



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**  
**CAUSE NO 1156 of 2012**

**RASHID JENEBY.....CLAIMANT**

**VS**

**PRIME BANK LIMITED.....RESPONDENT**

**RULING**

**Introduction**

1. The Claimant's claim against the Respondent brought by way of Statement of Claim dated 4<sup>th</sup> July 2012 is for unfair termination of employment. The Claimant presented his case between 18<sup>th</sup> July 2013 and 4<sup>th</sup> March 2014. The Respondent's first witness Banu Salyian took the witness stand on 4<sup>th</sup> March 2014 and when the matter came up for further hearing on 5<sup>th</sup> March 2014, Counsel for the Respondent, Mr. Mwangi made an application from the bar seeking leave of the Court to introduce a new document being a booklet containing job descriptions, including the Claimant's job description.

2. Miss Ouma, Counsel for the Claimant strongly opposed the Respondent's application. I therefore instructed the Respondent to file a formal application to which the Claimant would reply. I also ordered the Respondent to pay to the Claimant Kshs. 20,000 as thrown away costs.

**The application**

3. The Respondent's application dated 11<sup>th</sup> March 2014 seeks leave of the Court to adduce additional evidence by filing and serving additional list and bundle of documents. In a supporting affidavit sworn by Josephine Macharia, it was deponed that during the course of the trial, the issue of the Claimant's actual job description and duties had arisen time and again. It had therefore become necessary to apply for leave to produce additional documents by way of job descriptions including that of other employees of the Respondent. The Respondent further seeks to produce the Claimant's resume tendered at the time the Claimant was applying for a job with the Respondent.

4. Macharia further depones that production of the additional documents will not in any way prejudice the Claimant's case since he can be recalled for examination by his Counsel on any matters arising from the production of these documents.

5. On the face of the application and in the oral submissions made by Counsel for the Respondent, reference is made to Section 17(2) of the Industrial Court Act, 2011 which provides that appeals from decisions of this Court lie with the Court of Appeal only on points of law.

## **The Claimant's Opposition**

6. In a replying affidavit sworn by the Claimant on 18<sup>th</sup> March 2014, it was deponed that the Respondent raised the issue of the Claimant's job description only on 4<sup>th</sup> March 2014 when the Respondent's first witness, Banu Salyian begun testifying and the Court inquired from her and her Counsel whether the documents she was referring to in her evidence were part of the Respondent's bundle of documents. Salyian and her Counsel confirmed that the documents were in fact not part of the Respondent's bundle.

7. The Claimant further depones that since he has already testified and closed his case, admission of the documents sought by the Respondent would be highly prejudicial to him. The Claimant states that he feels ambushed as he cannot tell what case he is now facing in the Respondent's counterclaim.

8. Counsel for the Claimant submitted that the issue of the Claimant's job description was raised by the Court when the Respondent's first witness Banu Salyian was testifying. The witness was not stood down and the Respondent has not shown why it did not make its application for introduction of the additional documents when the Claimant's case was still open. Further, the Respondent had sought to introduce a second document yet when the Respondent's Counsel made an oral application on 5<sup>th</sup> March 2014, he talked of only one document.

## **Determination**

9. The single issue for determination in this application is whether the Respondent has made out a case for leave to introduce additional documentary evidence after closure of the Claimant's case. I have examined the chronology of filing of pleadings by the parties in this case and the following picture emerges:

- a. The Claimant filed his Statement of Claim on 6<sup>th</sup> July 2012 and the Respondent filed a Memorandum of Response on 16<sup>th</sup> October 2012.
- b. The Claimant then filed a Reply to Memorandum of Response on 20<sup>th</sup> November 2012 after which the Respondent filed an Amended Response and Counterclaim on 31<sup>st</sup> January 2013 and a further list and bundle of documents on 20<sup>th</sup> February 2013.
- c. Finally, the Claimant filed an Amended Reply to Amended Response and Counterclaim on 23<sup>rd</sup> April 2013.

10. I have perused these pleadings in as far as the Claimant's job description is concerned and make the following observations:

- a. In the Claimant's Reply to the Memorandum of Response filed on 20<sup>th</sup> November 2012 he pleads at paragraphs 3 and 8:

***“The Claimant avers that he worked with several other bank officers all of whom were responsible for different transactions including computer entries relating to customer transactions which entries were relied upon by other bank officers including the Claimant as part of the working system set by the Respondent”***

***“the Claimant avers that his duties at the bank at the material time were limited to verifying inter alia, the interest rates given to customers on their fixed deposits, the value dates and the amounts payable on those value dates before printing the said FDR vouchers for filing.”***

b) The pleadings in paragraphs 3 and 8 of the Claimant's Reply to the Memorandum of Response are reiterated word for word in the Claimant's Amended Reply to Amended Response and Counterclaim filed on 23<sup>rd</sup> April, 2013.

c) In the Respondent's Memorandum of Response filed on 10<sup>th</sup> October 2012, the Respondent at paragraph 3 pleads as follows:

***“The Claimant did not faithfully and diligently carry out his duties but undertook his work carelessly and or fraudulently and thereby exposed the Respondent to loss and damage contrary to his contract of employment dated 1st May 2010.”***

d) The pleading at paragraph 3 in the Respondent's Memorandum of Response is reiterated in the Respondent's Amended Memorandum of Response filed on 31<sup>st</sup> January 2013 which also states:

***“Further annexed hereto are the monthly progress reports dated 29/04/2010 and 4/05/2010 marked Annex D. In the said reports, the Claimant's duties are described and they include 'confirming cash, rates for FDRs; checking balances of clients' accounts; authorization of entries; cash confirmation for cashiers and checking of reconciliation'”***

e) Moreover, in the particulars of negligence, fraud and breach of employment contract set out at paragraph 7 of the Respondent's Amended Memorandum of Response and Counterclaim, the Claimant is accused of delegating duty without management permission and failing to adhere to his duties and job description.

11. It seems to me therefore that by the time the parties set this matter for hearing, the issue of the Claimant's job description had been established as a key issue for determination before this Court. The Court is therefore unable to understand why the Respondent would fail to exhibit such a basic document as the Claimant's job description in a matter clearly touching on conflict of roles and responsibilities. The Respondent did not even raise this matter when the Claimant was testifying yet the issue of the Claimant's actual job description featured prominently at this stage as well.

12. Counsel for the Respondent told the Court that the documents he seeks to introduce were not brought to his attention in good time. Further, according to the supporting affidavit sworn by the Respondent's Human Resources Manager, Josephine Macharia, the Respondent's request for leave to introduce additional documents is motivated by the fact that the Claimant's actual job description and duties has arisen time and again in the course of the trial.

13. Counsel for the Claimant referred the Court to the case of ***Johana Kipkemei Too Vs Hellen Tum [2014] eKLR*** in which **Sila J** declined to allow the defendant to introduce new documentary evidence after closure of the plaintiffs' case. It was the view of the learned Judge that to allow the defendant's application would render the trial unfair to the plaintiffs thereby violating Article 50(1) of the Constitution.

14. In the instant case, the Court finds that the reason offered by the Respondent for its failure to introduce the subject documents before closure of the Claimant's case do not constitute sufficient cause for the Court to exercise its discretion in favour of the Respondent.

15. Even worse, when Counsel for the Respondent first made an application from the bar on 5<sup>th</sup> March 2014 only one document being; a booklet of job descriptions was mentioned. However, when the Respondent eventually filed its application on 11<sup>th</sup> March 2014 yet another document being; the Claimant's resume was introduced.

16. To my mind, this is a classic case of a party fixing their case as the trial progresses to which the Court as an impartial arbiter cannot be a party. The discretion of the Court is to be exercised judiciously in the interest of justice. It is not to be used to fill in the gaps in the case of any party in a dispute. To take any other view would, in my opinion, be in violation of Article 50(1) of the Constitution which guarantees the right to fair hearing.

17. For the foregoing reasons, the Respondent's application dated 11th March 2014 is dismissed. In light of the thrown always costs already paid to the Claimant by the Respondent, I make no order for costs in this application.

Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 5TH DAY OF MAY 2014**

**LINNET NDOLO**

**JUDGE**

***In the Presence of:***

.....***Claimant***

.....***Respondent***