



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO. 1259 OF 2011**

*(Before D.K.N. Marete)*

**DOMINIC N. MBITHI.....CLAIMANT**

**VERSUS**

**DUBAI BANK KENYA LIMITED.....RESPONDENT**

**JUDGEMENT**

By a memorandum of claim dated 26th July, 2011 and filed on the following day, this matter was brought to court. The issue in contention is cited as;

**Wrongful, unlawful and unfair termination of employment of Dominic N. Mbithi.**

The respondent by a memorandum of response dated the 13th September, 2011 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that he was employed by the respondent as a Branch Manager with effect from 16th December, 2005 and confirmed on 20th June, 2006. On the 8th June, 2011 he was unlawfully, maliciously and summarily terminated from duty on falsified and unsubstantiated ground contrary to the Employment Act, terms of service and other relevant statutes. He also avers that even before such unlawful termination, the respondent had in contravention of the law transferred the claimant three times within a month with intent of forcing him to resign. Further, the respondent refused and or neglected to pay the claimant damages and all his entitlements as per the law, demand notwithstanding. He claims as follows;

1. Six (6) months gross salary in lieu of notice of Ksh.150,000.00 per month
2. Twelve (12) months salary gross salary in accordance with section 49 (i) (c) of the employment Act at Ksh.150,000.00
3. Punitive and exemplary damages for unlawful termination
4. The respondent issue a certificate of service to the claimant

The claimant also submits that during his entire stint of service with the respondent he served diligently and had not any warning letters or other reprimand by the employer/respondent until the 16th March, 2011 when he was transferred to the respondents Nakuru Branch as part of the restructuring programme. Later on 24th March, 2011, he was transferred back to ICEA Branch as a Marketing Manager and given an unrealistic target of mobilizing deposits of not less than Kshs.30,000,000.00 per month effective from

20th April, 2011.

The claimant further avers that all the aforesaid acts were actuated by malice as the targets had no basis and could not be easily attained by any bank in Kenya. This was intended to frustrate the claimant to resign and that even before he could work on the targets, his services were terminated on false and unsubstantiated grounds of retrenchment which was only applicable to him. He was also not issued with prior notice of the retrenchment or paid his dues as required by the law. This is despite various demands on his part. He in the penultimate submits that the respondent is in the process of disposing off his assets with a view to winding up his business and this would render this claim nugatory, unless there is a deposit of security in court. He prays for;

1. That this Honourable Court do find that his termination and transfers was wrong and unlawful and do grant the following orders;
  - a) That the respondent do immediately pay the claimant his entitlements as particularized in paragraph 5 herein stated.
  - b) The sale of the respondent's assets be stayed and/or stopped until security of Kshs. 3,000,000/= is deposited in this court and or until this claim is determined.
  - c) Punitive and exemplary damages for wrongful termination, pain and injury.
  - d) Any other relief this Honourable court may deem fit to grant in the circumstance.

The respondent on the other hand denies the claim. He admits the particulars of employment on 16th December, 2005 all the way up to 8th June, 2011 when the claimant's employment was terminated. While also admitting the factual basis of the claim as relates to transfers and issue of a target of deposit mobilization of Kshs. 30,000,000.00 which were not achieved, the respondent submits that he retrenched him and other members of the marketing department as a method of cutting down operational costs and also as part of the ongoing restructuring programme.

The respondent submits that the claimant was retrenched for the following reasons;

1. The Marketing Department which the claimant was heading was so costly to run and the revenue which the department was generating was so low
2. The claimant's performance was below average and even after the claimant was transferred to the marketing department, he could not perform as expected.
3. The claimant was nearing retirement age.

The respondent denies malice in the transfers and submits that these were within its policies and the terms of the letter of appointment dated 16th December, 2005. The claimant was paid all his terminal dues prior to the retrenchment. The claimant was a poor performer and was not as diligent as he claims. There is therefore no due claim for consideration hence the silence on the claimant's tremendous demand notices. She also denies the allegation of asset disposal and winding up and puts the claimant into strict proof thereof.

It is notable that this suit opened up through an application by way of a Notice of Motion dated the 26th July, 2011 by way of a certificate of urgency in which the issue of disposal of assets was thrashed and tempered by an issue of appropriate orders of court. It sought orders as follows:-

1. **THAT** this application be certified urgent and heard ex-parte in the first instance, service thereof be dispensed with.
2. **THAT** the respondent by itself, agents and or servants be restrained from selling, approving and or transferring its assets and liabilities either by way of asset sale or share

transfer to any purchaser pending hearing and determination of this application.

3. **THAT** the respondent by itself, agents and or servants be restrained from selling, approving and or transferring its assets and liabilities either by way of asset sale or share transfer to any purchaser pending hearing and determination of this claim.

4. **THAT** the respondent be ordered to deposit security of Kshs. 3,000,000.00 with this court to cover for the claimant's claim.

5. **THAT** the respondent be ordered to compensate the claimant for wrongful and unlawful termination.

and was grounded on

a) The claimant was employed by the respondent as a Branch Manager since 16th December, 2005 confirmed on the 20th June 2006 until the 8th June, 2011 when he was unlawfully, maliciously and summarily terminated from duty on falsified and unsubstantiated grounds contrary to the Employment Act, terms of service and other relevant statutes.

b) The claimant states that even before the said unlawful termination, the respondent had in contravention of the Employment Act and other labour statutes transferred the claimant three times within a month with intent of forcing the claimant to resign.

7) The respondent's acts and omissions of transferring the claimant to two different places and departments within a month without according him allowances and or reasons for such acts is contrary to the principles of natural justice, equity and fair play, notwithstanding that the claimant has a family.

8) The respondents acted contrary to the laws governing employment.

9) The respondent's process of selling off its assets without paying its liabilities and employees is unlawful, which will render this claim nugatory unless the sale is stayed, stopped and or security deposited in this court.

The court in satiation of the anxiety of the claimant/applicant issued orders as hereunder;

1. **THAT** this application is hereby certified urgent and the same is hereby heard *ex parte*, and service of summons is dispensed with in the first instance.

2. **THAT** the company by itself, its agents and/or servant is hereby **RESTRAINED** from selling, approving or transferring its assets and liabilities either by way of asset sale or share transfer to any purchaser pending the hearing and final determination or disposal of these application and claim *inter partes*.

3. **THAT** the company is hereby **ORDERED** to deposit security of Kshs. 3,000,000/= with this court to cover the grievant's claim, of any.

4. **THAT** this application is listed for mention *inter partes* before me on 30th August, 2011, at 9.30 to fix a suitable date for hearing.

5. **THAT** meanwhile, the management of the company are directed to file their replying affidavit and statement to this application and the memorandum of claim on or before 22th August, 2011

5. **THAT** the copies of this application and the memorandum of claim be served upon the

management of the company for mention *inter partes* as foretasted.

The issues for determination in this suit therefore are;

1. Was the termination of the employment of the claimant wrongful, unlawful and unfair?
2. Is the claimant entitled to the relief sought?
3. Who bears the costs of this cause?

The first issue for determination is whether the termination of the employment services of the claimant was wrongful, unlawful and unfair. The factual basis of the claim and response having been hereinbefore set out, the next thing is whether this falls within the province of unfair termination as expressed in section 45, Employment Act, 2007. If this is the case, the claimant would carry the day.

Section 45, Employment Act provides as hereunder;

45.(1) *No employee shall terminate the employment of an employee unfairly.*

(2) *A termination of employment by an employer is unfair if the employer fails to prove-*

- a. *that the reason for the termination is valid;*
- b. *that the reason for the termination is a fair reason-*
  - i. *related to the employees conduct, capacity or compatibility; or*
  - ii. *based on the operational requirements of the employer; and*

(c) *that the employment was terminated in accordance with fair procedure.*

(3) *An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.*

(4) *A termination of employment shall be unfair for the purposes of this Part where-*

- a. *the termination is for one of the reasons specified in section 46; or*
  - (b) *it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.*

(5) *In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the **Industrial Court** shall consider-*

- a. *the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;*

(b) *the conduct and capability of the employee up to the date of termination;*

(c) *the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and*

*the procedural requirements set out in section 41;*

- d. *the previous practice of the employer in dealing with the type of circumstances which led to the termination; and*
- e. *the existence of any previous warning letters issued to the employee.*

The claimant in his pleadings and even submissions opines that the action to retrench him was actuated by malice, was unlawful and malicious. He was not issued with a notice of retrenchment and the abnormal transfers and unrealistic target all amounted to unfair treatment and consequential termination.

The action of the respondent amounted to wrongful and unfair termination of the employment of the claimant. It is apparent that the reasons for termination were unfair and invalid. This should not be sustained in appropriate industrial relations and stands condemned. Misconduct on the part of employers to their employees should be abhorred and condemned at all costs. In the circumstances of this case, the employer meted out an unjust, unlawful and inequitable action against the claimant. This resolves the issue number 1 in dispute.

Having established a case for unfair termination of the claimant's services, I am inclined to find for claimant and this resolves the other issue - entitlement to relief. The claimant is entitled to the relief sought and I therefore order compensation as hereunder;

- |                                                                         |   |                  |
|-------------------------------------------------------------------------|---|------------------|
| 1. One month's pay in lieu of notice                                    | - | Ksh.150,000.00   |
| 2. Eight (8) months compensation for unlawful termination of employment | - | Ksh.1,200,000.00 |
| 3. Punitive and exemplary damages for unlawful termination              | - | Ksh.200,000.00   |

The costs of this suit shall be borne by the respondent.

Dated, delivered and signed the 6th day of June, 2013.

**D.K. Njagi Marete**

**JUDGE**

**Appearances**

- 1. Mr. Madala instructed by Madala & Company for the claimant.
- 2. Mr. Kipng'eno instructed by Kiplagat Associates Advocates for the respondent.