



**REPUBLIC OF KENYA**

**INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 939 OF 2012**

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

**PAUL ODHIAMBO OSWAGO.....CLAIMANT**

**VERSUS**

**MOLYN CREDIT LIMITED.....RESPONDENT**

**JUDGEMENT**

This matter was brought to court vide an Amended Memorandum of Claim dated 17th October, 2012. The issues in dispute are therein cited as;

- *Breach of employment contract*
- *Unfair, unlawful and wrongful suspension and eventual termination of employment*
- *Unlawful retention and conversation of salary*
- *Non payment of salary in lieu of notice*
- *Non issuance of certificate of service*

The claimant has also file a Claimant's Defence to Counter Claim dated 25th September, 2013.

The respondent in an Amended Reply to Memorandum of Claim and Counter Claim amended on 23rd October, 2012 denies the claim and prays that the same be dismissed with costs. She also prays for judgement against the claimant as set out in the Counter Claim.

The claimant's case is that he was employed by the respondent in July, 2011 as a personal loans office with the task of soliciting and introducing loan clients to the respondent. It was a term of service that he was entitled to a months notice before termination or salary in lieu thereof. In the event of termination by way of summary dismissal on the basis of disciplinary offences for gross misconduct, the claimant was entitled to elaborate procedure as follows;

a) *Warning letter*

b) *Detailing of the particulars and facts of the case and written reasons for the dismissal*

c) *An opportunity to answer to the allegations within 48 hours*

d) *An elaborate disciplinary procedure starting with a 'show cause letter'*

e) *An appearance before the staff disciplinary committee*

Annexed hereto as Appendix B is a true copy of the Respondent's HR manual

It is his further case that during his stint of service he served the respondent diligently, with utmost honesty and dedication with commendable results.

The claimant's further case is that in November, 2011, he introduced one, Simon Korir to the respondent as a loan client. Mr. Korir duly and successfully applied for Kshs.110,000.00 which loan subsequently fell into arrears of recovery for four months. This was blamed on the claimant's failure to deliver the clients data sheet and loaded the accruing penalties for payment from the claimant's salary. This was Kshs.95,463.00.

The claimant's other case is that the decision to surcharge his salary was wrongful and illegal and amounted to breach of the claimant's employment contract as follows;

(i) *The claimant did deliver the borrowers data sheet to the borrower's employer and the allegation against him is false and merely scapegoat for the omission of the Respondent's personnel who are themselves responsible for ensuring that deductions are effected and any default immediately detected and acted upon;*

(ii) *The purported deduction contravenes the express provisions of the Employment Act;*

(iii) *The decision was arrived at unilaterally by the Respondent without giving the claimant an opportunity to answer to the allegations against him;*

(iv) *The loan and disbursement thereof was approved by the Respondent's CEO and Customer Care personnel upon their satisfaction that the records of the transaction were in order and therefore the blame cannot be placed on the claimant.*

(v) *The decision is otherwise discriminatory as the deduction was never levied on the salaries of the other personnel who approved the loan and disbursement thereof and or failed to detect the default in time.*

(vi) *Pursuant to the Loan Agreement the borrower/Client and or his employer were and remain contractually bound to repay the loan, the interest and penalties thereof and the Respondent was not justified in purporting to recover the sums from the Claimant who owes no obligation for the recovery of the same under the contract;*

(vii) *The omission in deducting the loan was as a result of the client's failure to abide by the terms of the loan agreement which holds him personally liable to instruct his employer to deduct the installments and to ensure that the loan is repaid*

(viii) *The Respondent is poised to unjustly enrich itself as it has a viable claim against the borrower/client who remains liable for and bound to pay the interest and penalties accruing from the non deduction of this salary to repay the loan.*

He also cites a breach of his employment contract as follows;

Particulars of breach of employment contract

a) *The Respondent failing to meet its express duty under the contract to pay the Claimant all his dues without any unjustified deductions*

b) *Breach of the implied duty to afford the Claimant a hearing before taking such a far reaching decision as appertains his remuneration;*

c) *Unlawfully retaining money lawfully owing to the employee*

The claimant's further case is that on 5th April, 2012, the respondent conjured up false and flimsy allegations that he was involved in perpetuating fraudulent transactions by colluding with a named officer from the Kenya Prisons Department to present falsified documents to enable acquisition of loans not qualified for. He was suspended for two weeks pending investigations vide a letter dated 5th April, 2012. This amounted to wrongful and unlawful termination of employment as follows;

a) *The claimant's employment was suspended and eventually terminated without any lawfully justification whatsoever and the allegations against him were false and unfounded;*

b) *The Claimant's employment was suspended and eventually terminated without being given a hearing by the Respondent;*

c) *The Claimant's express request to be given a hearing and opportunity to answer to the allegations was not granted;*

d) *The Claimant was not involved in any purported investigations (if any) during his suspension despite being the suspect;*

e) *The content and finding of the purported investigations were never disclosed to the Claimant;*

f) *The Claimant was never given the details or particulars of the purported fraudulent transaction; least of all the identity of the persons with whom he purportedly colluded with; and*

g) *The process of the suspension and termination wantonly disregarded the Respondent's own procedures as set out in the HR Manual.*

He adds,

*Particulars of breach of contract*

a) *Unlawful termination before the contractual termination date i.e. 30<sup>th</sup> June 2013;*

b) *Unlawful termination thereby barring him from earning income by way of retainer and commission as was envisaged under the contract;*

c) *Termination without the Respondent discharging the implied duty to grant the Claimant and opportunity answer to the allegations against him; and*

d) *Failure to pay him all his contractually granted terminal dues at the time of the termination.*

He prays as follows;

1. **DECLARATION THAT** *the deduction of Kshs.95,463.00 by the Respondent from his March and April 2012 salary was unfair, wrongful and unlawful;*

2. **ORDER OF IMMEDIATE PAYMENT** *to him of the sum of Kshs.95,463.00 being unfairly, wrongfully and unlawfully deducted from his salary with interest at prevailing commercial rates from 30<sup>th</sup> March 2012 until payment in full;*

3. **DECLARATION THAT** *the suspension of his employment vide the Respondent's letter dated 5<sup>th</sup> April 2012 was unfair, unlawful and wrongful;*

4. **ORDER OF IMMEDIATE PAYMENT** to him of the sum of Kshs.170,000 he would have reasonably earned in the month of April had he not been suspended; with interest at commercial rates until payment in full;
5. **DECLARATION THAT** the termination of his employment vide the Respondent's letter dated 25<sup>th</sup> April 2012 was unfair, unlawful and wrongful;
6. **ORDER OF IMMEDIATE PAYMENT** to him of the sum of Kshs.170,000 being his average monthly earnings as payment in lieu of notice;
7. **ORDER OF IMMEDIATE PAYMENT** to him of Kshs.2,380,000 being loss of income expected over the remainder of the contract period i.e 14 months
8. **DAMAGES** for breach on contract to be assessed by court taking into account the remainder of the contract period at the time of termination i.e. 14 months
9. Immediate issuance of a **CERTIFICATE OF SERVICE**
10. **EXEMPLARY DAMAGES** to be assessed by court
11. **ANY OTHER** alternative or supplemental remedies and or orders the Honourable Court may deem just to grant
12. **COSTS** of this suit with interest at court rates until payment in full

The respondent's case is a denial of the claim.

The respondent however admits that he was employed as a loan officer but was procedurally terminated from employment in accordance with her laid down procedures.

The respondent further denies the claim of diligence service by the claimant and avers that he committed numerous irregularities and in various instances overstated sales to earn illegitimate commissions. He failed to follow the laid down procedure for disbursement of loans and in particular failed to present the data sheet/advise letter to the employer of the borrower, and her ICT board. This was confirmed by the ICT board on enquiry by the respondent occasioned by a delay in loan deductions.

The respondent's other case is that the claimant handled the loan approval for Simon Korir negligently and was therefore eligible for surcharge in accordance with clause 12.9 of the Employment Manual *inter partes*. The claimant also issued various loans involving the prisons department without regard to procedure thereby occasioning non performing loans. This was through falsification and misrepresentation of the borrower's ability to repay.

The respondent's further case is that as a consequence of this massive misconduct and dishonesty, he was suspended from employment in accordance with clause 12.0 of the Human Resource Manual. She asserts a case of lawful termination of employment and deems the claim as frivolous, vexatious and a clear abuse of the process of court.

The respondent claims Kshs.2,652,084.00 and interest being loss occasioned by the misconduct of the claimant in the course of his duties as counter claim.

The matter came to court variously until the 17th April, 2018 when it was heard. At the hearing, CW1 – Paul Odhiambo Oswago duly affirmed testified in adoption of his witness statements dated 9th April, 2018. He prayed that this be adopted as his evidence in chief. He also prayed that it be so adopted as his evidence by this court.

The respondent on a conciliatory note forfeited cross-examination of the claimant. He, however, sought leave to file a witness statement in support of her case. The parties thereon agreed on a determination of the matter by way of written submissions.

The issues for determination therefore are

1. Whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful"
2. Whether the respondent is entitled to the counter-claim"
3. Whether the claimant is entitled to the relief sought"
4. Who bears the costs of this claim"

The 1st issue for determination is whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful. The claimant in her written submissions dated 30th April, 2018 submits in reiteration of his case of unlawful termination of employment.

The claimant submits a case of summary dismissal without being awarded an opportunity to be heard in violation of clauses 12.7, 12.8 and 12.12 of the Employee Handbook which provides as follows;

- a. *Issue the employee with a show cause letter detailing allegations raised against the employee; and*
- b. *Accord the employee an opportunity to be heard on the allegations raised against the employee.*

It is his case that his suspension from employment was without being afforded an opportunity to be heard and so was the summary dismissal. The claimant further amplifies his case as follows;

*13. In a bid to purport to rectify the defect in the suspension letter, the Respondent, at paragraphs 7, 9, 15 and 16 of the Amended Reply to Memorandum of Claim and Counterclaim, shifted the narrative in the letter of suspension to now allege that;*

- a. *The Claimant did not notify the employer of one Simeon Korir, a borrower, to deduct and remit monthly loan repayments to the Respondent; and*
- b. *The Claimant "processed" non-performing loans to Jackson Kipkorir Ndekelo, Jibril Yunis Hassan, Nehemiah Lemien kimosop, George Oudo Makokha and Daniel Kibet Yegon.*

*14. The new allegations now emerging in the Respondent's response were never particularized in the letter of suspension issued to the Claimant; the Claimant thus did not have any chance to respond to them before the Respondent could terminate the Claimant's employment. More fundamentally, the allegations are devoid of any substance.*

*15. The Claimant's job title was "Personal Loans Officer" with the mandate to prequalify loan applicants for their Credit worthiness. The Claimant was like a sales representative to the Respondent; the Claimant would only be paid on the basis of independently verified the credit worthiness. The Claimant would only be paid on the basis of independently verified the credit worthy loan applicants that the Claimant introduced to the Respondent.*

*16. In prequalifying a loan applicant, all that the Claimant was required to do was to ascertain that a loan applicant indeed worked for a particular employer, their monthly earnings and to obtain the authority of the a loan applicant and the employer to monthly deduct and remit to the Respondent loan repayment instalments.*

The respondent faults the submissions and the case of the claimant as a mere denial of responsibility. It is her case that suspension was a choice in the disciplinary process and adopted in the disciplinary process of the claimant. This is provided for under clauses 12.10 and 12.12 of the Human Resource Manual as follows;

*"Where an employee commits a serious offence warranting investigations, MCL shall suspend the employee from duty immediately without pay, less any statutory deductions. The employee will cease drawing other benefits and allowances at this time."*

*“Depending on the gravity of the case, MCL may take one or more of the following actions against an employee:- show cause letter, warnings, recovery of days of absence from salary, surcharge, suspension, termination of employment, summary dismissal and criminal proceedings.”*

The respondent further denies unlawful termination of employment and submits compliance with the manual policy whereby the grounds of termination were stated in the letter of termination as follows;

*“the company has established that you have been involved in perpetuating fraudulent transactions which led in losses of assets of the company. The scheme involves you colluding with certain officers from Kenya Prisons Department to present falsified documents that enable them to obtain loans from the company which they had otherwise not qualified for. These loans then start being defaulted due to the irregularities committed before disbursement.”*

Further, clause 12.12 provides as follows in so far as summary dismissal is concerned;

*“Summary dismissal shall be applied to cases of gross misconduct and bankruptcy. A letter detailing the facts of the case and giving reasons for the dismissal will be sent to the individual and a copy place in his personal file. The employee will be provided with an opportunity to answer within 48 hours.....”*

It is the respondent’s case that the claimant did not answer the letter of summary dismissal as stipulated in the policy manual and therefore a justification for the summary dismissal as a mode of termination of employment. I agree.

The respondent clearly demonstrates misconduct on the part of the claimant in the performance of his duties. This was through negligence, fraud, dishonesty and irregularities occasioning loss to the respondent through non performing loans. This attracted suspension and consequential summary dismissal in accordance with the Human Resource Manual tying the parties contract of service. The claimant’s case of unlawful termination of employment therefore flounders and collapses on the way side. I therefore find a case of lawful termination of employment and hold as such.

The 2nd issue for determination is whether the respondent is entitled to the counter-claim. The respondent has not adduced evidence in support of the counter claim. She merely states a case of a counter claim but does not establish the same. It must therefore fail.

The 3rd issue for determination is whether the claimant is entitled to the relief sought. He is not. Having failed on a case of unlawful termination of employment he becomes disentitled to the relief sought.

I am therefore inclined to dismiss the claim with orders that each party bears their own costs of the claim.

Dated and signed this 19th day of July, 2018.

**D.K. Njagi Marete**

**JUDGE**

Delivered and signed this 20th day of July, 2018.

**Maureen Onyango**

**PRINCIPAL JUDGE**

Appearances

1. Mr. Okoth Instructed by Ataki Kimori & Okoth Advocate for the claimant.

2. Mr. Chege Instructed by Muchoki, Kang'ata, Njenga & Company Advocates for the respondent.



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