



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

**CAUSE NUMBER 1960 OF 2014**

**CAROLINE CHEMUTAI ROTICH.....CLAIMANT**

**VERSUS**

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

**JUDGMENT**

1. The claimant in this suit averred that she was employed by the respondent on 14<sup>th</sup> October, 2013 as Senior Manager Retail Banking at a gross salary of Kshs.333,000/= per month.
2. According to the claimant during her service with the respondent, she dispensed her duties responsibly and at no time did the respondent make any complaint in regard to the claimant's work in terms of performance or discipline.
3. The claimant further averred that on 27<sup>th</sup> October, 2014 she was surprised when she reported to work in the usual manner and her staff badge was confiscated by the respondent hence could not access her place of work. Her office email as well as access to the respondent's ICT system was also disabled.
4. According to her, no reason was given to her by the respondent for these adverse actions. This treatment the claimant contended was inhuman, discriminatory and humiliating and caused her immense mental anguish as she was subject to great ridicule, rumours and speculation by the colleagues on her actual job status.
5. The claimant averred that as at the time of filing the instant suit, she had not been served with a termination letter. She further averred that during the subsistence of her employment with Kenya Commercial Bank, she took mortgage facility amounting to over Kshs.7,000,000/= over LR No. NAKURU MUN. BLOCK 17/292 a loan that was transferred to the respondent by virtue of her employment hence should the respondent terminate her employment in the manner they intended, she would be unable to repay the loan and would be greatly prejudiced and may lose her property.
6. The claimant averred that the actions of the respondent violated the express provisions of the Employment Act and if effected would greatly prejudice her and could lead to loss of her property mentioned above.
7. The claimant therefore sought issuance from the Court a permanent injunction restraining the respondent from breaching her contract of employment by subjecting her to inhuman, hostile and humiliating work environment.

8. In the alternative the claimant seeks an order for compensation for loss of employment equivalent to 12 months wages, damages for discrimination, inhuman treatment and harsh working environment.

9. The respondent in its reply to the claim averred that the claimant's duties included:-

**(a) Constantly deliver exceptional sales results for Retail Banking products. This will be achieved by planning, developing, implementing and analyzing sales plans and activities to meet sales objectives of the bank.**

**(b) Provide direction and strong leadership to the team, efficient business management, strong team work and stakeholders' management and a productive working environment for growth.**

**(c) Ensuring strategic directives are translated into feasible sale/sales support for the local market, and the risk/cost elements are managed effectively.**

**(d) Market management by providing input into the annual country marketing plans, Researching and analyzing the business by understanding key business drivers, influences and competitor activities.**

**(f) Service management and relationship building and driving excellent customer experience whilst strengthening and maintain key customer relations.**

**(g) Implement processes to monitor and manage sales capacity to leverage on market potential and enhancing cross selling initiatives.**

**(h) Identify and manage business risks from both a customer and bank perspective by ensuring that appropriate control mechanisms are in place to minimize risk exposure.**

**(i) Preparation and submission of daily and weekly reports on sales activities to the line manager.**

**(j) Maintain a well-developed working knowledge of the complete line of products, services offered and process flows, taking responsibility to keep up to date and request assistance for further development needs.**

**(k) Ensure market penetration and growth in market share within the retail space by developing and expanding business opportunities.**

**(l) Formulate and implement sales attraction plans that will facilitate the achievement of business objectives within the different business segments of the market.**

**(e) Ensure profitable growth in sales by driving, formulating, measuring and managing the achievements of multichannel sales strategy for the network to grow new business and expand share of wallet.**

10. The respondent therefore averred that the claimant did not satisfy the demand for her job description. The respondent further averred that the claimant was to serve six months of probation but upon completion of 3 months she proceeded on maternity leave hence could not be objectively appraised necessitating an extension of the probation period for a further three months until 14<sup>th</sup> August, 2014 to allow the claimant time to fully serve the probation period.

11. According to the respondent, the claimant served the probation period until 27<sup>th</sup> October, 2014 when a decision was made to terminate her services after a thorough appraisal of her performance during the probation period. The respondent averred that during the probation period of the claimant she exhibited incompetence and poor performance in the execution of her duties and responsibilities. In particular she

failed to carry out the following tasks:-

- (a) Institutionalize farming call plans**
- (b) Automate customer allocation to farmers**
- (c) Sufficiently staff personal banking unit**
- (d) Roll out personal banking role profiles**
- (e) Implement sales effectiveness tools**
- (f) Segment the retail book as highlighted in the Bank's retail strategy**
- (g) Draw clear farming deliverables including daily reports and analytics**
- (h) Steer the personal banking team to meeting its deliverables.**

12. According to the respondent the above highlighted poor performance was brought to the claimant's attention and were variously discussed through myriad of internal emails and verbal communication where she was requested to explain the dwindling performance of the highlighted units handled by her.

13. The respondent contended that the claimant's poor performance of her task made the respondent to incur economic losses prompting the Bank to classify and mark the units as under "ICU" status since they required emergency recovery strategies to revive them. However, despite giving the claimant time to try and revive the ailing units, the claimant failed to employ viable and sound strategies to improve them and was thus put under performance watch by her supervisor. In spite of the foregoing measures, the claimant failed to perform as was required of her hence on 27<sup>th</sup> October, 2014 a meeting was called where she was present and her performance discussed and a decision was reached to terminate the claimant's services on account of incompetence and poor performance and the decision immediately communicated to her.

14. Regarding denial of access to her place of work, the respondent averred that upon reaching the decision to terminate the claimant's services, she was requested to leave behind her staff badge and access card as her services had been terminated.

15. Concurrent with this suit, the claimant filed an application under certificate of urgency seeking interlocutory order of injunction against termination of her services. The affidavits in support of the application as well as replying affidavit by the respondent elaborates more on the factual circumstances that led to the disputed termination of the claimant's services. They will therefore be considered in this judgment.

16. The claimant's affidavit in support of her application as well as the respondent's replying affidavit repeated the averments in the memorandum of claim as well as memorandum of response respectively. However, the claimant's further affidavit sworn on 15<sup>th</sup> December, 2014 elaborated more, her factual understanding of her disputed termination. She deponed on the main that:-

**(a) That the allegations by the Respondent that her performance was below par, the same was not true, as even as at 7<sup>th</sup> November 2014 when she had filed the suit herein the Respondent General Manager Retail Banking, Ezekiel O. Owuor sent out an email to all senior staff and concluded that she was an outstanding member of staff.**

**(b) That it was ironical that the said General Manager Ezekiel Owuor was purporting to have sat on meetings where her performance was discussed as wanting.**

**(c) That the internal memo correspondences by the Respondent stated clearly that for the**

time at work she was doing well and her half year appraisal signed by her line manager stated that her performance was satisfactory. The appraisal was submitted on 1/10/2014 which was later sent back and a sign off requested which she did on 13/10/2014. No issues had been raised on her performance.

(d) That during the period of her tenure no issues of incompetence were raised as seen in the correspondence between the Respondents and her. Email's between the Respondent and her showed that the various tasks assigned to her were completed and the claims stated are baseless, those that were pending were tasked to different departments whereby the delay experienced was due to technical issues by the IT department, and which the line General Manager was well aware of as it was discussed in the meeting.

(e) That there were no discussions held on her poor performance as could be seen from the attached emails from the response of the Respondent. These were general emails discussing activity reports. And from week 2 the performance was above and was on an improving trend. In any event, normal General Office meetings and discussions do not amount to a disciplinary process.

(f) That the retail project brainstorming for the farming initiatives began in June 2014 and notably the personal banking piece started taking shape after the workshop on 31<sup>st</sup> July 2014, when they were informing the team of their change of role and expectation. However, this is a misrepresentation of the said ICU meeting. This meeting (on 5/9/2014) was to review how far the retail project was. She was not part of the meeting nor was her poor performance discussed as neither stated nor was she put under performance watch. There were 4 areas of discussion, the hunter farmer model (where she was), branch communication, customer fulfillment and communication and finally card partnership, discussions not limiting to the failure of branches to embrace the retail project (steered by the head of branches) and the areas in farming that needed to be concluded which informed the formation of various members in the ICU noting that each member nominated had a key role in the success of the items highlighted. There were 4 ICU teams formed. They were nominated to make it work not because of any poor performance on her part.

(g) That on 27<sup>th</sup> October 2014 at 4.30 p.m. she was called to attend a meeting at Delter 1<sup>st</sup> floor, she had no prior knowledge on what was to be discussed nor who were going to be the attendees. The respondent produced doctored minutes that the meeting was to discuss her termination.

(h) That the meeting held on 27<sup>th</sup> October, 2014 which was initiated by her general manager, revolved around the retail project and what she had done and what was pending which she clarified and were surprisingly missing in the minutes provided. The General Manager proceeded to leave the room not willing to listen to her and asked Human Resource to proceed with the meeting noting that Human Resource was surprised by the meeting showing that they had not been briefed earlier of the meeting for they asked her what she wanted to do at that point and if she had a prior meeting with her General Manager to discuss the same. Which she confirmed that no prior meeting was held with him on the same. She responded that she would like to have a second meeting with her General Manager whom she felt had not taken time to listen. The Human Resource team requested that she surrender her badge and access card and that they were going to set up a meeting with her General Manager and inform her.

(i) That in the said meeting she was not given a chance by the Respondent to defend herself whatsoever.

(j) That the Respondent has never issued any warning letters with regard to her purported poor performance and should produce the warning letters on the same.

17. In his submission on behalf of the claimant, Mr. Koceyo for the claimant stated mainly that the claimant was still in the employment of the respondent since at the time of filing the suit, the claimant had not been served with a termination letter. The purported termination letter dated 31<sup>st</sup> October, 2014 was allegedly posted to the claimant on 7<sup>th</sup> November, 2014 but the address used was according to Counsel, wrong hence his client did not receive her termination letter. Further on the date that the letter was allegedly posted, there was already a Court Order restraining the respondent from terminating the claimants' services.

18. According to Counsel, the actions by the respondent violated the provisions of the employment Act and the claimant was apprehensive that the respondent would breach her contract of employment.

19. Regarding reasons for termination of employment, Counsel submitted that at the time the claimant was in respondent's employment, she was not informed of any shortcomings in her performance neither was there communication from the respondent to the claimant that her performance was wanting. In any case if there were to be such performance issues, the respondent was under obligation to inform the claimant and give her time to improve. The allegation of non-performance and incompetence were raised for the first time by the respondent in response to the suit, through email correspondence attached to Mr. Nicholas Kaweru's affidavit.

20. These email correspondences, according to Counsel do not demonstrate that the claimant was under any disciplinary action nor that her performance was wanting. According to Counsel, a broader look at the complete email sequence showed that the issues that were being discussed were normal and usual office deliberations addressed to all staff in a given segment.

21. Regarding minutes of the meeting held on 27<sup>th</sup> October, 2014 after which the claimant was terminated, Counsel submitted that at no time did his client admit that in all issues that were discussed she failed to perform. In any event the meeting was initiated by the General Manager and the claimant had clarified on what she had done besides the respondent did not adduce any valid evidence to support any substandard conduct at work on the part of the claimant. The conclusion therefore according to Counsel, was neither a valid nor justifiable reason for terminating the claimant's employment.

22. Regarding procedure for termination Counsel submitted that there was no notice to the claimant on any intended disciplinary action. The claimant ought to have been given the allegations against her in advance to enable her prepare her defence. According to Counsel, the alleged meeting on 27<sup>th</sup> October, 2014 was a routine staff meeting to discuss performance of the business as the claimant had just been summoned to the meeting without notice.

23. The respondent through its Counsel, Mr. Muriuki submitted that the claimant's performance was variously discussed with her through myriad internal emails and verbal communications where she was requested to explain the dwindling performance of her units. In spite of this, the claimant failed to perform as was required of her. As a result a meeting was convened on 27<sup>th</sup> October, 2014 where it was agreed that the claimant was not competent to handle her work as was required of an officer in her position. The management therefore decided to terminate her services.

24. After the meeting of 27<sup>th</sup> October, 2014 the claimant left the respondent's premises and agreed to come and collect her letter of termination. The claimant was therefore guilty of concealment of material facts and coming to Court with unclean hands and bad faith.

25. Counsel further submitted that the fact that the claimant made an alternative prayer for compensation for unlawful termination was the surest evidence that she knew she had been terminated although she felt the same was unlawful.

26. Mr. Muriuki contended that the claimant was terminated after completing her probation and after recommendations upon appraisals deemed it improper and uneconomical to retain the claimant in employment.

27. Counsel further submitted that prior to terminating the claimant's employment the respondent held two meetings with the claimant. The first was on 27<sup>th</sup> October, 2014 and the second on 30<sup>th</sup> October, 2014. From these meetings, Counsel contended that claimant was found to be incompetent at the job she was offered. The claimant failed to offer any explanations why her department was performing poorly and failed to meet the set targets. The reasons for claimant's termination was therefore fair and valid.

28. Regarding claim for discrimination, Counsel submitted that the claimant did not even attempt to prove that she was discriminated against.

29. Having undertaken the analysis of pleadings and submissions in this matter, the issue that stands to be decided is whether the respondent's had valid reason(s) for terminating the claimant's services and if they did, was a fair procedure followed in carrying out the termination. As a corollary, if the Court comes to the conclusion that the termination was unfair in terms of reasons and or procedure, what would be appropriate order of compensation to make?

30. The contract of employment dated 14<sup>th</sup> October 2013 issued to the claimant stated that she was appointed as Senior Manager – Retail Banking. The letter however did not provide or make reference to any document elaborating or expounding further, what the duties and responsibilities of a Senior Manager Retail Banking were.

31. The respondent, however in its memorandum of response to the claim outlined some of the key responsibilities of the claimant which she was accused of failing to discharge. No supporting document was attached to vouch for the alleged key responsibilities. The claimant however took no issue with averments over her alleged responsibilities except that she denied the accusation of failing to discharge them.

32. According to the claimant the emails relied on by the respondent to show that she was not performing were general emails discussing activity reports. These according to her were general office correspondence and could not amount to disciplinary process.

33. Termination on account of non-performance or incompetence is a very complex process. Except in cases where performance or competence can be easily seen from an immediate tangible end product, it is normally not easy to decide on incompetence or non-performance on tasks that are entirely based on decision making or exercise of discretion.

34. In a competitive business environment such as the one the respondent is operating in, each player has their own business plan and strategy whose execution is multi-faceted and team-oriented process. In majority of cases a failure in strategy or business plan may not be easily assignable to one particular individual except the CEO in cases where the organization is faced with severe market operational and profitability challenges in which case the Board of Directors acting in the interest of the shareholders can remove such CEO. In order to isolate and assign responsibility for non-performance of an inherently term-work task, it would be necessary to map and plot such individuals performance over time using existing organizational performance tools.

35. The Court has reviewed and analysed email communications relied on by the respondent and attached to the memorandum of response to show that there was communication with the claimant regarding her performance but nothing seem to be specific to the claimant assigning any serious blame on her for non-achievement of any target or performance. Majority of the emails originated from an address: [eowuor@chasebank.co.ke](mailto:eowuor@chasebank.co.ke) to a John Irugu then forwarded to a Mr. Ezekiel Owuor who then forwarded the same to the claimant.

36. As observed earlier performance which is based on an organization's market strategy is team-work oriented therefore if there was any specific hiccups in the team which were directly attributable to the claimant, nothing prevented the respondent from issuing the claimant with a show cause letter. None was specifically done in this case. The Court therefore is unable to find any reason whose validity can be examined to see if it warranted the termination of the claimant's services for non-performance.

37. Regarding procedure for termination, if the minutes of the meeting held on 27<sup>th</sup> October, 2014 attached to the respondent's memorandum of response are to be considered as a disciplinary hearing then the same are flawed and contravene the express provisions of the Employment Act which requires that an employee to be subject to disciplinary hearing must be furnished in advance with the charges and afforded a reasonable opportunity to respond to the charges. The minutes by their very heading appeared to have been some sort of "fait accompli" since it states that the meeting was convened to discuss reasons for termination of the claimant. Without saying more, the Court reaches the conclusion that the respondent had no reason and or valid reason to terminate the claimant's services on account of non-performance. Further, even if such reason or reasons existed, the procedure adopted in carrying out the termination was in contravention of the Employment Act and rules of natural justice generally.

38. Regarding the quantum of compensation, for unfair termination of services, the claimant by the time of termination had worked for the respondent for approximately one year. Prior to her appointment she worked for Kenya Commercial Bank from where she moved her mortgage loan of approximately 7 million to the respondent by virtue of her employment. Her termination and under the circumstances would obviously disrupt her financial circumstances.

39. Justice Ojwang in the case of Manginya Salim Murgani v. KRA 2008 eKLR observed as follows:-

**"in so far as the employee spends the bulk of his or her time in the service of the employer, little other livelihood in most cases, is earned by the employee outside the framework of the employment relationship. Of this fact, this Court takes judicial notice; and it must then be considered that the status quo of the employment relationship, inherently vests in the employee both normal rights and legitimate expectations."**

40. It is for the above reasons that the current employment and Labour Laws offer more protection than before to employees. When it comes to separation from the employment relationship it is no longer the case that the employer does not have to have a reason for termination of an employee's services.

41. To this extent, the Court will award the claimant 10 months salary as compensation for unfair termination of her services. The claimant shall further have the costs of the suit. This award shall be subject to taxes and any other authorized deductions.

42. It is so ordered.

Dated at Nairobi this 2<sup>nd</sup> day of October 2015

Abuodha J. N.

Judge

Delivered this 2<sup>nd</sup> day of October 2015

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge