



**Musumba v NCBA Bank Kenya PLC (Cause E030 of 2024)
[2024] KEELRC 1142 (KLR) (17 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1142 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E030 OF 2024**

**SC RUTTO, J
MAY 17, 2024**

BETWEEN

KELVIS M. MUSUMBA CLAIMANT

AND

NCBA BANK KENYA PLC RESPONDENT

RULING

1. What is before this Court for determination is a Notice of Motion Application dated 16th January 2024, through which the Claimant/Applicant seeks the following orders;
 1. Spent.
 2. Spent
 3. That this Honourable Court be pleased to issue orders compelling the Respondent to furnish the Applicant with the investigation report pertaining to his termination.
 4. That pending hearing and determination of this application and the claim filed herewith, this Honourable Court be pleased to issue orders compelling the Respondent to furnish the Applicant with disciplinary proceedings, minutes and/or transcripts of recordings of the disciplinary hearing.
 5. That this Honourable Court be pleased to issue orders restraining the Respondent from converting the Applicant's staff mortgage and staff loan facility to commercial rates pending hearing and determination of the claim filed herewith.
 6. Spent.
 7. That the Honourable Court do grant any other order it deems fit in the circumstances.
 8. That the costs of this Application be borne by the Respondent.



2. The Application is premised on the grounds set out on the face of the Motion and the Claimant's Supporting Affidavit sworn on 16th January 2024. Grounds in support of the Application are that the Claimant was issued with a show cause letter dated 28th July 2023. The show cause letter was in respect to an alleged ongoing investigation on suspicious transactions involving fraudulent re-activation and debiting of accounts. The Claimant was subsequently suspended from duty vide a letter dated 1st August 2023 to allow for investigations.
3. The suspension persisted for a period of three months until 8th November 2023 when the Claimant was invited for a disciplinary hearing, whereupon the Respondent reached a decision to terminate his employment. This decision was communicated vide a letter dated 21st December 2023. The Claimant contends that his termination was unfair, unlawful and discriminatory.
4. It is the Claimant's assertion that termination from employment effectively meant his staff benefits were equally stopped, the unfairness of the entire disciplinary process notwithstanding.
5. He further avers that the Respondent has indicated that it will forthwith convert his staff mortgage and personal loan into public commercial rates with effect from 20th January 2024, which rates he terms as quite exorbitant and beyond his reach more so now that his salary and staff benefits have been discontinued forthwith severely diminishing his financial capability.
6. It is the Claimant's assertion that with the aforesaid conversion, he stands to lose his house which he purchased vide the aforesaid mortgage. He avers that the house is his primary place of residence as well as his young family.
7. The Claimant further avers that he requested for the recordings of the hearing but the Respondent did not provide the same to enable him prepare an administrative appeal. He was constrained to lodge the appeal without the requested information which invariably means there is a chance his administrative appeal will fail.
8. The Application is opposed through a Replying Affidavit sworn on 12th February 2024, by Ms. Christine Wahome, who describes herself as the Respondent's Senior Legal Counsel. Ms. Wahome avers that the Respondent is not in possession of the audio or visual recording of the disciplinary meeting. That even though the meeting was recorded, the Respondent has been unable to retrieve that recording.
9. She further states that regardless, the minutes of the meeting were also kept in writing and the Claimant approved and signed off on them.
10. As for the investigation report, Ms. Wahome avers that the same covers other employees who are not parties to the suit. That it also covers personal data of those employees as well as that of the Respondent's customers.
11. She is informed by the Respondent's counsel on record that the Respondent is under a statutory duty to keep that information confidential. She avers that the Respondent will provide a redacted version of the investigation report when responding to the substantive suit.
12. With regards to the Claimant's contention that his employment was unlawfully terminated, Ms. Wahome avers that the Court cannot in the application, determine whether or not the Claimant's employment was lawfully terminated. That should be a decision left for the court that hears the full evidence.
13. On the issue of the interest on the Claimant's outstanding loan, it is Ms. Wahome's assertion that at the time of applying for the loan, the Claimant accepted the terms of the Letter of Offer dated 23rd



- May 2022. That under the clause titled "Interest" in that Letter of Offer, the Claimant unequivocally accepted that the interest rate will change from staff rate to commercial rates upon his leaving employment. According to her, this change is not conditional on the termination of employment being lawful.
14. It is Ms. Wahome's view that given that contractual provision, the court would be re-writing the contract for the parties if it were to order maintenance of the interest rate at staff rates. She is informed by counsel on record for the Respondent that the court has no power to re-write the contract.
 15. That further, interest at the staff rate is a fringe benefit that an employee receives while in employment. Once that relationship terminates, the fringe benefits must also terminate. Ms. Wahome avers that it would be inequitable and absurd to insist on maintaining the fringe benefits when the relationship upon which it is founded, no longer exists.
 16. She further states that the change in the rate of interest only means a change in the monthly installments. If the court ultimately finds that the change should not have happened, it can order a refund of the difference between the staff rate and the commercial rate.
 17. According to Ms. Wahome, the Claimant's stated fear of losing the house purchased with the loan is speculative. He will only lose the house if he defaults in repaying the loan as contractually agreed. At any rate, such a loss was in the Claimant's contemplation when he took the loan. It is not irreparable.
 18. In response to the Respondent's Replying Affidavit, the Claimant filed a Supplementary Affidavit in which he avers that he is not opposed to being issued with the redacted investigation report as long as the redacted information relates to the personal data of the other employees and not the actual substance of the investigation.
 19. He further deposes that the Respondent stands to suffer no prejudice whatsoever in view of the fact that the facility is secured with a charge over the house and if the court was to find in favour of the Respondent after the hearing of the case, the Respondent will still recover the loan amount and any forgone interest.

Submissions

20. When the matter came up for mention on 13th February 2024, the Court directed that the Application be canvassed by way of written submissions. Both parties complied and I have considered their respective submissions.

Analysis and Determination

21. At the outset, I note that the issue regarding the investigation report and disciplinary proceedings is spent as the Respondent has indicated that it will avail a redacted version of the investigation report when responding to the substantive suit. With respect to the disciplinary proceedings, the Respondent annexed a copy of the same to its Replying Affidavit.
22. As such, to my mind, the singular issue for determination at this juncture is whether the Claimant has made out a case for grant of an injunction. Put differently, should the Court restrain the Respondent from converting the Claimant's staff mortgage and staff loan facility to public commercial rates pending the hearing and determination of the main suit?
23. In its submissions, the Respondent has stated that the Claimant accepted the terms of the Letter of Offer dated 23rd May 2022 which provides that the interest rates will change from staff rate to commercial rates upon his leaving employment.



24. In this regard, the Respondent contends that this change is not conditional on the termination of employment being lawful. The Respondent further posits that staff rates are fringe benefits that come with the employment relationship and remain only for as long as the employment relationship remains.
25. In my respectful view, despite the letter of offer being contractual, the question as to whether the termination of the Claimant's employment was unfair, has a bearing on the matter given that the facility was extended within the employment relationship. Notably, the Claimant's suit is premised on alleged wrongful and unfair termination of employment. Indeed, the Claimant would have continued servicing the mortgage and loan facility at staff rates were it not for his termination from employment.
26. On this issue, I ascribe to the finding by the court in the case of *Chris Kisire Chepkoi v National Bank of Kenya Limited* [2017] eKLR where the Court held that:

“The requirement that all contracts of employment be terminated within the law is mandatory pursuant to the provisions of section 41, 43, 45 and 47 of the Employment Act, 2007. Until there is a determination of the same, to make the claimant lose a benefit that was available within his employment which has now been terminated and the same alleged to be unfair would be to deny him a fair hearing before this court, such would remove the claimant from his employment with the respondent and deny him work benefits that were denied of him upon the termination of such employment.”

27. And further, in the case of *Beatrice Wangui Mwibia v Barclays Bank of Kenya* (supra) [2019] eKLR the Court stated that:

“The court is yet to hear and determine the Applicant's petition in the instant case and so whether or not the Respondent can vary the interest rates is also dependent on whether or not the termination of employment was lawful and fair. As the applicant has submitted, she risks losing her family home if the orders sought are not granted. It is my opinion that she has satisfied that she is likely to suffer loss that cannot be compensated by way of damages should the orders sought not be granted.”

28. Besides, the Claimant has prayed for an order of reinstatement. Therefore, in the event the Court orders reinstatement of the Claimant upon hearing the main suit, the fringe benefit of staff interest rates would be restored fully.
29. That said, I now turn to consider whether the Application is merited.
30. The threshold for grant of injunctive orders was set out in the celebrated case of *Giella v Cassman Brown & Co Ltd* [1973] E.A. In this regard, the applicant has to establish a prima facie case, and that if the orders are denied, he will suffer irreparable injury. Further, and in case of doubt, the issue in contention ought to be decided on the scale of a balance of convenience.
31. Applying the above principles to the case herein, the pertinent question that ought to be determined at the outset is whether the Claimant herein has made out a prima facie case with a probability of success.
32. In the case of *Mrao v First American Bank of Kenya Limited & 2 Others* [2003] KLR 125, a prima facie case was described as follows:

“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly



directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

33. In this instance, the main consideration ought to be whether the Claimant has pointed out a right that has apparently been infringed. The court must remind itself at this juncture, that this is not mini-trial hence will not examine the evidence presented microscopically.
34. The Claimant herein has averred that his termination was unfair and did not meet the prerequisites outlined in the Employment Act. In this regard, the Claimant has proceeded to highlight what he considers as procedural irregularities. He asserts that despite multiple requests, the Respondent failed to furnish him with sufficient information in the form of audit trails to adequately respond and or defend himself. He further avers that his termination was premeditated and that the Respondent kept changing the time for the disciplinary hearing hence rendering him unable to bring a representative with him to the hearing.
35. It is the Claimant’s further contention that his employment was not terminated for valid and fair reasons in that there was no evidence that he benefitted from the alleged fraudulent transactions.
36. The Claimant further contends that there was no standard operation procedure or system manual to guide the authorization process and that this was not considered by the Bank hence he was left to his own devices.
37. In light of the averments made by the Claimant, it is not in doubt that this would require the Court to interrogate and call for rebuttal by the Respondent. Indeed, the claims against the Respondent cannot be termed as frivolous.
38. It is therefore the finding of this Court that the Claimant has established a *prima facie* case.
39. Establishing a *prima facie* case is not an end in itself and cannot form sufficient basis to grant an interlocutory injunction, hence the court must further be satisfied that the injury to be suffered by an applicant in the event the injunction is not granted, will be irreparable.
40. The question then should be, will the Claimant suffer irreparable injury in the event he is not granted the injunctive orders he seeks at this stage?
41. On this issue, the Claimant has submitted that he has paid off a significant portion of the mortgage which he continues to service to this day even after termination of his employment. He further submits that the prayer for an injunction is primarily meant to preempt hardship on his part to the point of having his house auctioned as this would occasion irreparable loss to him.
42. On its part, the Respondent has submitted that they have not seen the irreparable injury that will occur absent of an injunction. That at worst, the rate of interest will change to commercial rates. That on its own, that would not lead to the sale of the security. According to the Respondent, the alleged injury is speculative.
43. It is unequivocal that there is a big contrast between the staff interest rates enjoyed by the Claimant prior to his termination from employment and the public commercial rates the Respondent sought to impose upon termination of the Claimant from employment.
44. In my view, converting the loan to commercial rates would significantly impact the Claimant’s ability to continue servicing the facility. This is further bearing in mind that with the Claimant having been terminated from employment, he has lost his source of income and it is more than probable that he will strain to service the facility at the higher repayment amounts accruing from commercial interest rates Therefore, the risk of the Claimant losing the home which he purchased through the mortgage



facility is imminent. In my view, the ensuing injury cannot be adequately compensated by an award of damages.

45. Accordingly, I find that the Claimant has established that he will suffer irreparable loss, in the event the injunctive orders are not granted. On the other hand, the Respondent still holds the house as security and can still charge commercial interest rates should the Court determine that the Claimant's termination was fair. Further, the Respondent can recall the loan and mortgage facilities with the applicable interest rate from the date of termination.
46. In light of the foregoing, and all things considered, it is apparent that the balance of convenience tilts in favour of the Claimant.

Orders

47. In total sum, the Court allows the Claimant's Application dated 16th January 2024 and makes the following orders:
 - a. The Respondent be and is hereby restrained from converting the Claimant's staff mortgage and staff loan facility to commercial rates pending hearing and determination of the Claim herein.
 - b. The costs of this application shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MAY 2024.

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STELLA RUTTO

JUDGE

In the presence of:

For the Claimant/Applicant Mr. Ikua

For the Respondent Ms. Cheruiyot instructed by Mr. Kongere

Court Assistant Millicent Kibet

