



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 673 OF 2017

JIM KENNEDY KIBIRO NJERU.....PLAINTIFF

VERSUS

EQUITY BANK (K) LIMITED.....DEFENDANT

RULING

What is before court is the Plaintiff's Notice of Motion dated 25th April, 2017 brought pursuant to Article 10, 40 (3), 159(2) (d) of the Constitution, Sections 1A, 1B and 3A of the Civil Procedure Act, Order 40 rules 3 & 7 of the Civil Procedure Rules, Section 93(3) of the Land Registration Act and all the other enabling provisions of the Law.

The application is based on the grounds, which in summary is that the Plaintiff is a former employee of the Defendant whose employment was unlawfully, illegally and unfairly terminated by the Bank. Subsequently the Plaintiff together with nine of his colleagues instituted a suit in the Employment and Labour Relations Court at Nairobi ELRC No. 1430 of 2015 and vide the said case Hon. Lady Justice Hellen Wasilwa on 6th April, 2016 ordered that the loan facilities taken out by the Plaintiff and his colleagues be preserved as they would suffer immensely if the loans were converted to commercial rates. The Defendant in total disregard to the Court order has converted the Plaintiff's loan to a commercial rate and subjected the same to an interest rate of 18% as opposed to staff rate of 5% making it difficult for him to repay the loan. The Defendant has instructed Josrick Merchants Auctioneers to advertise the Plaintiff's land parcel number KAJIADO/KAPUTEI - NORTH/14551, MILIMANI ESTATE KITENGELA (hereinafter referred to as the 'suit land') for sale by public auction on 28th April, 2017. The Plaintiff will be rendered homeless as he relies exclusively on the suit land for a home and a source of livelihood both for himself and his family which comprises of his young school going children. The Plaintiff remains committed to repaying the loan amount fully and is not in arrears as alleged by the Defendant.

The application is supported by the affidavit of JIM KENNEDY KIRIRO NJERU the Plaintiff herein where he deposes that vide a letter of offer dated 13th June, 2011 he was offered a loan facility by the Defendant of Kshs.3,500,000 at an interest rate of 5% per annum and it was secured by a first legal charge over the suit land which is registered in his name. He maintains that while an employee of the Defendant, he faithfully and dutifully paid monthly instalments of Kshs.23,099 until sometime on 2nd July, 2015 when the Defendant terminated his contract. He avers that together with nine of his former colleagues, they instituted a claim for unlawful and unfair termination in the ELRC at Nairobi which case has now been confirmed for full hearing on 2nd May, 2017. He states that the ELRC in the ruling by Justice Hellen Wasilwa dated 6th April, 2016 directed that the Defendant was to accord them the benefits they were rightfully entitled to as its employees, which benefits include but not limited to the preferential interest rate at 5% per annum on all loan facilities held by the employees, current facility inclusive. The Defendant has converted the preferential interest rate of 5% to a commercial one and is demanding a total sum of Kshs.5, 073,717.81 to be paid instantly or the suit land is to be auctioned. He claims that while still in employment with the Defendant, he made an investment through the Employee Share Ownership Plan (ESOP) where he acquired 18,000 shares in the Defendant company, which shares would have in fact matured for purposes of trading at the market price in 2013. He asserts that the Defendant shares' current market price is Kshs.32.75 per share which figure translates to approximately Kshs.589,500 being the monetary worth of his shares and the Defendant has withheld the said ESOP shares which had matured by 2016 and the same is currently an issue of determination at the ELRC Case in Nairobi. He declares that while still employed by the Defendant, he had mileage claims amounting to Kshs.26,388.15 and Equity Bank Sacco shares totalling Kshs.28,053 which the Defendant has refused to pay and or allow him to access respectively. He claims he has more than Kshs.1,586,046 which monies are in the custody of the Defendant and can offset the alleged loan arrears if any, which arrears are not admitted. He affirms that the findings in the pending ELRC case will have a direct bearing on the instant case as to how much is payable.

The application is opposed by the Defendant whose Human Resource Manager Staff Loans LUCY KAMAU swore a replying affidavit where she confirmed that the Plaintiff was its former employee who was summarily dismissed from employment on 2nd July, 2015. She deposed that on 2nd May, 2011 he applied for staff loan from the Defendant bank in the sum of Kshs.3,500,000. And the Defendant through a letter dated 13th June, 2011 offered to extend the loan facility to the Plaintiff which said amount he accepted and provided the suit land as a security over the charge. She avers that under Clause 3 of the Offer, the principal plus interest was to be repaid in 240 months instalment of Kshs.23,099 each and 5% interest rate per annum was to be charged from the date of the draw down and the Defendant reserved to vary the rate of interest without prior notice to the Plaintiff. She contends that the benefit of staff loans was a contractual privilege, which the Plaintiff not entitled to it after ceasing to work for the Defendant.

She claims that in terms of clause 5 of the Offer, in the event the Plaintiff failed to pay any sum, he was expected to pay additional interest rates on such sums from the date of such failure. Further that it was clear under clause 4 of the Offer that in the event the Plaintiff ceased working for the Defendant, the loan facility would be charged at the prevailing commercial rate without prior notice to him. Further that clause 9 of the Offer Letter stated that failure by the Plaintiff to repay the loan would lead to the realization of the security. The Plaintiff further took a staff loan of Kshs.580,000 which was secured by a further Charge over the suit land on 13th August, 2013. She contends that after the Plaintiff and some other employees were dismissed from employment, they instituted a suit against the bank on 14th August, 2016 in the Employment and Labour Relations Court being Cause No. 1430 of 2015 but did not seek to restrain the Bank from charging commercial interest and additional interest in terms of clause 4 and 5 of the Offer. She insists that the Bank was only restrained from listing the Plaintiff and the fellow claimants at the Credit Reference Bureau and not interfering with the Plaintiff's free, unhindered and voluntary operation of their individual savings and other accounts held at Equity Bank Sacco Ltd. Further that on 6th April, 2016 Lady Justice Hellen Wasilwa in the Labour Case restrained the Defendant from converting the loans the Claimants including the Plaintiff were servicing to commercial rates but did not restrain the Plaintiff from repaying their loans which encompassed paying additional interest rate in case of default nor did it address the question of accrued commercial interest rate from the time they left employment being 2nd July, 2015. She affirms that the Plaintiff was duly served with the statutory notices which were sent by registered post at his last known address and he has neglected, refused and or failed repay the loan and is in breach of clause 13 of the offer letter. On 4th January, 2016, the bank issued a demand for him to pay the outstanding loan amounting to Kshs. 4, 355, 702.34. Further, that since the Plaintiff has failed to settle the outstanding loan, the Bank is entitled to exercise its statutory power of sale and as at November, 2016 the amount owed stood at Kshs. 4,875, 217.49 and they instructed Josrick Merchants Auctioneers to sell the suit property, that served the Plaintiff with a Redemption Notice. She reiterates that the Plaintiff was allowed unhindered access to his savings account as well as Equity Bank Sacco and therefore he should have applied the alleged savings of Kshs.1,586, 046 towards repaying the loan. She confirms that the Plaintiff acknowledged in his affidavit that he paid the monthly instalments towards servicing the loan until 2nd July, 2015 and that on 21st April, 2017, the Bank instructed Paragon Property Valuers Limited to conduct valuation of the suit property which undertook the said valuation and prepared a report that placed the suit property's open market value at Kshs. 6 million with forced sale value at Kshs. 4.5 million respectively. She insists the Plaintiff was well aware that as at 27th November, 2015 that the Bank had utilized the amounts held at Equity Bank Sacco to repay the loan. Further that the ESOP had been disposed off and the proceeds realized therefrom to offset his outstanding loan.

The Defendant filed its written submissions but the Plaintiff failed to do so and relied on their supporting affidavit. On 17th July, 2017 the parties gave their submissions on the application, which I have considered.

Analysis and Determination

Upon consideration of the materials presented and arguments canvassed by the parties in respect of their Notice of Motion dated 25th April, 2017, I find that the only issue for determination at this juncture is whether the Plaintiff is entitled to the injunctive orders sought pending the hearing and determination of this suit.

It is not in dispute that the Plaintiff was granted a mortgage facility of Kshs. 3.5 million with the Defendant while still in their employment which he secured with a charge over the suit land. It is also not in dispute that the Plaintiff further took out a staff loan of Kshs. 580,000 and secured it with a further charge over the suit property. It is not in dispute that the Plaintiff has defaulted in the mortgage repayment and was served with the requisite notices of sale of the suit land through public auction. What is in dispute is the interest rate charged on the loan, the outstanding balance and the Bank's conversion of Plaintiff's ESOP and Equity Bank Sacco Shares to repay part of the mortgage.

It is now established in Kenya that the principles for consideration in determining whether temporary injunction can be granted or not is well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** as follows:

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

In line with this principle, I wish to interrogate whether the Plaintiff/Applicant has demonstrated a prima facie case with a probability of success.

I note that Lady Justice Hellen Wasilwa in the ELRC Cause No. 1430 of 2015 stated at paragraph 23 and 24 of her ruling dated 6th April, 2016, as follows: **'However, on a balance of convenience, it would be pertinent for this Court to preserve the loan they are currently servicing because they stand to suffer immensely if they are converted to commercial rates at the moment. If in any event the Court finds otherwise, then the Respondents will still be able to recover their dues as they are holding onto the Applicants terminal dues.'**

From the reading of this, I find that the issue of interest rate had already been dealt with, and the Bank ordered not to convert it to a commercial one until the ELRC suit was heard and determined. I note from the Defendant annexure of the Bank Statement from page 85 and 86, the loan amount to be paid monthly doubled from the months of July, 2015 and have stayed so up to May, 2017 despite the Court Order from the ELRC given in April 2016. From this it is evident that the issue of interest rate is contentious, requires clarity and is best determined after a full trial and not at this stage.

In the case of **Mrao Limited Vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125** the court held that: **' In civil cases, a prima facie is a case in 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. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.'**

I note the Plaintiff claims the Defendant has converted the interest rate from 5% to 18%. The Defendant has expressly admitted that the

interest rate on the loan was converted to a commercial rate when the Plaintiff was terminated. In so far as the Plaintiff has defaulted in the mortgage repayment, I note that the Defendant has also admitted converting the Plaintiff SACCO Shares and ESOP to repay part of mortgage but has not provided the exact figure within the replying affidavit on how much this amounted to. I further find that the ELRC suit mentioned above which is still pending is dealing with issues interlinked with this instant suit and its outcome will have an impact on this suit.

In the circumstances, I find that failure by the Defendant to present the interest rate charged on the loan account after the Plaintiff left employment, and amount of proceeds from the SACCO and ESOP that it utilized to repay part of the loan requires an explanation and in relying on the *Case of Giella Versus Cassman Brown and Mrao vs. First American Bank Limited*, I find that the Plaintiff has indeed established a prima facie case with a probability of success.

On the second issue as to whether the Plaintiff might otherwise suffer irreparable injury, which would be adequately compensated by way of damages. In the instant case, I note that the Plaintiff and his family reside on the suit property which is also a source of his livelihood. I hence find that it is the Plaintiff who will suffer irreparable injury if the injunctive orders are not granted.

On a balance of convenience, from the facts and materials presented, I find that the balance tilts in favour of the Plaintiff who is likely to suffer more inconvenience if the injunction is disallowed as opposed to what the Defendants will suffer if the injunction is allowed.

From the above, it is clear that Plaintiff has established a prima facie case to meet the threshold for the grant of orders of injunction. I consequently allow the Plaintiffs' Notice of Motion dated the 25th April, 2017 pending the hearing and determination of the suit. I however urge the Plaintiff to continue repaying the mortgage as failure to do so will be to his detriment once the issues in contention are determined.

Costs will be in the cause.

Dated signed and delivered in open court at Kajiado this 7th day of December 2017.

CHRISTINE OCHIENG

JUDGE

Present :

Ms Maronich holding brief for G. Msore for Applicants

Koyna holding brief for Kuche for Respondents

Cc Mpoye