for the newly established respondent's Meru Branch.

Prior to that appointment the claimant had served at the Co-operative Bank of Kenya for 14.5 years as a bank branch manager.

The claimant was responsible of overall establishment of the respondent's Meru Branch through opening it, marketing, managing staff, ensuring internal controls and the general growth of the branch. The branch had been closed in 2001 and was reopened in February 2013 under the claimant's management. The claimant managed the reopening beginning sometimes in December 2012.

The claimant was given targets to achieve but testified that the targets were not negotiated as he did not participate in setting the targets.

The claimant received a letter about his performance dated 24.02.2014 signed by Ruth Gakenia, the respondent's acting Head of Branch Business at the material time.

The letter stated as follows:

**“RE: PERFORMANCE IMPROVEMENT PROGRAM**

**Reference is made to various meetings that you have had with your supervisors in which you discussed at length matters relating to the recently concluded performance improvement program.**

**Refer to the actions that have been taken, including training, mentoring and close monitoring have not yielded any improvement and therefore the following will be taken:**

- 1. You will be put on PIP with immediate effect.**
- 2. You will be reviewed after 3 months and a decision will be made based on your performance.**

**We take this opportunity to reiterate that the importance of this action as a last remedial intervention towards turning around your performance and wish you all the best.”**

The claimant testified that he only received that letter on performance improvement program (PIP) without targets he was expected to achieve under the PIP.

The claimant further stated that the letter which he received on 24.02.2014 surprised him because he had undertaken performance review for year 2013 in January 2013 with favourable recommendations as per exhibits R1- R7 on respondent's bundle. It was the claimant's evidence that after 3 months of performance improvement program, the claimant never had a review with his supervisor. The claimant stated that he prepared the employee development action schedules dated 31.03.2014 and 30.04.2014 and forwarded to his boss but saw in court as filed and for the first time the adverse comments by his supervisor that his performance was wanting as targets were not met, the daily call program was not forwarded and that the Meru branch performed poorly.

The claimant received the notice to attend final performance review dated 06.06.2014.

The notice signed by the said Ruth Gakenia stated as follows:

**“NOTICE TO ATTEND FINAL PERFORMANCE REVIEW**

**Kindly refer to the letter dated 2th February 2014 in which you were placed on a performance improvement program, which has been subsequently reviewed monthly and follow up actions agreed upon.**

**In view of the above, you are hereby advised that the period of the program has now lapsed and therefore you are required to attend a performance review to be held on 12<sup>th</sup> June 2014 at the Project Meeting room, Rehani House at 9.00 am. The meeting is being convened to review your performance since the last time of your review, which was not on target in accordance with what was expected of you.**

**You are requested to present yourself at the performance review at the above specified date and time without failure.**

**You have the right to be accompanied at the hearing and the choice of companion is limited to a fellow employee of the Bank. Should you wish to be accompanied, your companion may act as a witness of the proceedings, take notes, address the meeting and confer with you during the meeting. They cannot, however, answer questions on your behalf or address the meeting if you do not wish them to do so.**

**Please note that the Bank reserves the right to refuse a companion to attend the meeting if it considers that person would prejudice the meeting. If the bank exercises its right to refuse the attendance of your chosen companion, you will be able to choose another companion subject to the same conditions.**

**If you elect to be accompanied, please inform me of the name of your chosen companion in advance of the meeting.**

**During the course of the meeting you will be afforded the opportunity to respond to the performance concerns attributed to your work.**

**A record of the proceedings will be kept and you will be notified of the outcome of the review in writing.**

**Any action taken against you may be appealed via the bank's appeal process as set out in the Bank's disciplinary/appeals procedures”**

The claimant testified that he attended the meeting as scheduled but the formal performance review was not carried out because he went into the meeting and explained about budget and performance variances and that was all. He also attended without a companion because in his view, the respondent was going to choose his companion as set out in the invitation letter. The minutes of the meeting is exhibit R7 on the respondent's bundle.

The meeting made the following recommendations:

1. Show cause letters to be issued.
2. If the response to the show cause was the same as the response he gave in the hearing then his employment should be terminated.
3. Review the branches and have sessions with the staff after the exit to communicate.

The show-cause letter dated 12.06.2014 was received by the claimant on 13.06.2014. The letter referred to the performance hearing of 12.06.2014 and stated that the claimant's performance for 2013 was below target and he was put on performance improvement program (PIP) but his performance had failed to improve over the PIP period. The claimant was therefore required to show cause, by 14.06.2014, why disciplinary action was not to be taken against him for poor performance. The claimant replied by his letter dated 14.06.2014 and he raised the following points in his exculpation:

- a) The branch had received skewed support from the respondent's head office especially in terms of projects booking.
- b) The branch suffered staffing and knowledge gaps.
- c) The branch lacked sales agents to sustain the sales momentum created by the regular staff.
- d) Lack of adequate support from project team when the branch generated project leads which would otherwise bring in more cash flows.

As measures to improve the performance, the claimant highlighted as follows:

- a) The General Manager, Business Development was to visit and support the branch during 3<sup>rd</sup> and 4<sup>th</sup> weeks of June in closing business with the Meru University, and, the Meru and Tharaka Nithi Governors where the branch had pending deals.
- b) The staff had been reorganized for a door to door marketing of the bank.
- c) The branch had forwarded four viable project deals to the projects team at the respondent's head office for revival so as to increase the branch deposit base.

The claimant testified that he was thereafter invited by email for a disciplinary hearing but which did not take place. The claimant then received the letter of termination of service dated 25.06.2014. The letter referred to hearing of 12.06.2014 and the response to the show-cause letter dated 14.06.2014, the respondent's letter of 24.02.2014 and PIP signed on 7.04.2014. The letter stated that the claimant's performance for 2013 was below target and the claimant had failed to improve despite being put on the PIP. Thus, the letter stated that the claimant's actions amounted to gross negligence contrary to section 44(4) (c) of Employment Act, 2007, section 8(b) of the Regulations and Rules for Management and Secretarial Staff and the claimant's employment was terminated so that the claimant's last working date was to be 25.06.2014. The claimant's gross pay at termination was Kshs. 287,679.00.

The **1<sup>st</sup> issue** for determination is whether the termination was unfair. After the show cause letter, it is obvious that the claimant was thereafter not accorded a hearing as envisaged in section 41 of the Employment Act, 2007. The claimant raised serious issues in self exculpation which have remained unresolved. In view of those unresolved issues the court finds that the respondent cannot be said to have had genuine reasons to terminate the claimant's employment as envisaged in section 43 of the Act. The court further finds that under section 41(2) of the Act, the respondent was required, before terminating the claimant's employment, hear and consider the claimant's representations in view of the alleged poor performance. As pointed out, the claimant made strong representations as challenges that had occasioned the poor performance and also put forward measures he proposed as would lead to his better performance

but the respondent has not showed its considered position on those representations as required in the cited section.

The court has considered the final performance review meeting of 12<sup>th</sup> June 2014. The court finds that the meeting was an internal employer-employee meeting aimed at discussing and improving performance. It would appear that the respondent misdirected itself to design and in a misconceived manner framed the meeting to serve both as a performance sharpening meeting as well as a disciplinary meeting. The court finds that it was not a disciplinary meeting that could lead to termination on account of poor performance as envisaged in section 41 of the Employment Act, 2007 because it was not express that the meeting on final performance would entail proceedings that could lead to termination of the employee, the claimant. The court holds that a notice for purposes of a hearing and eventual termination of the employee under section 41 of the Act must be express and not ambiguous so that the employee is clearly prepared to attend with a view of putting a strong case in self exculpation in view of the impending drastic termination decision. In any event, in this case, the respondent was aware that the final performance review meeting was not such disciplinary hearing and proceeded to issue the proper show cause notice which the claimant replied to in writing but the relevant hearing as provided in section 41 of the Act never followed.

The court finds that the termination was therefore unfair both procedurally and in substance. It was unfair. While making that finding the court further finds that the earlier meeting of 12<sup>th</sup> June 2014 on final performance review was not essentially a disciplinary meeting but a performance deliberation so that it did not serve the kind of disciplinary hearing as envisaged under section 41 of the Act.

The **2<sup>nd</sup> issue** for determination is whether the claimant is entitled to 12 months' gross salaries for compensation under section 49 (1) (c) of the Act. The court has considered that the claimant failed to specifically negotiate about the respondent's obligations towards the achievement of the claimant's performance targets so that the claimant thereby contributed to his dismissal in that way. The claimant did not show that while in service, he negotiated about the respondent's obligations that would have mitigated the challenges and fostered the proposals he advanced in his reply to the show cause letter. There was no evidence of grievances by the claimant about those matters as he served and in particular about the design of the performance measurement and management system and procedures. The court has further considered that the respondent failed to address the claimant's valid or genuine concerns in his reply to the show cause letter. The court has considered all the other circumstances of the case including the period of time the claimant had served, the period he expected to continue in employment and that the claimant had been employed following his previous stable job at the Co-operative Bank of Kenya. The court considers that 6 months' gross salaries making **Kshs.1, 726,074.00** will meet the ends of justice in this case.

The **3<sup>rd</sup> issue** for determination is whether the claimant is entitled to house allowance. The employment contract is clear that the claimant would be paid a basic salary of Kshs. 255, 963.00 per month plus a consolidated allowance of Kshs. 24, 037.00 per month. Under section 31(1) of the Employment Act, 2007 the employer is required to pay sufficient sum for rent or to provide reasonable housing accommodation for the employee. But under section 31(2) of the Act, section 31(1) does not apply where the contract of service contains a provision which consolidates as part of basic wage or salary of the employee an element intended to be used by the employee as rent or to enable the employee to provide himself with housing accommodation. In the present case the court finds that the provision in the contract of payment of a consolidated allowance was such a provision that enabled the claimant to provide himself with housing accommodation or was intended to be used by the claimant as rent. The prayer for housing allowance will therefore fail.

There was not material on record to justify the prayer on discrimination as alleged and the same shall fail.

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

- a) The declaration that the termination of the claimant's employment by the respondent was unfair.

b) The respondent to pay the claimant **Kshs.1, 726,074.00** by 1.09.2015 in default interest at court rates to be payable thereon from the date of this judgment till full payment.

c) The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered** in court at **Nyeri** this **Friday, 12<sup>th</sup> June, 2015**.

**BYRAM ONGAYA**

**JUDGE**