



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 254 OF 2012

BETWEEN

FRANCIS CHEGE NJUGIA CLAIMANT

VERSUS

FARIJI SAVINGS AND CREDIT CO-OPERATIVE

SOCIETY LIMITED..... RESPONDENT

Rika J

CC. Leah Muthaka

Mrs. Kamuyu instructed by Grace Kamuyu & Company Advocates for the Claimant

Mr. Oguwe instructed by Irungu Mwangi & Company Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND ULAWFUL TERMINATION

AWARD

1. Francis Chege Njugia initiated this Claim through a Statement of Claim filed on 21st February 2012. He alleges he was employed by the Respondent Co-operative Society as its Accountant, effective from 23rd October 2007. His contract of employment was unfairly and unlawfully terminated by the Respondent on 18th July 2008. He has approached the Court seeking orders for:-

- a. Outstanding salary for the month of July 2008 at Kshs. 19,000;
- b. 3 months' salary in lieu of notice at Kshs. 90,000;
- c. Pro-rata leave for the period in employment at Kshs. 22,500;
- d. Provident fund contribution of Kshs. 20,700;
- e. Compensation for unfair and unlawful termination at 12 months' salary of Kshs. 360,000

In total he claims a sum of Kshs. 512,200.

2. The Respondent Society filed a Statement of Reply on 25th April 2012 denying the Claim. The Respondent also counterclaims a sum of Kshs. 80,229.89 from the Claimant, being the balance of staff loan advanced to the Claimant during his service. These pleadings were amended in a Statement filed by the Respondent on 17th October 2012, which the Claimant replied to in an Amended Reply to the Statement of Reply and Reply to the Counterclaim on 1st November 2012. The Claimant testified and

closed his case on 1st November 2012, while the Respondent called its Chairman Fredrick Muchiri who testified on 13th March 2013 when the Respondent's case closed. The dispute was last mentioned in Court on 3rd April 2013, when the Parties confirmed the filing of their Closing Arguments and were advised by the Court Award would be delivered on notice.

3. Chege told the Court that he was employed by the Respondent as its Accountant effective from October 2007. He was initially employed in an acting capacity. He was confirmed in November 2007. At the time he was first employed, the Respondent went by the name Kagwe Christian Development Fund and Savings and Credit Co-operative Society Limited. The Respondent changed its name to Fariji Savings and Credit Co-operative Society Limited on 1st January 2010.

4. He worked well and enjoyed good relationship with his employer. He always got approval from the Respondent, on all projects he initiated. His contract was terminated on 18th July 2008. He testified there was no reason or reasons given to him by the Respondent for the termination. There were no warnings, written or verbal. The letter was passed onto him by the Society's Chairman. This was done on a Saturday afternoon. No opportunity was availed to the Claimant to answer to any allegations. He was simply asked to hand over. He did so on the same day. He characterized the decision as 'uncivilized'. Rules of natural justice were ignored.

5. Chege worked without a job description. He took his own initiative. The letter of termination informed him that he had failed to deliver on the improvement of the Society. He did not know what was meant by this statement. He was not issued with a Certificate of Service. The allegations by the Respondent damaged the reputation of the Claimant. He earned Kshs. 30,000 as of the date of termination. He conceded he had been advanced staff loan of Kshs. 100,000. He had paid about Kshs. 55,000, leaving a balance of Kshs. 45,000. He has not paid this balance. He denied the assertion by the Respondent that he unilaterally recruited a Debt Collector for the Respondent. He did not have the mandate to employ anybody. The Debt Collector in question was appointed by the Board of Management.

6 Cross-examined by the Advocate for the Respondent, Chege testified that he was employed in an acting capacity in 2007 and confirmed in 2008. The letter of appointment was silent on termination. His pay slip showed Provident Fund deductions. He was being deducted Kshs. 1,150. The Respondent had deducted from the Claimant a total of Kshs. 13,800. The employer and the employee each contributed 5% of the employee's basic salary towards the Provident Fund. The loan advanced to Chege totaled Kshs. 100,000. He was paying Kshs. 5,000 every month. The Statement of his Account showed he had a balance of Kshs. 67,000 as of May 2008. He explained that he was repaying the loan and was not focused on the outstanding amount. Chege told the Court that as a senior employee, he was entitled to 3 months' salary in lieu of notice. The claim for compensation is based on the provisions of the law. The Debt Collector, Mr. Ndung'u, was employed through the Management Committee. The Claimant was not given any warning before termination. He clarified on redirection that he applied for the sum of Kshs. 350,000. Kshs. 100,000 was approved. It was to assist him pay school fees. It was a staff loan, attracting interest at the rate of 1% per month. The Claimant prays the Court to allow the Claim.

7. Muchiri testified that the claims made by Chege against the Society are false. He conceded the Claimant was employed by the Respondent as its Accountant. The witness could not recall what the Claimant was paid in salary at the end of each month.

8. There were valid grounds for termination. Chege appointed a Debt Collector for the Respondent without the authority of the Management Committee. The said Debt Collector had no permanent address or offices, and misappropriated Respondent's recovered debts. The result was that the Respondent lost Clients and Members. Chege was warned at the Management Committee meetings. He did not change. He appointed a Printer to undertake the Society's work, again without the authority of the Management Committee. He called Muchiri to a hotel, and solicited for Muchiri's endorsement of the irregular procurement of printing services. Thirdly, he requested for loan from the Respondent while he was not yet eligible to have such a facility. Termination was based on valid grounds. He took a loan of Kshs. 100,000. He paid Kshs. 45,000. His balance on termination was Kshs. 55,000, which had attracted interest of about Kshs. 27,000. The Respondent counterclaims this amount.

9. Muchiri stated on cross-examination that he joined the Respondent in 2001, and became its Chairman in May 2011. He agreed the Claimant has not received any terminal dues from the Respondent. Chege was entitled to terminal dues. The Respondent did not compute these dues, on the ground that the Claimant had filed the matter in Court. Termination was on 18th July 2008. Muchiri could not remember if the Claimant filed the Claim in 2012. Chege was the Accountant. He was the Accounting Officer. The Management Committee hired employees. Chege looked for the Debt Collector but did not appoint him. The Debt Collector and the Printer were service providers. Such service providers are hired through competitive bidding. Ndung'u was not on the list of the bidders. Little of the dealings between Ndung'u and the Claimant were captured in the Financial Report. The Minutes of the meeting of the Management Committee of 15th July 2008 indicate the Debt Collector recovered Kshs. 826,819.28. The Printer appointed by the Claimant did some work for the Respondent, but did not supply any material. The Claimant had a loan balance of Kshs. 54,000 and accrued interest of Kshs. 27,000. It is the only amount he owes the Respondent. The witness stated the sum due to the Respondent from the Claimant is Kshs. 108,589.89. He was unable to say if this amount was correct. The termination letter stated the Claimant failed to deliver on improvement of the Society. It was not the same termination reason given by Muchiri in his testimony. The Respondent prays for dismissal of the Claim, and for Award in terms of the Counterclaim.

The Court Finds and Awards:-

10. It is the common evidence of the Parties that Francis Chege Njugia was employed by the Respondent as its Accountant from 23rd October 2007. It is not disputed that his contract was terminated by the Respondent, in a letter dated 18th July 2008. He was not paid any terminal benefits. The Respondent justified its decision on the following reason:

“The Management Board, on assessing your work performance has noted that you failed to deliver on the improvement of the Society as had been expected of you.”

11. Other grounds for justification were not captured in the letter of termination. There is nothing in the letter about the hiring of a Debt Collector; the hiring of a Printer; or inappropriate loan application. These were statements made by the Respondent in its pleadings and evidence as afterthought. The role of hiring staff belonged to the Management Committee. The Claimant was merely an employee of the Respondent. It was not shown by the Respondent that he hired any employee. It was beyond him to do so. He probably recommended the hiring of Ndung'u as a service provider, and perhaps even the hiring of a Printer; recommending and appointing are nonetheless different acts. There was absolutely no evidence given by the Respondent that Chege hired these persons, or that in hiring them, he acted inappropriately and against the interest of the Respondent. It was not surprising that this was not a reason contained in the letter of termination, as justification for the Respondent's decision. The allegation that Chege applied for loan while he was only 7 months in employment and therefore ineligible, does not look to the Court to amount to an employment offence. The loan scheme had its own regulations, and the most the Respondent could do in case of ineligibility, is politely inform the Claimant he did not qualify for the loan. The Respondent went ahead, approved and disbursed the loan. It is difficult to see how this can be an employment offence.

12. The reason given in the face of the termination letter was not supported by evidence. The letter refers to work assessment; no appraisal documents with respect to the Claimant's performance, were availed to the Court. The letter vaguely alludes to the Claimant's failure to deliver on the improvement of the Respondent. There are no benchmarks suggested. No financial records, projections or targets were exhibited. It was not even made clear what the Claimant was meant to do and failed to do, to deliver on the improvement of the Respondent. These allegations were vacuous verbiage. They do not amount to valid termination ground.

13. There were no charges laid out against the Claimant, no invitation to respond to any allegations, and no semblance of a disciplinary hearing. Procedural fairness was completely disregarded. The Claimant was just slammed with a termination letter on a Saturday afternoon.

14. The Court is satisfied that the Claimant's contract of employment was terminated without substantive justification and procedural fairness, contrary to the minimum statutory standards contained in Sections 41, 43 and 45 of the Employment Act 2007. The Claimant is entitled to compensation, which the Court grants at 12 months' salary, totaling Kshs. 360,000. The Court is similarly satisfied that the Claimant merits his balance of July 2008 salary at Kshs. 19,000 and 1 month salary at Kshs 30,000. Other prayers were not given sufficient foundation in law and fact and are rejected.

15. The Claimant does not deny that he took a staff loan of Kshs. 100,000, and had paid Kshs. 45,000 at the time of his departure. The Respondent was not clear on the exact amount owed by the Claimant. Mr. Muchiri wavered when cross-examined on the level of the Claimant's indebtedness. A sum of Kshs. 108,589.89 is contained in the Counterclaim. The Respondent indicated the sum due as of 16th October 2012 to be Kshs. 83,589.89. The sum Counterclaimed in the initial pleadings from the Respondent was Kshs. 80,229.89. The variations can probably be attributed to the interest charged on the outstanding balance. The Court will allow the Counterclaim in the sum initially sought by the Respondent at Kshs. 80,229.89. It is not reasonable for an employer to continue charging interest on staff loan to an employee who has since left employment. The figures ought to be frozen with the termination. The Respondent is granted the sum of Kshs. 80,229.89 as originally counterclaimed. In sum, it is hereby ordered:-

[a] Termination of the Claimant's contract of employment was unfair;

[b] The Respondent shall pay to the Claimant compensation at Kshs. 360,000; July 2008 salary at Kshs. 19,000; and 1 month salary in notice at Kshs.30,000- added up at Kshs. 409,000;

[c] The Respondent's Counterclaim is allowed at Kshs. 80,229.89;

[d] Upon offset, the Respondent shall pay to the Claimant the total sum of Kshs. 328,770, within 30 days of the delivery of this Award; and

[e] No order on the costs and interest.

Dated and delivered at Nairobi this 18th day of September 2013

James Rika

Judge