

**IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM**

LABOUR REVISION NO. 464 OF 2020

(Originating from Labour Dispute No. CMA/DSM/KIN/162/19/90)

BETWEEN

IBRAHIM NYAMUBI..... APPLICANT

VERSUS

AKIBA COMMERCIAL BANK PLC..... RESPONDENT

JUDGMENT

Date of Last Order: 29/09/2021

Date of Judgment: 19/11/2021

I. Arufani, J.

The applicant filed the instant application in this court urging the court to call for records of proceedings of Labour Dispute Number CMA/DSM/KIN/162/19/90 dated 25th September, 2020, revise and make such orders as it deems fit to do. The application is made under section 91 (1) (a), (2) (b), (4) (a) and (b) of the Employment and Labour Relations Act (hereinafter referred as the ELRA) and Rules 24 (1), (2) (a), (b), (c), (d), (e) and (f), (3) (a), (b), (c) and (d) and 28 (1) (a), (b), (c), (d) and (e) of the Labour Court Rules GN. No. 106 of 2007 (hereinafter referred as the Rules) and any other enabling provision of the law.

The background of the matter as appears in the record of the matter is to the effect that, the applicant was employed by the respondent on 1st February, 2011 as a loan officer trainee and started with a probation period of 6 months. He was confirmed in a post of Loan Officer from 1st September, 2011. On 1st January, 2016 he was transferred to the respondent's main branch head office to work there as a Portfolio Officer.

It was averred the applicant processed the loan advanced by the respondent to one Kherry Mussa Mgeta who was granted loan of Tshs. 15,000,000/= but he failed to repay the loan. It was stated that, after the client being granted the loan, he disappeared and the property he pledged as a security for the loan could have not been sold to realize the loan as it was not his property. It was stated by the respondent that, after conducting investigation they realised that, the applicant had failed to comply with their lending manual which provides for the procedures to be followed while discharging their duties.

The applicant was charged with the offence of misconduct where he was found guilty and terminated from his employment on 19th February, 2019. Upon being aggrieved by the termination, the

applicant referred his complaint to the Commission for Mediation and Arbitration (hereinafter referred as the CMA) where the decision was made in favour of the respondent. On his second bite the applicant knocked the door of this court seeking to challenge the award of the CMA on the following grounds:-

- i. "The arbitrator erred in law and fact in holding that the applicant's termination was substantively and procedurally fair.*
- ii. That the arbitrator erred in law and fact for failure to properly evaluate the evidence adduced before the commission.*
- iii. The arbitrator erred in law and fact for failure to fault unprocedural process of termination as the applicant was terminated by the chairman of the disciplinary committee which is contrary to the law.*
- iv. That the arbitrator erred in law and fact in not finding that the applicant's complaints were meritorious and that he was entitled to the reliefs prayed for in CMA F1."*

The application was supported by the applicant's affidavit. In opposition, the counter affidavit of the respondent's advocate was filed in the court. Hearing of the application was conducted by way of written submission. Both parties were served by advocates. While Mr.

John J. Lingopola was for the applicant, Mr. Kalaghe Rashid was for the respondent.

In his submission, the counsel for the applicant, Mr. Lingopola prayed the affidavit of the applicant to form part of his submission. He argued the 1st and 2nd grounds jointly and stated that the arbitrator ruled at page 7 and 8 of the awards that, the applicant's termination was on valid reason that the applicants faulted the procedure of processing the loan. He submitted that the evidence adduced by the respondent failed to substantiate all accusations laid against the applicant. He added that, the allegation that the applicant issued loan on a forged document issued as security for the loan is a fallacy because, forgery being criminal matter, ought to have been reported to the police for necessary actions.

He went on submitting that, the respondent did not do what is stated hereinabove as the applicant was neither charged, reported to the police station nor taken to court to determine his guiltiness to the alleged misconduct so as to use the same as a valid reason for termination of employment of the applicant. He stated that, the respondent also failed to tender before the CMA certificate of title or any document to prove that the land was surveyed.

He submitted that, the respondent had a duty to prove his allegation as provided under section 110 (1) and (2) of the Evidence Act, CAP 6 RE. 2019. He stated that, the respondent's failure to substantiate their allegation against the applicant proves that the applicant was terminated from his employment without good reason. To support his submission, he cited the cases of **R. G. Patel v. Lai Makanji** (1957) EA 314 and **Omari Yusuph v. Rahma Ahmed Abdulkadir** (1987) TLR 169.

It was submitted further by the counsel for the applicant that, the respondent failed to inquire into whether the client's business life span is over six months. Counsel for the applicant submitted that, there was neither a business licence nor any witness from where the business was allocated was summoned to prove the same. He contended further that, the issue of client's verification on whether he met the criteria to be granted loan is conducted by the branch committee which includes Branch Manager, Portfolio manager and loan officers.

He argued that, it is the committee which approved that the client had met the criteria to be granted loan. He submitted that, it is not true that the applicant failed to verify the existence of the

property and ownership from the local government's authority, rather he did all the procedure in accordance with the bank policies and submitted the documents to the committee. Counsel for the applicant submitted that, the respondent had no valid reason for terminating employment of the applicant.

As regards to the 3rd and 4th grounds, it was the submission by the counsel for the applicant that, prior commencing the disciplinary hearing, the employer is mandatorily required to conduct investigation to ascertain the grounds for taking a disciplinary action against an employee. He stated that is provided under Rule 13 (1) of the Employment and Labour Relations (Code of Good Practice) GN. No. 42 of 2007. He submitted that the respondent did not conduct any investigation on the alleged misconduct. He went on submitting that, failure to conduct investigation amounts to procedural irregularities and referred the court to the case of **Huruma H. Kimambo v. Security Group**, Rev. No. 412 of 2016. Counsel for the applicant prayed the court to revise and set aside the CMA's award.

On the respondent's part, Mr. Rashid prayed for his counter affidavit to form part of his submission. He argued that as reflected at

paragraph 3 of page 7 of the impugned award, in determining the validity and fairness of reason for termination, the arbitrator critically analysed the evidence adduced by the parties at the trial. He stated the applicant failed to follow the procedures provided in their lending manual which he was well aware of.

He submitted further that, the lending procedure manual which was tendered and admitted at the CMA provides that, for the loan to be approved, the customer's business must have a life span of over six months. He argued the applicant never exercised due diligence to ensure that customer's business has such a life span and later, it was revealed that the said business was not even operating as it was closed after the client obtained the said loan. He submitted that, the offences committed by the applicant were serious and they rendered the employment contract intolerable. He supported his argument with the case of **NMB Bank PLC V. Matete Chacha Keboye**, Rev. No. 21 & 31 of 2021 (unreported).

It was Mr Rashid's further contention that, the core value of banking industry is integrity, trust and confidence. He argued that, employee is expected to exercise high degree of honest and trust. He submitted that in the present application the respondent has lost

trust against the applicant as he failed to adhere to their procedure as provided under their lending manual despite of knowing them. To strengthen his argument, the counsel for the respondent cited the cases of **NMB PLC V. Andrew Aloyce**, Rev. No. 01 of 2013 and **Japhet Kessy V. National Microfinance Bank**, Rev. No. 139 of 2017 (both unreported) where it was held that:-

"The banking and financial sector being the sensitive institution, the employees are entrusted to be trustworthy, honesty and building confidence to customers which are crucial keys of the whole business."

Mr. Rashid contended further that, the respondent proved the misconduct committed by the applicant and submitted that the arbitrator correctly arrived to a conclusion that termination of employment of the applicant was made on valid and fair reason.

Concerning the 3rd and 4th grounds, it was submitted by the counsel for the respondent that, the arbitrator clearly and correctly observed the position of the law as provided under Rule 13 of the GN. No. 42 of 2007. He submitted that the respondent adhered to all the procedures. He stated the investigation of the allegation levelled against the applicant was conducted as evidenced by the report

dated 4th February, 2019 admitted before the CMA as exhibit D7. He stated that, having been served with the allegations, the applicant was issued with a notice to attend disciplinary hearing on 7th February, 2019. He stated the applicant attended the disciplinary hearing on 11th February, 2019 where he was afforded with all the rights as reflected on the hearing form. To support his argument the counsel for the respondent cited in his submission the case of **Barclays Bank Limited V. Zephania Mkirya**, Rev. No. 175 of 2017 (unreported). At the end he concluded his submission by praying the court to uphold the award issued by the CMA.

Having carefully considered the rival submission from both sides and after going through the record of the matter and the applicable laws, the court has found the issues or grounds for revision raised and argued by both sides in this matter can be merged into two issues for determination in this application and be as follows:-

- i. Whether termination of employment of the respondent was both substantively and procedurally fair?*
- ii. What are the relief entitled to the parties?*

Starting with the first issue, the court has found it is the requirement of the law as provided under Section 37 (2) of the ELRA

that for termination to be fair, the employer must establish that he has a valid and fair reason for termination of employment of an employee, and that he adhered to the required procedures for termination of employment of an employee. The stated position of the law has been emphasized by this court in a number of court's decisions which one of them include the case of **Sharifa Ahemed V. Tanzania Road Haulage (1980) Ltd.**, Rev. No. 299 of 2014, [2015] LCCD II where it was stated that:-

"The well-established principle in law is that termination of employment which is not based on valid reason and fair procedure is unfair, Section 37 (2) of Employment and Labour Relation Act. The intention of the legislature is to require the employer to terminate employees only on valid reason and not at their own whims."

While being guided by the above stated position of the law the court has found the record of the application at hand reveals that, the applicant did not dispute he was responsible for processing loans for the clients of the respondent. He did not also dispute is the one assessed and verified the collaterals of the client namely Kerry Mussa Mgeta and submitted his information to the loan committee which

acted on that information to authorize the loan issued to the mentioned client.

It is also on record that, the applicant on the first instance found the land of the client was un-surveyed and he submitted the sale agreement as proof of the client's ownership to the collateral. However, when the second verification was conducted by the officers from the respondent it was discovered the land pledged as a security for the loan was a surveyed land as it had beacons. That is appearing on the disciplinary hearing form admitted in the matter before the CMA as evidence. It is the respondent's procedure that in processing loan on surveyed land a client has to issue the certificate of title of the land to be used as a collateral for the loan but in this matter, the certificate of title was not issued as the applicant failed to conduct due diligence on the collateral verification.

The applicant alleged that the respondent failed to prove the land was surveyed as they failed to submit the certificate of title or any document to show the land in question was a surveyed land. The court has found that, although it is a position of the law as provided under section 110 (1) and (2) of the Evidence Act that he who alleges must prove existence of the allegation but the argument by the

applicant's counsel that the respondent failed to prove the land was surveyed is without merit.

The court has arrived to the above finding after seeing that, Juliana Boniface who testified before the CMA as DW1 stated in her testimony that, after seeing the client had failed to service the loan she directed other respondent's officer to assist the applicant to make follow up of the client and the information they got from the neighbour of the land pledged as the security for the loan together with the leader of the local government area informed them their client was not the owner of the land used as the security for the loan and the land is a surveyed land.

The court has found that, although it is true that the applicant called Ally Salum who testified before the CMA for the applicant as PW2 and said the land in dispute is un-surveyed and is owned by Kerry Mussa Mgeta but the court has found that witness was a political party leader who is not responsible with issues of ownership of the land in their area. The court has arrived to the above view after seeing that, while PW2 said the land is un-surveyed but DW1 said in her testimony that when the second verification was done by their officers they were told by the neighbour of the land and the Local

Government leaders of that area that Kerry Mussa Mgeta was not the owner of the land. She said they were told that, though certificate of title had not been issued for that land but the land is a surveyed land and is not un-surveyed as argued by the applicant and his counsel. As the arbitrator believed the evidence of the respondent the court has no justifiable reason to differ with the finding of the arbitration.

Under that circumstances the court has found there was sufficient evidence in the record of the matter which established the applicant failed to perform his duty of doing proper verification of the property pledged as a security for the loan issued to the client by the respondent. To the view of this court the applicant was required to do proper verification of the security for the loan and submit to the respondent the right documents or reports to enable the loan to be issued to the right client.

If the applicant performed his duties honestly and responsibly, the respondent would have been in a good position of disapproving grant of the loan to the said client. The court has found the act of the applicant to fail to discharge his duty honestly and responsibly caused the respondent to fail to recover the loan from the client because the documents submitted to the respondent's committee by the applicant

and used to issue the loan to the client would have not enabled the respondent to realize the loan by selling the land used as the security for the loan.

As for the life span of the business which was also a criterion to be considered in assessing eligibility of a client to be granted loan the court has found that, the counsel for the applicant argued that the respondent failed to adduce any evidence to prove that the said business had a life span of only two months. He stated the respondent's allegation that the applicant failed to follow the procedure on verification of the business cannot stand on a ground that the client closed the business after he obtained loan. Again, the applicant's counsel contended that, the duty of verifying whether the client met the criteria to be granted loan is vested to the loan committee and not to the applicant.

It is the view of this court that, the committee acted on the information given to them by the applicant who was believed to have performed his duties in accordance with the policies of the respondent. The fact that the loan was approved by the committee cannot exonerate the applicant from his liability of acting dishonestly and irresponsibly in performing his duties. The applicant as the officer

of the respondent had a duty of performing his duties in accordance with the laid down procedures diligently and honestly. If the applicant properly assessed the said collateral, the respondent would have been in a better position of recovering the loan by selling the property used as a security for the loan. The above stated view is being bolstered by what was stated by this court in the case of **Victoria Finance PLC V. John Clement Mwakasonda**, Rev. No. 974 of 2019, where it was stated that:-

"The respondent as the applicant's officer, had a duty of acting with high degree of honesty and diligence in his capacity despite the fact that he was not the final person to authorize the loan. The respondent ought to have acted responsibly and foreseen the outcome of his negligence to the applicant's business."

Since there is no any other evidence in the record of the matter showing the client's business had a life span required for being granted loan and the only evidence available is that of DW1 who said they were told the client's business had a life span of only two months the court has failed to see any merit in the applicant's argument. In the strength of what I have stated hereinabove the court has found there is no justifiable reason to

fault the arbitrator's finding that the respondent had valid reason for terminating employment of the applicant on a ground of misconduct committed by the applicant.

Coming to the issue of the procedure for termination of employment of an employee, the court has found the applicant alleged that the arbitrator erred in law and fact as he found termination of employment of the applicant was procedurally unfair. The counsel for the applicant argued that, the respondent did not conduct investigation before terminating employment of the applicant as required by the law. The procedure for termination of employment of an employee is prescribed under Rule 13 of the GN. No. 42 of 2007. Rule 13 (1) of GN. No. 42 of 2007 requires an employer to conduct investigation before taking an employee to a disciplinary hearing to ascertain whether there is a fair and valid reason for a disciplinary hearing to be conducted.

Having gone through the record of the present application the court has found there is investigation report which was used as evidence on the disciplinary hearing admitted in the case as an exhibit. That shows the argument by the counsel for the applicant that investigation in relation to the allegation levelled against the

applicant was not conducted has no basis as it is not supported by the *record of the matter*. The court has found as rightly found by the arbitrator and argued by the counsel for the respondent the record of the matter shows investigation was thoroughly conducted before disciplinary hearing being conducted, hence the respondent adhered to all the procedures laid down by the law for terminating employment of the applicant.

In the premises the court has found the applicant has not been able to convince the court the arbitrator erred in finding he was fairly terminated both substantively and procedurally. Consequently, the application of the applicant is hereby dismissed in its entirety for want of merit. It is so ordered.

Dated at Dar es Salaam this 19th day of November, 2021.



I. Arufani

JUDGE

19/11/2021

Court: Judgment delivered today 19th day of November, 2021 in the presence of Ms. Hakime Pemba, Advocate holding brief of Mr. John J.

Lingopola, Advocate for the applicant and in the absence of the respondent. Right of appeal to the Court of Appeal is fully explained.



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Labour Court TZ.