



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
CAUSE NO. 1837 OF 2011

MINNE MBUE.....CLAIMANT

VERSUS

JAMII BORA BANK LIMITED.....
RESPONDENT

JUDGMENT

1. The Claimant herein Minne Mbue is an Accountant. She pleads that prior to March 2010 she was employed by the Central Bank of Kenya on permanent and pensionable terms. She avers that the Respondent requested the Claimant to terminate her employment with Central Bank of Kenya and work for the Respondent as the Respondent’s Executive Director. The Claimant accepted the offer and terminated her employment with Central Bank of Kenya and entered into a written contract with the Respondent dated 25th March 2010. In it, she agreed to work for the Claimant as its Executive Director for a period of 5 years with effect from 5th April 2010 and upon expiry, the contract could be renewed for a further period of 5 years. She pleaded that on 29th August 2011 at the request of the Respondent, the Claimant agreed to terminate the said contract of employment to enable the Respondent undertake major structural changes within its organization. The Claimant avers that the contract was terminated under Clause 19.6 of the contract of employment and as a result she is entitled to three months salary in lieu of notice and salary for the unexpired period of the contract – 104 months, pay for leave days accrued but not taken, telecommunication costs for 104 months, fuel consumption costs for 104 months, annual club membership for 8 years, health insurance for 8 years and gratuity at rate of 25% of the total gross salary for the entire contract period. The total claim was Kshs. 112,594,570/-.

2. The Respondent denied the Claim and averred that it was not privity to the terms of the contract of employment between the Claimant and her previous employer the Central Bank of Kenya. The Respondent strictly denied that it caused the Claimant to terminate her employment with the Central Bank of Kenya. Further, the Respondent averred that the contracting parties entered into a contract of employment on 25th March 2010 as equal contracting parties and that the Respondent did not in any way force, coerce or unduly influence the Claimant to terminate her employment with her previous employer. The Claimant’s averments on the termination clauses were denied and the Claimant put to strict proof thereof. The term of the contract was to commence on 15th April 2010 for 5 years renewable for a further period of 5 years unless otherwise terminated. The Respondent avers that the Claimant completely and miserably failed in her duties as set out in the letter of employment and her job description as a result of which the Respondent suffered massive financial losses prompting it to mitigate the losses by *inter alia* terminating the contract of employment of the Claimant. One of the particulars of the averment was that the Claimant outsourced the staff loans to EcoBank Limited instead of promoting the Respondent’s business

interests, disobeying instructions of the board, failing to supervise staff under her, dismissing staff without consultation leading to low staff morale, absenteeism and so forth.

3. The Respondent averred that the termination of the Claimant's employment was mutually agreed upon by the Claimant and the Respondent due to the Claimant's poor performance. The Respondent denied that the dismissal of the Claimant was under Clause 19.6 of the contract of employment. The Claimant was offered a termination under Clause 19.6 but this was recanted after the Claimant made a counter offer through her letter dated 10th September 2011. The termination it was averred was lawful, procedural and fair. The Claimant was given an exit package notwithstanding that the Respondent was entitled to summarily dismiss the Claimant for unsatisfactory work performance and irregular borrowing.
4. After interlocutory applications and the filing of additional supplementary documents, the matter was finally set down for hearing and the Claimant testified on 24th January and 25th January 2013, 6th February 2013, 8th March 2013. The examination in chief and cross-examination were closely aligned to the pleadings filed. The Claimant testified at length about her experience, qualification and career path culminating with her engagement with the Respondent. She testified that clause 20 of the contract of employment did not provide performance as one of the grounds for termination of employment. She stated that she did not request nor tender resignation to the Board of Directors. She referred to Minute 10(f) of the 140th Board of Directors Meeting of 29th August 2011 and said that it was the Respondent who initiated the process of engagement. The Board resolved that the disengagement should be amicable. The contract of employment provided for the package under Clause 20.1. She testified that the balance of the contractual salary and benefits would be payable.
5. In cross-examination, the Claimant delved into her qualifications and employment history. She worked with Alexander Forbes, Price Water House Coopers, International Controls Limited and she was a member of MEFMI a regional body which is a Financial Regulators Training body. Where she took consultancy work in training Regional Bank Regulators on Banking Risks with an emphasis on Credit & Operational Risks. She was a Manager in Bank Supervision at Central Bank of Kenya and she knew City Finance Bank. The bank merged with Jamii Bora Micro Finance. Merger of financial institutions requires CBK approval. City Finance had a history of problems and it was struggling to meet CBK capital requirements. It was the smallest bank at the time under CBK's regulation. Merger was an effort to meet these challenges. The Claimant was involved in the merger and acquisition. She was involved in assessing the application for merger. In relation to her contract with the Respondent she testified that if the bank is placed under statutory management the contract is terminated. If termination is under Clause 19.1, 19.2 and 19.3 Clause 20.1 of the contract would not apply. She was aware of the performance challenges at the bank. Before the turn around, the institution needed a banking licence. Her first task was to merge the two entities in respect to financial reporting which she successfully did and the bank obtained a banking licence on 4th August 2010 three months after she took the job. Her second task was to merge operations in the 2 entities in terms of staff because there were professional staff working for City Finance and on the other hand the Micro Finance did not have skilled banking staff. Training was undertaken to improve their capacity. As per the Financial Accounting Standards there was a requirement to take a post merger acquisition audit which entailed the scrutiny of Jamii Bora account books at the time of the merger and City Finance in depth. The report showed huge impairment of the loan book of Jamii Bora which required to be written off. This meant that the capital was affected and was now below the minimum requirement and Jamii Bora Bank could not get a Banking licence for 2011. The Governor summoned the Board to Central Bank and Jamii Bora Bank was mandated to increase the capital to 500 million shillings. The Board of Jamii Bora recommended to the shareholders a further injection of capital and therefore the process of rights issue ensued. They were not allowed into the clearing house, the plans to recruit key staff from banking sector became a challenge. She testified further that at the time of the issue of her disengagement it was impossible in the circumstances to drive the business of the Bank forward. She said that she delivered on the required goals in view of the situation prevailing though at the

time of departure she had not turned around the Bank. She admitted that the Bank did not turn a profit during the period there a banking licence in place – August to December 2010. She conceded that performance of her duties was a material obligation of her engagement. She said that she was convinced by the then Director of Jamii Bora to join the upcoming bank. She added that the remaining 10 years she would have had at Central Bank were factored in her tenure at Jamii Bora and agreed with Mr. Mutua, Counsel for the Respondent that there is no direct inference of the 10 years in the contract. The Claimant confirmed that the termination of the contract was by mutual consent. Any discussions prior to the contract were superceded by the contract.

6. In re-examination by Mr. Oyatsi, the Claimant stated on the letter of 9th September 2011 attached as Exhibit MM3 in the Claimant's bundle, the offer of termination is by the Bank and she accepted the offer. However she said she did not accept the calculations as accurate. The Bank sought indulgence on the amount to be paid – 35.2 million. The Bank proposed to pay her 24 months salary in full and final settlement. She did not accept that offer. She stated that her contract was broken into 2 parts and renewal was not subject to any conditions. It was automatic renewal.
7. The Respondent called its witnesses – Dickson Muchira Njeru the Head of Credit at Jamii Bora since January 2010, Ingrid Sofia Munro a Director of Jamii Bora Bank. Dickson Njeru testified on the financial statements and financial reports to the Board of Directors which revealed the performance by the Bank for the period the Claimant was in charge. In some months there was good flows and on other months there were declines. Ingrid Sofia Munro the co-founder of the Jamii Bora Group testified that Minnie Mbue was the first CEO of Jamii Bora Bank. Ingrid Munro knew her as a staff member at Central Bank as the staff member responsible for City Finance Bank among other banks. Ingrid testified that the idea of Minnie coming to the Bank was Minnie's own idea. They had become very close during the merger. Minnie Mbue knew about City Finance Bank more than anybody else. She had all the information about Jamii Bora Bank Ltd before and after the merger because she was the person in charge at Central Bank. The original idea was that Ingrid would be CEO and Minnie would be her deputy but Ingrid suffered a stroke on 31st December 2009 and as a result of that it was generally agreed between the investors, Minnie and Ingrid that Minnie becomes CEO of the Bank and Ingrid becomes the Chairman. Ingrid signed the letter of appointment. She testified that the contract was for 5 years that meant that it could be renewed. She said it was common practice to have two 5 year terms provided of course one performs. There is room for termination. The CEO came to manage the Bank in accordance with the laws of Kenya and to make sure the bank performed. She was to manage the business of the bank with a view to realizing reasonable profit. Ingrid relinquished Chairmanship in September 2010 when Richard Njoba took over. She testified that she had great hopes in Minnie but sadly this did not turn out to be her type of job. She was a good regulator but she was not a good performer in building up the Bank. Ingrid was referred to letter of 7th September 2011 and confirmed it was from the Bank to Minnie and is signed by Richard the Chairman. The letter reflects the position of the Board. Ingrid confessed that she was very sad with how things developed. She had a lot of faith in Minnie but she didn't perform and the Bank just went down. In reference to the letter of Appointment Clause 19 and 20, she testified that the letter provides on termination and Clause 20 provides effect of termination.
8. On the letter of 9th September 2011, Ingrid testified that it was an offer and if Minnie rejected it, it was out. It was in her a view a generous offer. The offer was 2 years salary to be paid in 2 installments – 12 months salary at the end of January 2012 and 12 months salary at the end of January 2013. She rejected the offer and came to Court. The Bank could not keep Minnie. It would have been dead in one year.
9. In cross-examination by Mr. Oyatsi for the Claimant, Ingrid testified that Bank was the 8th Bank in performance and it was the fastest growing Bank. When Minnie came to the bank the bank went down. March 1st 2010 marks the beginning of the merged and that is what went down when Minnie was in charge. Ingrid continued to be a Director after she vacated the position of Chairman

of the Board. The Bank was audited in 2010 by Deloitte. She was asked questions on the report and said that the income went up in 2009 due to merger. The biggest expense was employment. Minnie was hiring staff and she sacked senior staff from Jamii Bora without payment of dues and new people were hired, the turnover of senior staff was too high. Ingrid had never seen such turnover. She agreed that the Bank failed to raise capital due to lack of performance. The bank was given some respite for 3 months and managed to raise capital in the 3 months. She testified that Capital is one of the major contributors to growth. If you don't have money you won't perform. Minnie had the duty to perform and she had to raise funds. The Bank failed to raise funds from investors due to poor performance. On being referred to the Income statement/financial report in Annex 4 of the Respondent's bundle she stated that the income increased between October, November and December after Minne had left. She attributed this to the new team. The loan portfolio was increased causing the positive changes. The Board met often and decision was reached to offer Minnie an amicable solution – the Bank offered 2 years pay but she asked for 10 years.

10. In re-examination by Mr. Mutua, Ingrid testified that under Minute (f) of the Board Minutes of 29th August 2011 exhibited, there was discussion and the effect of that para was that the Bank had decided to negotiate a peaceful solution. The Bank tried to raise core capital and failed until a new team was in place.

11. Parties filed their respective written submissions which have been considered. In sharp focus was the Letter of Appointment and the provision of Clauses 19 and 20 of the contract and the performance of the bank as well as the letter of offer of termination.

12. It is not disputed that the Claimant was an accomplished Accountant and Banker who joined the Respondent from the Central Bank of Kenya where she was instrumental in the merger of the City Finance Bank and the Jamii Bora Micro Finance. She worked for a short period and helped merge the 2 institutions. The performance of the Bank was not so good. The Claimant and the Respondent agreed to disengage. What seems to be the real grouse is the terms of the disengagement. The bank offered 2 years pay while the Claimant wanted payment for the 10 year period. Indeed during her testimony in Court she did reiterate her claim on the 10 years she could have worked for the Respondent.

13. The issues distilled for determination are

1. What was the duration of the contract?
2. Was the termination in terms of the Contract?
3. What reliefs is the Claimant entitled to in relation to the termination?

14. In contracts of employment, the terms of the contract are central to the resolution of these issues. The Contract entered into was a 5 year contract. The contract terms were not fixed. It could be terminated in accordance with the provisions of the Contract. The contract could be renewed for a further 5 years. It therefore was not a contract for 10 years. All things being constant, good performance and willingness of the Claimant and Respondent to continue in the engagement would have led to renewal. It was not an automatic renewal.

15. The Claimant and the first Chairman of Jamii Bora Bank Limited had some chemistry which led to their interaction as CEO and Chairman of the Board. There was a lot of expectation but when performance of the Bank was on a downward spiral, the Respondent offered to disengage and the package was by way of payment of 24 months salary. The same would attract interest at rate of 9% per annum from December 2011 until payment in full. The Claimant rejected the offer and the Bank proceeded to terminate the employment contract in terms of the letter dated 9th September 2011. The letter did not set out the terms of the disengagement save that it was with effect from 31st August 2011.

16. The Claimant's legitimate expectations were dealt a cruel blow by the turn of events in mid 2011.

The termination of the contract in 2011 was in accordance with provisions within the contract. The contract was not for 10 years. It could be terminated during any of the periods it would be in effect. Gratuity was payable upon completion of the contract term or part thereof. Other benefits were inextricably joined to the contract and were thus not extended beyond the term of the contract. The Claim on telecommunication costs for 104 months, the claim for fuel consumption for 104 months and the claim for medical, club membership, health insurance cover and salary for 104 months would all fail. The termination was in accordance with the contract which provided that there could be termination for cause. The Respondent and the Claimant were in agreement that disengagement was proper.

17. The Claimant had worked for 16 months. Her gratuity was 25% for the contract period or portion thereof. She was thus entitled to Gratuity at rate of 25% for 16 months. She was entitled to a 3 month salary in lieu of notice. The bank made a generous offer of 2 years salary. I would on my part only grant 12 months compensation available under the law. What had been offered was the best the Bank could have done was on the table but she rejected it. She is also entitled to the 10 days leave earned but not taken. Her gross pay was 800,000/-, 10 days of leave would be Kshs. 266,666.70 which she is entitled to. In short, she succeeds to some degree in her Claim.

18. I enter judgment for the Claimant as follows:-

1. Salary for 3 months being pay in lieu of Notice – 2,400,000/-
2. Gratuity for 16 months – 3,200,000/-
3. One year compensation - 9,600,000/-
4. Unpaid leave earned – 266,666.70
5. One half of Costs to be assessed or agreed
6. Interest at Court rates from date of judgment till payment in full.

It is so ordered.

Dated and delivered at Nairobi this 1st day of **November** 2013

Justice Nzioki wa Makau

Judge