



**Ngoto v Bank of Africa Kenya Limited (Cause E462 of 2025)
[2025] KEELRC 2304 (KLR) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEELRC 2304 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E462 OF 2025
SC RUTTO, J
JULY 31, 2025**

BETWEEN

ANNAFAITH MUTHONI NGOTHO CLAIMANT

AND

BANK OF AFRICA KENYA LIMITED RESPONDENT

RULING

1. What is before this Court for determination is a Notice of Motion dated 22nd May 2025, through which the Claimant/Applicant seeks the following orders;
 1. Spent.
 2. Spent
 3. Spent.
 4. Spent.
 5. That this Court issue an order restraining the Respondent, whether acting by its servants, agents or any other person acting under its authority, from varying or applying interest at a rate higher than the 5% staff interest rate on the loan account and facility between the Claimant and the Respondent pending the hearing and determination of the subject suit.
 6. That this Honourable Court be pleased to grant such other or further reliefs as it may deem fit.
 7. That the costs of this application be provided for.
2. The Application is premised on the grounds set out on the face of the Motion and the Claimant's Supporting Affidavit sworn on 22nd May 2025. Grounds in support of the Motion are that the Claimant was employed by the Respondent vide a fixed-term employment contract dated 11th September 2019. Vide a letter of 20th December 2023, she was confirmed under permanent and



pensionable terms in her position as a Recoveries Officer with effect from 1st January 2024. In March 2024, the Claimant was placed in the Portfolio Quality Management department (PQM) as a Relationship Officer.

3. The Claimant avers that on 10th January 2025, she attended a PQM investigation presentation wherein it became apparent that an employee of the Bank, Judy Maina, had, from December 2023, periodically diverted funds totaling approximately Kshs. 7,600,000/- from the Respondent's clients Paymasters' and Check-off accounts. According to the Claimant, the said employee had been diverting funds into the account of Winnie Njeri Gitau 0376340009 at the Respondent's Thika Branch and into two Cool Kids accounts, of which she was the sole signatory.
4. The Claimant contends that she was neither a beneficiary of a single cent of the money misappropriated nor complicit in any part of the fraud perpetrated. Nevertheless, the Respondent issued her with a show cause letter. She duly responded to the show cause letter and outlined comprehensively, adequately and reasonably why she should not be dismissed, addressing each allegation with a satisfactory explanation. However, the Respondent still issued her with a Disciplinary Hearing Notice.
5. The Claimant attended the hearing having been given less than 48 hours to prepare and the Respondent having refused her request to call a witness and representative.
6. The Claimant further avers that *the constitution* and/or quorum of the Disciplinary Panel was irregular and blatantly violated the Respondent's Human Resource Policy 2019. She further believes that the panel was unlawfully and intentionally bloated so that the Head of Audit could act as prosecutor, jury, judge and eventual executioner and ensure that the process could have no other outcome but her dismissal irrespective of her culpability or responsibility.
7. That vide a letter of 11th February 2025, the Claimant was summarily dismissed despite myriad failings in the disciplinary process.
8. The Claimant further avers that the Respondent did not lose money because she made errors but because another employee outside the supervision and/or her control willfully altered account numbers to enrich herself.
9. That her predecessor in the PQM department was not dismissed on account of the loss. She contends that if the fraud preceded her service in the department, she cannot be reasonably held culpable for the same.
10. According to the Claimant, she appealed the decision and while the Appeal Hearing was held on 28th February 2025, she was only notified of the outcome vide a letter dated 27th March 2025, and which she only received on 4th April 2025. According to her, this is a clear violation of the Respondent's Human Rights Policy. She contends that her appeal was not fairly considered and merely reiterated her dismissal letter.
11. The Claimant asserts that the Respondent's disciplinary procedures were deliberately compromised and rushed in order to prejudice her and deny her a fair hearing.
12. The Claimant further avers that the Respondent had advanced her a loan of Kshs. 1,500,00/- on 13th September 2024 payable monthly at Kshs. 22,000/- a staff interest rate of five (5%). That as at 11th February 2025, the loan stood at 1,419,674.76.
13. It is the Claimant's assertion that the Respondent stated in the letter of summary dismissal dated 11th February 2025 that unless and until she entered into a repayment plan with them on or before the 13th



- February 2025, just two days after her summary dismissal, she would be required to make immediate payment of the total outstanding amount owed on or before her last working date.
14. That further, interest on the facility shall cease to be at staff rate with effect from 12th May 2025 and shall be calculated on a variable interest at a percentage totaling 22.59% with the threat that the Respondent bank will take all necessary steps to ensure recovery of all amounts owing together with interest accruing thereon.
 15. The Claimant avers that she would be compelled to pay an interest rate on her loan account at the rate of 22.59% up from 5% when the loan was taken, solely on the premise of the loan interest. As such, not only will she have had her sole source of income unconscionably taken away from her, she will also face the overwhelming burden of having to pay four (4) times more in interest rates to clear her outstanding loan. She thus faces imminent financial ruin.
 16. According to the Claimant, unless the Court freezes the interest rate on her loan, her well-being and that of her family shall be immediately and irreparably damaged.
 17. The Application is opposed through a Replying Affidavit sworn on 16th June 2025, by Christopher Kuria, who describes himself as the Respondent's Manager, Human Resources. Mr. Kuria avers that by a Facility letter dated 3rd April 2024, the Respondent agreed to advance a loan of Kshs 1,500,000/- to the Claimant, who at that time was still an employee of the Respondent.
 18. It is Mr. Kuria's assertion that the Claimant expressly signed and accepted the terms of the Facility, which had the following apposite express provisions:
 - i. Clause 3.1 Interest on the Facility shall be charged at the variable rate of 5% per annum being the Applicable Staff Rate of interest for mortgage facilities, which is subject to change from time to time; and
 - ii. Clause 3.2 interest rate referred to under Clause 3.1 is only applicable for as long as the Borrower is in the employment of the Bank, and the Bank reserves the right to determine and change the applicable rate or rates of interest and methods of calculating the interest applicable from time to time. The Bank has full power and authority to charge different rates for different accounts and/or transactions, provided, however, that the Bank shall be required to furnish the Borrower with a 30-day notice in writing prior to any change in the applicable rate of interest and method of calculating the interest payable.
 19. Mr. Kuria deposes that it is therefore clear that the preferential interest rate of 5% per annum on the loan taken out by the Claimant only applied on condition that she remained an employee of the Respondent. According to Mr. Kuria, the Claimant consented to a change of the interest rate applicable to the loan by the Respondent.
 20. Mr. Kuria further avers that the Facility is a binding agreement between the Claimant and the Respondent that she willingly entered into and accepted the terms thereof and cannot ask this Court to vary the terms of a valid agreement as she is attempting to do through the Application.
 21. He further avers that by a letter dated 11th February 2025, the Claimant was summarily dismissed from employment for failing to properly carry out her duties, leading to losses suffered by the Respondent pursuant to Section 44 (4) (c) of the [Employment Act](#).
 22. Mr. Kuria avers that sometime in December 2024, the Respondent discovered an anomaly in some of the accounts/transactions that formed part of the portfolio managed by the Claimant. Consequently,



- and in accordance with the provisions of the HR Policy on Disciplinary Processes, the Claimant was suspended from duty to allow the Respondent to carry out investigations into the said anomalies.
23. The Respondent's Audit Department carried out a comprehensive investigation into the matter and a Special Audit Report was prepared. Consequently, the Respondent invited the Claimant to a meeting held on 10th January 2025, when the Report was presented to her.
 24. The Report revealed that the Claimant had failed to properly carry out her duties, leading to loss of funds by the Respondent and indirectly allowing fraudulent transactions to take place.
 25. Consequently, by a letter dated 24th January 2025, the Respondent requested the Claimant to show cause why disciplinary action should not be taken against her and was given ample time to respond.
 26. The Claimant provided her response to the show cause letter and the same was reviewed by the Respondent and found not to satisfactorily address the concerns raised in the show cause letter.
 27. Thereafter, by email sent on 3rd February 2025, the Claimant was invited to a disciplinary hearing scheduled for 6th February 2025. The Claimant was informed that she was entitled to be accompanied by another employee of her choice.
 28. The Respondent considered the representations made by the Claimant at the disciplinary hearing in addition to the response to the show cause letter and made the decision to dismiss her from employment. The decision was communicated to the Claimant through the dismissal letter.
 29. By a letter dated 17th February 2025, the Claimant lodged an appeal against the decision set out in the dismissal letter and she was invited to an appeal hearing scheduled for 28th February 2025. She was once again informed of her right to be accompanied to the appeal hearing by another employee of her choice.
 30. At the appeal hearing, it became clear from the representations made by the Claimant that she was fully aware of the process of approval of transactions, but that she had failed to check the specific document that is used to debit bank accounts because she had assumed it was correct. This failure to check is what led to the losses suffered by the Respondent.
 31. The appeal committee considered the representations made by the Claimant and found that she did not present any new information or documentation that had not already been considered by the disciplinary committee. The appeal committee upheld the decision of the disciplinary committee as set out in the dismissal letter. The decision of the appeal committee was communicated to the Claimant by a letter dated 27th March 2025.
 32. Mr. Kuria avers that the dismissal letter provided the status of the loan taken out by the Claimant under the Facility and as her employment with the Respondent had come to an end, the preferential rate of 5% was no longer applicable to her.
 33. The Claimant was therefore required to clear the full outstanding amount as at the date of her dismissal from employment or to enter into a new Facility Agreement with the Respondent on commercial terms.
 34. Mr. Kuria deposes that the Respondent procedurally, fairly and lawfully dismissed the Claimant from employment.
 35. He further contends that the Facility is a separate contract that was entered into between the Claimant and the Respondent for purposes of a loan. In his view, this is unrelated to the terms of the Claimant's employment and the subsequent termination thereof, which is the subject of the main suit.



36. Mr. Kuria maintains that the loan was only subject to a preferential interest rate of 5% on the condition that the Claimant was an employee of the Respondent, and now that she is no longer employed by the Respondent, she cannot seek to impose this rate.
37. That now, the relationship between the Claimant and the Respondent is that of banker/lender and customer/borrower. In this regard, Mr. Kuria asserts that the applicable commercial rate applies to the Claimant's loan as it does to other customers, and this variation is in accordance with the terms of the agreement between the Claimant and the Respondent as set out in the Facility.
38. It is Mr. Kuria's further assertion that the Claimant has not demonstrated that she has a prima facie case as far as the application of the commercial interest rate is concerned. That the Claimant only received a preferential rate by virtue of a parallel employment contract between the parties, and now that the employment contract has come to an end, there is no basis for the preferential rate.
39. He is further advised that it is settled that the court cannot rewrite the terms of a contract between the parties. According to Mr. Kuria, the Application simply seeks to rewrite the terms of the Facility, which this Court should not countenance.
40. That further, the Claimant has not demonstrated that she has a prima facie case as far as the terms of the Facility are concerned or that she will suffer irreparable loss that cannot be compensated by way of damages if the injunctive orders sought are not granted. On the other hand, the Respondent is facing exposure of Kshs.1,388,658/- that is outstanding from the Claimant who has failed, neglected and or refused to sign a fresh facility letter to enable her to continue to repay the loan in instalments. According to Mr. Kuria, the Claimant should not be allowed to use the Court process to seek endorsement of a non-performing loan.

Submissions

41. The Application was canvassed by way of written submissions. Both parties filed their written submissions, which the Court has considered.
42. In support of the Application, the Claimant has submitted that on the face of it, her case is not just arguable but meritorious. Citing the case of Mark Theophil Odero Adoyo v DIB Bank Kenya Limited (2022) eKLR, the Claimant further submits that she has been diligent in repaying her loans.
43. Submitting against grant of the orders sought in the Application, the Respondent has referenced the case of Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited [2017] eKLR, and has argued that the Claimant does not anywhere in her documents challenge the validity of the terms of the Facility.
44. In the same vein, the Respondent has maintained that the Claimant applied for and received the funds in relation to the loan, and the preferential interest rate of 5% was only applicable to the loan as long as she was its employee. In further support of this argument, reliance was placed on the cases of Michael Alwema Kilumbi v Barclays Bank of Kenya Limited [2018] eKLR, Lilian Rhoda Adhiambo v Barclays Bank of Kenya [2021] eKLR and Joseph Njagi Mwita & 4 others v Barclays Bank Limited [2019] eKLR.
45. The Respondent has further submitted that the Claimant is bound by the terms of the Facility that she willingly accepted and received the loan that was disbursed to her. That the preferential interest rate was strictly conditional on her remaining employed by the Respondent, which is no longer the case.
46. Placing reliance on the case of Kariuki v SBM Bank (Kenya) Limited (Cause E404 of 2023) [2023] KEELRC 2542 (KLR) (19 October 2023) (Ruling), the Respondent posited that to be barred from varying the applicable interest rate to a commercial rate would lead to unfair prejudice on its part



and would be tantamount to allowing the Claimant to use the court process to avoid her financial obligations.

47. According to the Respondent, the Application has not met the threshold for granting such orders as established in *Giella v Cassman Brown & Co Ltd* (1973) E A 358.

Analysis and Determination

48. To my mind, the singular issue for determination at this juncture is whether the Claimant has made out a case for grant of an injunctive order with respect to the applicable loan interest rates. Put differently, should the Court restrain the Respondent from varying or applying interest at a rate higher than the 5% staff interest rate on the loan account and Facility between the Claimant and the Respondent pending the hearing and determination of the main suit?
49. It is the Respondent's contention that the Facility is a separate contract that was entered into between the parties for purposes of a loan and is unrelated to the terms of the Claimant's employment and the subsequent termination thereof.
50. According to the Respondent, the loan was only subject to a preferential interest rate of 5% on the condition that the Claimant was its employee and now that she is no longer employed by the Respondent, she cannot seek to impose the preferential rate.
51. The Respondent has further contended that the Claimant only received a preferential rate by virtue of a parallel employment contract between the parties and now that the employment contract has come to an end, there is no basis for the preferential rate.
52. It is this Court's respectful view that, despite the Facility being subject to a separate contract from the Claimant's contract of employment, the two contracts are closely intertwined, given that the Facility was extended to the Claimant within the employment relationship.
53. I say so, bearing in mind that the Claimant's suit is premised on alleged unfair termination of her employment and as it is, this issue is yet to be resolved. Indeed, were it not for the Claimant's termination from employment, it is not in doubt that she would have continued servicing the Facility at the preferential staff rates.
54. On this issue, the Court adopts the finding in the case of *Chris Kisire Chepkoi v National Bank of Kenya Limited* [2017] eKLR, where it was 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.”
55. And further, in the case of *Beatrice Wangui Mwihi 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.”



56. What's more, it is notable that the Claimant has prayed for an order of reinstatement. Therefore, in the event the Court orders reinstatement of the Claimant upon hearing the suit on its merits, the fringe benefit of staff interest rates would be restored fully.
57. With that being said, I now turn to consider whether the Application is merited.
58. At this juncture, the Claimant seeks a relief in the form of an injunctive order. Such an order, being a discretionary remedy, is granted on the basis of evidence and sound legal principles. Principles that guide the Court in an application of this nature now form a well-trodden path, as were considered in the celebrated case of *Giella v Cassman Brown & Co Ltd* (1973) E. A thus: -
- “ Firstly, 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.”
59. Applying the above principles to the case herein, the pertinent question that this Court must answer is whether the Claimant herein has established a prima facie case with a probability of success and whether she will suffer irreparable injury should the orders be denied. Further, in the event of doubt, does the balance of convenience tilt in her favour?
60. 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.”
61. It is clear that at this point the Claimant herein is required to show that her right has been violated or is threatened with violation by the Respondent, in which case, the burden would shift to the Respondent to explain or rebut the Claimant's claim.
62. In support of her Application, the Claimant has argued that she was neither a beneficiary of a single cent of the money misappropriated nor complicit in any part of the fraud perpetrated. She has further contended that the fraud had begun in December 2023 before she joined the PQM department in March 2024.
63. The Claimant has further contended that she was given less than 48 hours to prepare and attend the disciplinary hearing, and further, her request to call a witness and representative was refused.
64. Fundamentally, the Claimant has impugned the substance of her termination from employment as well as the procedure applied by the Respondent in effecting the said termination.
65. In its Replying Affidavit, the Respondent has countered the Claimant's assertions and averred that the Claimant was procedurally, fairly and lawfully dismissed from employment.
66. In light of the foregoing rival positions, it is evident that at the hearing of the main suit, the Court will be required to interrogate and apply its mind to the parties' respective assertions in light of the provisions of Sections 41, 43 and 45 *Employment Act*.



67. Applying the principles set out in *Mrao Ltd v First American Bank of Kenya Ltd* (supra), this Court is satisfied that the Claimant has proved that she has a prima facie case.
68. Beyond establishing a prima facie case, an applicant seeking an injunctive relief must further establish to the satisfaction of the Court that the injury to be suffered in the event the injunction is not granted will be irreparable.
69. On this issue, the Claimant has contended that she will be compelled to pay an interest rate on her loan account at the rate of 22.59% up from 5% when the loan was taken, solely on the premise of the low interest. She has further averred that she will face the overwhelming burden of having to pay four (4) times more in interest rates to clear her outstanding loan, and thus, she faces imminent financial ruin.
70. On the other hand, the Respondent contends that it is facing exposure of Kshs. 1,388,658/- that is outstanding from the Claimant who has failed, neglected and or refused to sign a fresh facility letter to enable her to continue to repay the loan in instalments.
71. It is not in doubt that there is a big contrast between the staff interest rates (5%) enjoyed by the Claimant prior to her termination from employment and the commercial interest rates the Respondent sought to impose upon termination of the Claimant from employment. Indeed, as per the Claimant's letter of summary dismissal, the commercial interest rate at the time was identified as 22.59% p.a.
72. In this Court's view, converting the loan to the 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, has lost her source of income and it is more than probable that she will strain to service the Facility at the higher repayment amounts accruing from commercial interest rates. Therefore, the ensuing injury would be irreparable and cannot be adequately compensated by an award of damages.
73. Accordingly, I find that the Claimant has established that she will suffer irreparable loss in the event the injunctive orders are not granted. On the other hand, the Respondent still holds the security furnished by the Claimant as per Clauses 6.10 and 7.10 of the Offer Letter for the Facility. Further, the Respondent can still charge commercial interest rates should the Court determine that the Claimant's termination was fair and can recall the Facility with the applicable interest rates from the date of termination.
74. All things considered, it is apparent that the balance of convenience tilts in favour of the Claimant.

Orders

75. In sum, the Court finds the Claimant's Notice of Motion dated 22nd May 2025 to be merited and the same is allowed as follows;
 - a. The Respondent be and is hereby restrained from varying or applying interest at a rate higher than the 5% staff interest rate on the loan account and facility between the Claimant and the Respondent 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 31ST DAY OF JULY 2025.

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STELLA RUTTO

JUDGE



In the presence of:

For the Claimant/Applicant Mr. Odhiambo

For the Respondent Ms. Nekesa instructed by Ms. Wataka

Court Assistant Millicent

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

