



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 324 OF 2000

ELIJAH KIPNG'ENO ARAP BII PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED..... DEFENDANT

RULING

Elijah Kipng'eno arap Bii, the plaintiff herein seeks an order of injunction to restrain Kenya Commercial Bank Limited, the defendant, from selling whether by auction or otherwise howsoever alienating, possessing, repossessing or otherwise dealing with his properties known as LR No 631/710 (IR No 39617), Kericho, LR No 209/9854, Nairobi, LR No 20262 (IR No 65911), Nairobi and motor vehicle KAH 857Z or any property of his whether in purported exercise of a statutory power of sale or otherwise howsoever until the determination of the suit. I shall herein after refer to the plaintiff as "the applicant", the defendant as "the bank", and the plaintiff's property as the "suit property".

The application is appurtenant to a plaint filed in Court on 22nd February, 2000. In the plaint, the applicant pleads that he was appointed the General Manager of the bank with effect from 3rd March, 1993. The appointment was agreed to be until his retirement upon his sixtieth birthday on 24th August, 2009. On 20th March, 1998 the Minister of Finance announced through the media that he had been sacked as the General Manager of the bank. On the same day the bank in pursuance of the Minister's order entered the said sacking of the applicant in its records and on the following day, his office was physically taken and a new General Manager installed.

On 21st April, 1998 the bank wrote a letter to the applicant stating that he was sacked with effect from 23rd March, 1998. The applicant avers that his sacking and removal as the bank's General Manager was wrongful and unlawful. He claims special damages in the sum of Kshs 409,003,135 being the quantified loss of salary and benefits from the date of his removal from office until 24.8.2009 when he would have retired. It is further pleading that the applicant had taken out loans and a car loan facility which are being claimed by the bank in the sum of Kshs 91,339,547.48 as at 1st November, 1999. The said loans are said to have been fully performing and infact prepaid and were also fully secured for substantially more than the sums due. They carried an agreed interest rate of 8% and 3% per annum pursuant to the staff rate. Upon his wrongful removal from office, the bank claimed from him the total sums due on the said loan. It also unilaterally changed the interest rate from 8% and 3% to 40% and 39% per annum which latter rates were wholly unconscionable and without any basis in law, contract or commercial usage. It is further pleaded that by its own wrongful dismissal of the applicant, the bank has removed his means of repayment, it has wrongfully raised the interest rate six fold and it has erroneously and drastically increased the total sum due. The bank, it is pleaded, is seeking to benefit from its own wrong doing which it is not permitted to do in law. It is further pleaded that the bank, reclaiming the loan and engaged

interest, has put up the applicants properties for sale as a chargee and mortgagee demanding the sum of Kshs 91,339,547.48 and has in addition instructed bailiffs to repossess his Mercedes Benz E230 registration number KAH 857Z acquired under the staff car loan scheme. The applicant avers that the bank has no right in law to sell the suit properties as he does not owe the bank any money. On the contrary, the bank is liable to him in the sum of Kshs 409 million. Moreover the parcels of land are being sold on a claim which includes interest at exorbitant rates which are neither agreed nor lawful or reasonable. The applicant also pleads that the sale of the suit property would cause irreparable damage to him which cannot be adequately compensated by an award of damages. In the premises, he prays for a declaration that his dismissal was unlawful and wrongful, special damages for unlawful dismissal in the sum of Kshs 409,003,135/=, general damages, aggravated damages and an injunction to restrain the sale or alienation of the suit property.

The applicant has sworn two affidavits in support of the application. The first affidavit was sworn on 21st February, 2000 and was filed with the application. It essentially states on oath the matters pleaded in the plaint.

The second affidavit was sworn on 15th January, 2001 and is in response to the bank's replying affidavits sworn by Joseph Kiprono Cheruiyot and Gareth Andrew George respectively on the 24th July, 2000.

At the hearing of the application, Mr Wandaba, counsel for the applicant, argued that the termination of the applicant's employment as the bank's General Manager was illegal on two accounts. First, it was decided upon by the Minister for Finance who had no authority over the matter and the bank's Board of Directors merely rubber stamped the said decision by the Minister. Secondly, from press reports it appeared that the basis of the termination was that the applicant had unprocedurally borrowed unsecured debts from the bank – a position which was not factually correct as the applicant's borrowing was fully approved and the same was more than amply secured. Counsel pointed out that after the termination of the applicant's employment the interest rate on the loans escalated. He submitted that the fact of unlawful termination of the applicant's employment and the high interest rate have both incapacitated him from repaying his loan and the bank cannot now seek to benefit from this misfortune which it has itself authored by exercising its power of sale. It was inequitable for the bank to unlawfully sack the applicant, destroy him as a banker through the media and seek to take away all he has labored for through the purported exercise of the power of sale. The Court should not allow the bank to benefit from its own illegality or wrong, counsel strongly urged. He relied on the cases of *Michael Hamisi Wabungu v National Bank of Kenya & The Attorney-General* [HCCC No 300 of 2000] (unreported) and *Joseph Mugalla & 10 others v Standard Bank (K) Ltd* [HCCC No 2495 of the 1998] (unreported). In the former case the plaintiff was a former employee of the National Bank of Kenya. He was arrested in connection with some criminal complaint lodged against him at the instigation of the bank. While in police custody, he was served with a letter of suspension. While the criminal trial was going on, he was served with a letter terminating his employment. The bank then converted his loan to a commercial one and advertised the security therefore for sale. He was subsequently acquitted of the criminal charges. He instituted a suit against the bank and the Attorney-General, firstly to restrain the bank from selling his property and secondly for general and special damages for wrongful arrest, false imprisonment, malicious prosecution and wrongful termination of employment. On being satisfied that the plaintiff had made out a *prima facie* case that the termination of his employment was wrongful, Mbaluto, J granted an interlocutory injunction as prayed. The learned judge reasoned as follows:-

“...If the termination was unfair, unjust and unlawful, it follows that the taking away of the rights the plaintiff previously enjoyed as such an employee was done in an unfair, unjust and unlawful manner. When a situation such as that occurs, then this Court in exercise of its inherent jurisdiction to do justice, obviously has the right to intervene and stop the injustice. It is after all trite law that equity will not suffer a wrong to be without a remedy.”

In the second case, the plaintiffs were bank employees who had gone on strike. When the strike was called off by their Union, they sought to be re-employed together with their other colleagues who had also gone on strike. They were shut out. Their Union lodged a dispute with the Minister for Labour. They then filed a suit to restrain the bank from calling in their staff loans or charging commercial interests thereon

until a trade dispute lodged with the Minister for Labour under the Trade Dispute Act, Cap 234 of the Laws of Kenya was resolved by the Minister and/or the Industrial Court. Simultaneously with the filing of the suit, they sought interlocutory injunctive relief. Aganyanya, J granted the interlocutory injunction. He reasoned as follows:-

“The plaintiffs are most likely to establish a *prima facie* case with a probability of success not only in this Court but also in the reference to the Minister for Labour and/ or the Industrial Court. Of course it is possible for the defendant to argue that since the value of the properties charged and the commercial rates of interest intended to be charged are known and that as a result the plaintiff cannot suffer irreparable harm if this injunction is not granted, I consider on a balance that the said plaintiffs are going to suffer double jeopardy, they having already been sacked – hence not in any other employment to meet their obligations to the defendant.”

Mr Wandaba hailed these two decisions as representing an emerging jurisprudence on injunctions whose core was that where an employee could show *prima facie* that his contract of employment had been unlawfully, wrongfully or unfairly terminated, the employer, if it was a bank, was not entitled to exercise any statutory or contractual power of sale or call in the staff loan before the hearing and determination of the suit challenging such termination. He urged me to follow this new jurisprudence. He impressed on me that the power to grant an interlocutory injunction is wider than what is encapsulated under order 39 of the Civil Procedure Rules. He cited the case of *Njoroge Kironyo & others v Kironyo Njoroge* [1976] KLR 109. That case is authority for the proposition that although order 39 does not expressly give the High Court jurisdiction to grant an interlocutory injunction on the application of the defendant, the Court may in appropriate cases do so. Counsel also submitted that the balance of convenience favoured the granting of the injunction. He further urged me to adopt Aganyanya, J’s reasoning that damages cannot be an adequate remedy where the plaintiff is in effect being subjected to a double jeopardy. Counsel wound up his submissions by pointing out that the applicant’s terminal dues in the sum of Kshs 3,370,757.65 were unilaterally applied to his loan account by the bank and impressed on me that the applicant was ineligible for pension until he attained 55 years. He urged me to consider that with pension he would have no difficulty in servicing his obligations.

Mr Kairaria, counsel for the bank, relied on the affidavits filed on behalf of the bank. He argued that the applicant had not made out a *prima facie* case with a probability of success, that the applicant’s injury, if any, could adequately be compensated in damages, and that even the balance of convenience weighed in favour of the bank. On the existence of a *prima facie* case he submitted that there was no agreement that the applicant would serve until age sixty. On the contrary, the applicant’s employment with the bank was governed by his letter of appointment and the officers’ terms of service manual. He referred to paragraph 4 of Cheruiyot’s affidavit and the exhibits mentioned therein. According to the terms and conditions in those documents which the applicant himself accepted on 4.6.1993, the normal retirement age is fixed at 55 years, the optional retirement age at 50 years and the bank may terminate the service of an officer of the applicant’s rank by giving him three months’ notice or paying salary in lieu of such notice. Counsel submitted that the applicant’s service was lawfully and properly terminated by the bank’s Board of Directors on 23.3.98. Such termination was treated as early retirement and he was paid three months’ salary in lieu of notice and his other benefits were granted.

In these premises, counsel submitted, the applicant did not have any case for unlawful dismissal. Furthermore, counsel argued, even if such a case were to be made at the trial, the applicant’s remedy would be damages for unlawful dismissal whose measure would be salary in lieu of notice as per contract of service. In this case such damages would be three months’ salary in lieu of notice which amount has already been paid to him and he would accordingly get nothing. The case of *Rift Valley Textiles Ltd v Edward Onyango Oganda* [CA No 27 of 1992] (unreported) was relied on for the proposition that where dismissal is wrongful, it stands and what flows from the breach of contract of employment is damages according to the terms thereof. Such damages would not be aggravated damages and would not give the claimant benefits upto the retirement age. Counsel submitted that given this state of the law, it was not open to the applicant to seek to set off the damages he is claiming against his known liabilities to the bank as he is not entitled to the damages he is claiming. As regards whether the applicant owes the bank any money, counsel argued that from the applicant’s own correspondence to the bank it was evident that he

has acknowledged the debt and made proposals for payment. He cannot therefore be taken seriously when he avers in the plaint that no amount is owed to the bank. It is further submitted that the applicant has come to Court with unclean hands and he should not get equitable relief. In his letter of 26.1.2000, the applicant is thanking the bank for stopping two sales of his properties, he then says he is making arrangements to settle his obligations. He also promises to deliver the Mercedes car to the bank. Instead of honouring those promises, he files suit in which he claims he owes the bank nothing and gets an *ex parte* injunction. He does not disclose that he has acknowledged the debt, promised to repay the same and has been granted an indulgence. On the issue of interest, counsel refers to paragraph 19 of Cheruiyot's affidavit to show that the variation in the interest rates were within the terms of the contract between the parties including the contract of charge. As regards the contention that the applicant became unable to service his debt after termination of his contract of service, the defendant's counsel referred to paragraph 13, 14, 15, and 16 of Cheruiyot's affidavit to show that he was not servicing his overdrafts as required even when he was in employment. Reference was also made to the applicant's own exhibits to show that his loans were not fully secured contrary to his claim that the loans were amply secured. All in all, counsel for the bank submitted, there is no case for an injunction as there is a debt owing, and the statutory notices have been issued. In his view, if there is any dispute, it can only be on the amount owing due to interest. Such a dispute cannot be a ground for granting an injunction. The case of *Shah v Devji* [1965] EA 91 was relied on for the proposition that the Court should not grant an injunction restraining a mortgagee from exercising his statutory power of sale solely on the ground that there is a dispute as to the amount due under a mortgage.

As regards whether the applicant's injury can adequately be compensated in damages should it turn out at the trial that he was entitled to the reliefs sought, counsel submitted that the bank can compensate him in the unlikely event that he is damnified by any sale. He cited the case of *Ibrahim v Sheikh Bros Investment Ltd* [1973] EA 118 for the proposition that where damages would be an adequate remedy, even the fact that the breach of contract alleged is uncontroverted is not normally a ground for the grant of an injunction.

As regards the balance of convenience, counsel submitted that granting an injunction will not be beneficial to the applicant or the defendant because the value of securities will continue to be eroded while the debt will continue to escalate. In his view, the balance of convenience tilted in favour of refusing the injunction. Finally, counsel pointed out that since 1998 when the applicant's employment with the bank came to an end, the applicant had not made any payment in reduction of his liabilities.

In reply, Mr Wandaba reiterated that the applicant was unlawfully sacked by the Minister for Finance and the bank merely rubber stamped the decision but purported to have acted on its own initiative as a cover up.

He further stated that the applicant had not denied the debt. His case was that no money would be owing to the bank if he is allowed to set off the amount of damages claimed in the plaint. He also contended that the applicant was not guilty of lack of candour as all the matter relied upon by the bank to show such lack of candour was contained in his own exhibits to the Court. He conceded that the loans were due and unpaid even when the applicant was in employment but contended that the applicant was making efforts to repay the same.

Having set out the background of the matter and the rival submissions, it is now convenient to consider the application. The principles for the grant of an interlocutory injunction are not in doubt even though Mr Wandaba thinks there is a new jurisprudence in the decisions of Mbaluto and Aganyanya, JJ which I have referred to herein before. Those principles as enunciated in *Giella v Cassman Brown & Co* [1973] EA 358 and reiterated in subsequent appellate and High Court decisions too numerous to recount are that first, the applicant must show a *prima facie* case with a probability of success at the trial and if the Court is in doubt it should decide the application on a balance of convenience. Secondly, an injunction will not usually be granted unless the applicant will suffer an irreparable injury which cannot adequately be compensated by an award of damages. And it must always be remembered that as an injunction is an equitable remedy it may be denied to a supplicant whose conduct pertinent to the subject matter of the suit does not meet the approval of a Court of equity. The Court should also bear in mind that in assessing

whether there is a *prima facie* case or not it is not called upon to, and indeed it ought not to pronounce itself definitively on the contested facts and issues of law. I will approach the application before me with that perspective of the matter.

Does the applicant have a *prima facie* case with a probability of success? It is clear from the submissions of counsel that the applicant's averment in the plaint that he does not owe any debt to the bank and on the contrary it is the bank which is indebted to him is only tenable on the supposition that his contract of service was unlawfully and wrongfully terminated and he is consequently entitled to be paid a sum of Kshs 409,003,135/= as special damages representing loss of salary and benefits from which his contract was ended to his attainment of sixty years. This supposition raises two issues. The first is whether as a matter of legal principle a borrower can resist a lender's desire to exercise the statutory power of sale on the basis that he has made a legal claim for damages against the lender which is equal to or in excess of the debt due to such lender? In my opinion, a legal claim, until and unless admitted or proved is no more than a hope for money. It is a contingent asset or, in the language of the learned, a chose in action which cannot be offset against an existing liability. The borrower cannot be heard to say, he does not owe the lender money because there is a chance that a Court of law may at unknown time in the future adjudge the lender to be indebted to him in a sum equal to or exceeding his present liability. The second issue is whether the applicant's contract was unlawfully terminated, and if it was, whether he would be entitled to the damages claimed? Looking at the documents which constitute the contract of service, I am in agreement with the submissions by counsel for the bank that the applicant cannot *prima facie* prove that he was entitled to work until age sixty. On the contrary, his retirement age was to be 55 years. Furthermore, during this period of service, he was subject to the condition that the bank could terminate his employment on three months or salary in lieu thereof. In this regard, it is common ground that the applicant was paid three months' salary in lieu of notice and his other benefits were granted and applied to his loan account.

On those premises, whether the bank took its cue from the Minister for Finance or it exercised its own independent judgment in showing the applicant the door, it cannot be concluded that he has shown a *prima facie* case with a probability of success at the trial that the termination of his employment was unlawful. It would appear to be entirely in conformity with his contract of service as contained in the letter of offer and the officers' terms and conditions of service which were incorporated therein by reference and which applied to him. He got three months' salary in lieu of notice. A termination of employment in accordance with the contract terms could not possibly be unlawful. Unfair it may be, but unlawful it cannot be. And the laws of Kenya do not know of the doctrine of unfair dismissal. But even if the dismissal was unlawful, the law is as laid down by the Court of Appeal in the *Rift Valley Textiles Limited* case (*supra*): the dismissal is effective and the measure of damages is according to the terms of the contract.

The applicant having been paid three months' salary in lieu of notice, I am in agreement with Mr Kairaria's submission that he is unlikely to get the millions he has pleaded in the plaint. Indeed, he will probably be entitled to not a cent over and above what has already been paid to him. In short, the applicant's case to the extent it is predicated on a successful action for unlawful dismissal and compensation for loss of salary and benefits up to year 2009 appears to be no more than a pious hope. It is not a case with a probability of success at the trial. This finding alone distinguishes this case from the cases of *Michael Hamisi Wabungo* and *Joseph Mugallo & 10 others* (*supra*) relied upon by counsel for the applicant.

In both those cases, the Courts found that the applicants had shown a *prima facie* case with a probability of success at the trial that their dismissals were unlawful. The injunctions were issued on that basis. Be that as it may, as Mr Wandaba was strongly of the opinion that the cases represented an emerging jurisprudence to the effect that a dismissed employee who has challenged his dismissal is entitled as a matter of justice and equity to the preservation of the *status quo* as regards his properties if the same had been charged to his employer, I am constrained to comment further. That is not my understanding of those cases. But if that is what they are perceived to hold, I must respectfully disagree with any such purportedly new jurisprudence. In my opinion, justice must always be dispensed in accordance with well-established legal principles and not in accordance with judicial idiosyncrasy or whim. And of course it is

trite learning that equity follows the law. Being of that persuasion I cannot see that a lender who happens to be the employer of the borrower can be restrained from exercising his contractual or statutory powers merely because the borrower has brought into question the lawfulness of his dismissal from the lender's service. And even if it may be the case that in common parlance the dismissal of an employee and the recalling of his loans thereafter may be called double jeopardy, such action cannot be conceived to be double jeopardy within the meaning of the law.

Enforcement of contractual rights cannot be regarded as punishment. The bottom line is that all applications for injunction irrespective of the contractual or other relationships between the parties are to be decided on the basis of the settled principles for the grant of such relief. I do not get the impression that my brothers in the cases referred to were departing from those principles. It appears to me that they applied those principles to the facts in the cases before them. To that extent therefore, I am unable to discern any new jurisprudence in those cases. I am almost certain that my brothers would themselves if asked deny that they were setting new jurisprudential frontiers.

The other issue raised by the applicant is interest on the charge debt. He complains that a commercial rate of interest has been applied to his loans after his dismissal. That is so. However such escalation of interest is as shown in Mr Cheruiyot's replying affidavit perfectly in accordance with the applicant's terms and conditions of employment and the instruments of charge and mortgage. There would be no probability of success on that score.

All in all, on a consideration of the arguments canvassed before me, I find that the applicant has not shown a *prima facie* case with a probability of success at the trial. This finding is in itself sufficient to dispose of this application. Be that as it may, I will consider the other conditions for the grant of an interlocutory injunction.

Is the applicant's probable injury capable of being adequately compensated in damages? I have no doubt that it is. The applicant has known all along that the securities he offered for his charge debt would be realized if default was made in the repayment. As I have said severally, once property is offered as security it by that very fact becomes a commodity for sale. And there is no commodity for sale whose loss cannot be compensated adequately in damages. So although Mr Wandaba's eloquence nearly induced in me tears of sympathy for the applicant, I am on a rational consideration of the matter impelled to conclude that the applicant's loss is perfectly compensable by an award of damages and that the bank is capable of meeting any such award. The application fails on this ground too.

Last but not least, I take a look at the conduct of the applicant. He admits the debt in correspondence to the bank and promises to make arrangements to pay the same. He even promises to surrender his Mercedes Benz car. Instead of doing or even attempting to do that, he knocks on the door of equity. The door is opened on his representations that he owes the bank nothing; that he has a substantial claim against the bank; and he is a victim of unlawful dismissal and application of unconscionable and unagreed rates of interest on his loans, and further that the debt was amply secured and well serviced before his most unfortunate dismissal. Then when the facts are presented *inter-partes*, it is crystal clear that he is indeed indebted to the bank, the interest rates charged are in accordance with his contract with the bank, the loans were not well serviced even when he was in service and some securities were never even perfected. And to cap it all, it emerges at the trial of his application in mid-2001 that he has not paid a cent to the bank since the termination of his contract of service in 1998. Can a Court of equity grant him relief in those circumstances? No. The applicant is undeserving of any equitable relief on this additional basis also.

In the result, the applicant's application dated the 21st day of February, 2000 is for dismissal and is hereby dismissed with costs to the defendant.

Dated and delivered at Nairobi this 28th day of June, 2001

A.G. RINGERA

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JUDGE