



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
AT NAKURU
CAUSE NO. 18 OF 2014

PETER MURITHI MWARANIA.....CLAIMANT

v

FAMILY BANK LIMITED.....1st RESPONDENT

THE REGISTERED TRUSTEES OF FAMILY BANK LTD

STAFF RETIREMENT BENEFITS SCHEME.....2nd RESPONDENT

JUDGMENT

1. Peter Murithi Mwarania (Claimant) was employed by Family Bank Ltd (1st Respondent) as a Branch Business Development Manager through a letter dated 29 December 2008 effective 12 January 2009. The 1st Respondent confirmed him as Manager- Nakuru Njoro House Branch through a letter dated 27 August 2009. On 18 March 2011, the 1st Respondent informed him that he was being appointed as a Senior Manager, Nakuru Njoro House Branch.

2. Prior to joining the 1st Respondent, the Claimant had served with Housing Finance and Equity Bank Ltd.

3. On or around 27 October 2011, the Claimant gave the 1st Respondent three months written notice of intention to resign in accordance with the terms of the employment contract. The resignation letter itself did not give any reasons for the resignation.

4. Through a letter dated 23 November 2011, the 1st Respondent informed the Claimant that he was being summarily dismissed on the ground of gross misconduct under section 44(4)(c) of the Employment Act. The particulars of the misconduct were set out in the letter. The letter also set out the Claimant's final dues.

5. The Claimant being dissatisfied with the summary dismissal lodged a 21 page Statement of Claim against the Respondents stating the issues in dispute as

- 1) Wrongful dismissal and/or unfair termination.
- 2) Discrimination

and seeking three months pay in lieu of notice, annual/pro rata leave, 12 months compensation for unfair termination and exemplary damages totalling approximately Kshs 40,000,000/- among other reliefs.

6. The Respondents were served with Notice of Summons and copy of Statement of Claim and on 21 February 2014, they filed a Memorandum of Appearance through the firm of Ochieng, Onyango Kibet & Ohaga Advocates.

7. On 13 March 2014, Mr Karanja holding brief for Mr. Nyamunga for the Respondent sought 14 days within which to file a Response. The Court ordered the Respondents to file a Response before 27 March 2014, and fixed 4 April 2014 for mention for further directions.

8. During the mention on 4 April 2014, the Respondents were not represented but Mr. Wambeyi for the Claimant informed the Court that Mr. Nyamunga had been bereaved and required more time to file a Response. The Court ordered that the Response be filed and served within 7 days and set mention for 7 May 2014.

9. On 7 May 2014, Mr. Nyamwange for the Claimant informed the Court that a mention notice had been served but the Respondents were not represented. Counsel sought a hearing date which the Court fixed for 4 November 2014.

10. When the Cause was called up for hearing on 4 November 2014, the Respondents were not represented. Mr. Wambeyi for the Claimant informed me that a hearing notice had been served and an affidavit of service filed.

11. I confirmed from the record that a hearing notice had been served and acknowledged by the Respondents' Advocates on record on 29 May 2014 and therefore allowed the hearing to proceed.

Claimant's case

12. I will only narrate the Claimant's case/testimony as is relevant in a complaint of unfair termination and for the determination of the real issues in dispute arising from the pleadings.

13. The Claimant testified and stated that due to some happenings he did not agree with at the workplace, he tendered a 3 month resignation notice dated 27 October 2011, and that on 23 November 2011, while serving the notice period he was called by the 1st Respondent's Ag Human Resources Manager, Margaret Mburu to Nairobi and on the way to Nairobi he received several calls asking him about what was going on because an email had been sent out on that day that he was no longer an employee of the 1st Respondent.

14. On arrival in Nairobi and after waiting for two hours, the Ag. Human Resources Manager handed him a letter which he was not allowed to read but requested to acknowledge receipt but he refused and the HR Manager asked him to leave.

15. The Claimant however stated that his dismissal was covered in several media and advised to 1st Respondent's employees through email and that on 25 November 2011, he handed over to a Michael Mbugua.

16. On the reasons for dismissal, the Claimant stated that the same were far-fetched and malicious.

17. On final dues, the Claimant stated that he was not paid any dues and that he had outstanding loans which he could not service, leading to his name being sent to a Credit Reference Bureau.

18. The Claimant stated that he was seeking the reliefs outlined in the Statement of Claim.

Issues for determination

19. From the Claimant's pleadings, testimony, documents and Claimant's written submissions, the main issues identified by the Court as arising for determination are, whether the summary dismissal was fair and if not, appropriate remedies.

20. The Claimant has also sought some contractual and statutory entitlements which have no bearing on manner of dismissal. The Court will discuss whether they are merited.

21. But at the outset, the Court will address the issue of failure by the Respondent to file a Response or appear at the hearing.

Evaluation

Failure by Respondents to file Response

22. The Respondents were served with Notice of Summons and Statement of Claim. They did not file any Response within the prescribed 14 days.

23. On 13 March 2014, the Court acceded to their request to file a Response out of time and directed that the same be filed before 27 March 2014.

24. The Respondents did not comply with the order within the set time. On 4 April 2014, the Court again directed the Respondents to file and serve Response(s) before 7 May 2014. That order was not complied with.

25. Further, the Respondents were served with a hearing notice but did not appear at the hearing.

26. The legal consequence of the failure to file a Response or attend during the hearing is that the facts as put forth by the Claimant in the pleadings and testimony have not been controverted. And the implication is that there are no real issues of fact in dispute.

Burden on employees/Procedural fairness

27. The present claim primarily relates to a complaint of unfair termination.

28. And in cases of unfair termination, the Employment Act, 2007 has set out the burden to be discharged by employees and employers.

29. Section 47(5) of the Employment Act, 2007 has set the statutory burden an employee should meet before the employer is called upon to discharge its part of the burden. It provides that

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

30. The statutory threshold for an employee has been set low.

31. Section 35 of the Employment Act, 2007 requires an employer to give written notice of termination. None was given in the instant case.

32. Further, section 41 of the Act requires a hearing. By virtue of section 41(2) of the Act, in cases of summary dismissal, an employer is enjoined to hear and consider the representations to be made by the employee.

33. The Claimant's unchallenged testimony is that there was no hearing. In fact, the announcement of his dismissal had been made through emails to other employees of the 1st Respondent while he was en route

to 1st Respondents head office in Nairobi.

34. The Court is therefore satisfied that the Claimant has discharged the statutory burden placed upon him by section 47(5) of the Employment Act, 2007 to demonstrate that his summary dismissal was unfair.

Substantive fairness

35. The Employment Act, 2007 has placed an onerous responsibility upon employers in complaints of unfair termination. I need not repeat the requirements as can be gleaned from sections 43 and 45 of the Act but to state briefly that it is incumbent upon an employer to prove the reasons for dismissal and that the reasons are valid and fair.

36. The Respondent did not file a Response or participate in the hearing. It failed to controvert the facts as asserted by the Claimant. They also have failed to discharge the statutory burden required of them.

37. The only conclusion the Court can reach is that the summary dismissal of the Claimant was unfair, both procedurally and substantively.

Appropriate remedies

3 months pay in lieu of Notice

38. The period of notice to terminate the services of an employee may have either a contractual or statutory foundation.

39. Clause 3 of the offer of employment letter provided for three months notice or pay in lieu of notice.

40. The Claimant pleaded that his consolidated salary was Kshs 249,000/- per month but the only evidence is the letter dated 14 May 2010 advising that the salary was Kshs 225,000/-.

41. The Court would award the Claimant the equivalent of three months wages in lieu of notice in the sum of Kshs 675,000/- under this head of claim.

Annual leave/pro rata leave

42. The Claimant sought Kshs 224,100/- under this head. He pleaded 24 days for 2010, and 21 days for 2011. The summary dismissal letter made reference to 21 unutilised leave days and leave allowance for 11 months.

43. In testimony, the Claimant did not lay an evidential basis for how he arrived at the figures pleaded.

44. The employer is ordinarily the keeper of employment records. With the material placed before Court, the Court would award the Claimant Kshs 217,562/30 as set in the summary dismissal letter.

Compensation

45. This is one of the primary remedies for unfair termination. It is a discretionary remedy. The Court's discretion is however fettered by the factors set out in section 49(4) of the Employment Act, 2007.

46. The Claimant served the 1st Respondent for about 3 years. He stated that he has not been able to secure alternative employment despite having served in the banking sector for over two decades.

47. Considering the length of service and that the Claimant has not been able to secure alternative employment, the Court would award him the equivalent 6 months' salary as compensation assessed in the sum of Kshs 1,350,000/-.

Exemplary damages

48. Exemplary damages are meant to punish. The primary statutes on employment and labour have not expressly provided for an award of exemplary damages for unfair termination or wrongful dismissal.

49. The Claimant has not set out any contractual or statutory basis for an award of exemplary damages.

50. This head of relief must be rejected.

Pension dues

51. No evidential basis was put before Court for this head of relief. It is also rejected.

Conclusion and Orders

52. The Court finds and holds that the summary dismissal of the Claimant was unfair and awards him and orders the 1st Respondent to pay him

a. 3 months salary in lieu of Notice	Kshs 675,000/-
b. Outstanding leave	Kshs 217,562/30
c. 6 months salary as compensation	Kshs 1,350,000/-
TOTAL	Kshs 2,242,562/30

53. The claims for exemplary damages and pension dues are dismissed.

54. Claimant to have costs of the Cause.

Delivered, dated and signed in open Court in Nakuru on this 5th December 2014.

Radido Stephen

Judge

Appearances

For Claimant Mr. Wambeyi instructed by Wambeyi Makomere & Co. Advocates

For Respondent Ochieng, Onyango, Kibet & Ohaga Advocates (no response filed/no attendance during hearing)