



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mbugua & another v Standard Chartered Bank Limited (Cause E298 of 2023) [2023] KEELRC 442 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 442 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE E298 OF 2023**  
**K OCHARO, J**  
**FEBRUARY 9, 2023**

**BETWEEN**

**DOUGLAS MUIRURI MBUGUA ..... 1<sup>ST</sup> CLAIMANT**

**DOUGLAS MUIRURI MBUGUA ..... 2<sup>ND</sup> CLAIMANT**

**AND**

**STANDARD CHARTERED BANK LIMITED ..... RESPONDENT**

**RULING**

1. Through a Notice of Motion Application dated May 10, 2022 the Claimant seeks the following orders:
  - a. That the application be certified urgent and dispensed with in the first instance.
  - b. An order of injunction, restraining the Respondent, whether by itself, its servants or agents from levying any bank charges or interest rate on the Claimant's loan facility, at any other rate of interest save for the allowed staff interest rate not exceeding 6% per annum, pending the hearing and determination of the application.
  - c. An order of injunction, restraining the Respondent, whether by itself, its servants or agents from levying any bank charges or interest rate on the Claimant's loan facility, at any other rate of interest save for the allowed staff interest rate not exceeding 6% per annum, pending the hearing and determination of the claim.
  - d. That the Claimant be allowed to pay a monthly sum of Kshs 20,000.00 towards the repayment of the loans for a period of one year until he recovers financially, whichever comes first.
  - e. That the costs of and incidental to the application be provided for.
2. The application is grounded on the grounds obtaining on the face of the application, and the supporting affidavit sworn by the Claimant/Applicant on the May 10, 2022.



3. The Respondent opposes the application upon basis of the grounds obtaining in the replying affidavit sworn by Lorraine Adoli Oyombe, its Employee Relations manager.
4. The Court gave directions that the application be canvassed by way of written submissions. The parties consequently filed their respective submissions.

### **The Application**

5. The Claimant stated that up to until the March 10, 2022, he was an employee of the Respondent, when his employment was brought to an end by the latter. He contended that the termination of his employment was without, justifiable reason[s], and procedural fairness. The disciplinary procedure leading to the decision to terminate was a sham. The termination letter was issued on same day of the disciplinary hearing.
6. In the course of his employment, he had obtained financial accommodation from the Respondent, in form of three loan facilities. As at the time of the termination he had Kshs 10,410.56 due and owing to the Respondent on the loan account[s].
7. He asserts that prior to the termination he was faithfully and dutifully servicing the facilities.
8. The Claimant/Applicant contends that after the termination which he holds was unfair, the Respondent has indicated that it wants the above stated outstanding amount repaid at commercial rates.
9. The Claimant argues that if the orders sought are not granted, the Respondent will effect its said intention, change the staff rates and applied on the facilities to commercial rates.
10. The Claimant/Applicant asserts that should the commercial rates be allowed to come effective; he stands the risk of losing his home as well as the job which he has already lost.
11. Currently as he is out of employment, he has no source of income. His property is likely to be auctioned courtesy of a situation that has been created by illegal actions of the Respondent.
12. The Claimant/Applicant contends that if the Respondent proceeds to exercises its statutory power of sale, he shall suffer irreparable harm as a consequence.
13. He states that he is only able to raise Kshs 20,000 per a month. He urges the Court to direct that he be allowed for a period of one year, to repay the facilities in the monthly instalments of the above stated amount, then thereafter, the instalment amounts be reviewed upwards.
14. He contends that the Respondent will not suffer prejudice if the orders sought are granted. He has a *prima facie* case against the Respondent.
15. If he loses his home situate on Juja Kilimoni, through an auction, his young family and him shall be rendered destitute.

### **The Response**

16. The Respondent asserts that it grants loan facilities at staff rates to individuals who are in its employment and who are eligible to apply and qualify to receive facilities under its staff facilities offering.
17. The Claimant as an employee of the Respondent applied for and was granted a mortgage facility that was secured by a charge over his property. At the time the Claimant was leaving employment, the outstanding balance on the facility was Kshs 7,701,665.18.



18. The Respondent further stated that in the course of employment, the Claimant had applied for and was granted, a personal loan at staff rate and credit card facility at commercial rates, as at the May 23, 2022, the outstanding sums on the facilities were Kshs 2,652,598.55 and 74,678.05, respectively.
19. The Respondent states that the Claimant will not be prejudiced in any manner if his application was dismissed as he will have an opportunity to be heard on his case on merit and if successful the reliefs sought shall be granted to him.
20. The respondent states that the monthly repayment instalments o Kshs 20,000 proposed by the Claimant/Applicant shall be way below the contractual monthly instalments of Kshs 92,385 on the mortgage facility without even factoring in the monthly instalment due both on the credit card and unsecured loans.
21. The Claimant does not deny that he has defaulted in repaying the loans, entitling the Bank to initiate a process towards exercising its statutory right of sale over LR No 6/8/Kalimoniin Juja, however, which process the bank has not initiated. The Claimant stands no risk of suffering prejudice, the matter should be allowed to be heard substantively on merit.
22. The Respondent contends that the staff rate is an incentive only offered to serving staff which ceases upon a member of staff's exit. The interest charged on any outstanding loan liability reverts to commercial rates as is the practice in the Banking Industry.
23. The bank should be allowed to charge interest on the outstanding liabilities. If the Claimant succeeds in his claim against the Respondent upon full hearing on merit, any interest sum paid over and above the interest amount that would have been if the rate applied was 6% can easily be worked out, and a refund made or the sums applied towards liquidation of the outstanding liabilities. The Claimant therefore can be compensated by way of damages.
24. The Respondent believes that a grant of the orders sought will be tantamount to reinstating the Claimant in employment and allowing him to enjoy benefits that only employees are entitled to. This shall be contrary to the Provision of Rule 17 [5] of the [\*Employment and Labour Relations Court \[Procedure\] Rules\*](#).

### **The claimant's submissions**

25. The Claimant identifies and proposes three issues for determination thus:
  - a. Whether the Applicant has established a prima facie case.
  - b. Whether the Applicant will suffer irreparable injury if the order sought is not granted.
  - c. Balance of convenience.
26. Citing the case of [\*Mrao Limited v First American Bank of Kenya Limited & others\*](#) [2003] eKLR, the Claimant/Applicant submits that 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 Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed on by the opposite party as to call for explanation or rebuttal from the latter.
27. In the instant case, the Claimant has demonstrated that the termination was purely prompted by malice and therefore without a valid reason. That in the circumstances the orders sought should be granted.



To buttress this argument reliance has been placed on the judicial decision in Mark Theophis Odero Adoyo v DIB Bank Kenya Limited [2022] eKLR, thus:

“In the Atscango case [supra] the Court went further to hold that an employer’s right to vary preferential interest rates extended to an employee whose employment has been terminated, is pegged on the termination being lawful. It follows therefore that where substantive questions on the legality of the termination are raised, the employer’s right in this regard is stayed, pending the determination of these questions.”

And in Victor K Mutisya v First Community Bank Limited [2018] eKLR, where the Court held:

“The Applicant has indicated that indeed he was an employee of the Respondent and was terminated on redundancy. He avers that redundancy was unfairly and unjustifiably done hence his contention that the loans facilities be left to apply at staff rates since the Respondent was responsible for his termination. If indeed the Applicant is found unfairly terminated, he would have suffered double damage where he would have been terminated unfairly and also be forced to repay his loans at commercial rates.”

Too in Irene Njeri Njenga v DIB Bank Kenya Limited [2021] eKLR, the Court held:

“Prima facie case as defined in Mrao v First American Bank, includes but is not confined to an arguable case. In the case before me, there are arguable issues that would require investigation by Court based on pleadings before the Court as the Claimant avers that the termination of her employment was unfair while the Respondent denies the same.”

28. The Claimant submits that in its pleadings the Respondent has only denied the Claimant’s allegation on procedural unfairness, but not the validity of the reasons for the termination.
29. On the 2<sup>nd</sup> proposed issue, the Claimant submits that if the orders sought are not granted, he will suffer irreparable injury. As to what amounts to irreparable loss, reliance was placed on the holding in Nguruman Limited v Jan Bonde Nelson & others [2014] eKLR, thus:

“On the second factor, that the Applicant must establish that he might otherwise suffer irreparable injury which cannot be adequately remedied by damage, in the absence of an injunction, is a threshold requirement and the burden is on the Applicant to demonstrate prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than unfounded fear or apprehension on the part of the Applicant. The equitable remedy of temporary injunction is issued to solely prevent grave and irreparable injury: That is injury that is actual, substantial and demonstratable. Injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is of such a nature that monetary compensation of whatever amount will never be adequate remedy.”

30. The Claimant is at the verge of losing his home where he resides with his family due to malicious actions of the Respondent, consequently, in the circumstances of this matter an injunction is grantable, he places reliance on the decision in Irene Njeri Njenga v DIB Bank Kenya Limited [2021] eKLR [supra] and Mark Theophis Odero Adoyo v DIB Bank Kenya Limited [2022] eKLR [supra].
31. Lastly, the Claimant submits that the balance of convenience falls his favour. If the orders sought are not granted, he shall have lost his home and in the event the claim succeeds and he is reinstated he shall



- have been rendered homeless. That the balance of convenience tilts in favour of him continuing to repay the facilities at staff rates, reliance is placed on the decision in *Victor K Mutisya v First Community Bank Limited* [2018] eKLR.
32. The Respondent submits that the Claimant has not demonstrated that he has a *prima facie* case with high chances of success. He voluntarily took up the loan facilities knowing very well that upon exiting the bank, interest on any outstanding liabilities due and owing to the Respondent shall revert to attracting interest at commercial rates. Reliance has been placed in decision in *Evans Oliver Olwali v Standard Chartered Bank* [2018] eKLR wherein the holding in *Elijah Kipng'no Arap Bii v Kenya Commercial Bank Limited* [2007] eKLR, thus:
- “..... There is no 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 has been charged to his employer.”
33. The Respondent contends that the Claimant has not demonstrated that he will suffer irreparable harm which cannot be compensated by way of damages since the difference in the interest rates can be compensated by way of monetary award as held in the case of *Evans Oliver Olwali v Standard Chartered Bank* [2018] eKLR.
34. On the balance of convenience factor, the Respondent argues that it stands at a greater disadvantage, if the orders sought in the application are granted. If granted financial accommodation to the Claimant under a contract, any temporary injunction against it, shall amount to depriving it of the enjoyment of its rights under the contract.
35. To grant the orders sought shall be tantamount to reinstatement of the Claimant in the Respondent's employment. The staff facilities offering policy does not allow ex-staff to enjoy staff rates. The stated rates are extended to staff for motivation purposes.
36. The Claimant's contention that he had a legitimate expectation to remain in the employment of the Respondent for life stands on loose sand. The letter of employment contains a termination clause allowing either party to terminate the contract upon giving the other due notice or salary in lieu of notice.
37. Granting the orders sought by the Claimant shall amount to rewriting the contract for the parties herein, a thing that this Court should not allow to happen. To bolster this argument the decision in *National Bank of Kenya Limited v Pipe Plastic Samkolit [K] Limited and another* [2002] EA 503, was cited.

### **Determination**

38. I have carefully considered the material placed before me by the parties regarding the Claimant's/ Applicant's application, I distil one issue for determination, whether the application herein is fit for granting.
39. Before I delve further into interrogating the issue, I find it imperative to from the onset consider two points that the Respondent has raised. The Respondent argues that this Court is incapacitated from issuing the orders sought as for so doing shall amount to rewriting a contract for parties. This concern can be best addressed if one were to understand the jurisdiction of this Court duly and the whole essence for which the remedy for temporary injunctions exists in legal systems.
40. Rule 17[5] & [b] the *Employment and Labour Relations Court [Procedure Rules, 2016]*, provides:



- (5) In a suit where an injunction is sought, a Claimant or Applicant may at any time in the suit, apply to the Court for an interim or temporary injunction to restrain the Respondent from committing a breach of contract or injury complained of, or a like kind arising out of the same contract or relating to the same property or right.”
- (6) where an application is made to the Court under paragraph 5 for a temporary or interim injunction on such terms as it deems fit.”
41. Considering the forecited jurisdictional provisions it goes without say that any person who has commenced a suit before this Court that is in the nature described in Rule 17[5] has a right to bring an application for an interim or temporary injunction. Imperative to mention that Rule 17[5] deals with situations arising from contractual disputes. The only question here is, whether the instant suit falls in the realm of those described under the provision aforesaid. The straight answer is, yes.
42. Having stated as I have hereinabove, it strikes me that the argument by the Respondent as brought forth hereinabove, is as a result, with due respect out of ignorance of the jurisdictional provisions or a deliberate or otherwise lack of appreciation of the same.
43. The Respondent contends that granting the orders of interim injunction sought in the application shall equate reinstating the Claimant in employment of the Respondent. The term “re-instatement” as used in the context of employment, may be understood as the restoration of a former employee to his previous position after termination of his or her employment, termination which was adjudged unfair. In the ordinary run of things, the reinstated employee is entitled to same terms and conditions that he or she had enjoyed previously without loss of continuity of employment.
44. The foregoing being the truth, I find considerable difficulty in understanding the rationale behind the Respondent’s argument. Consequently, I hold that it not convincing, it is rejected.
45. However, in my view, what this Court cannot grant as a result of the Respondent’s argument is the order sought for adjusting the monthly repayment instalment down to Kshs 20,000, for a while. Critically looking at it the same is neither any injury or breach of contract contemplated in the above stated rule of procedure.
46. Having stated as I have hereinabove, I now turn to consider whether the Claimant’s/Applicant’s application meets the conditions necessary for its grant. Jurisprudence is firm on what an Applicant must establish before his or her application for a temporary injunction is granted. The conditions are as were established in the well celebrated case of *Giella v Cassman Brown*, thus: being a *prima facie* case with a probability of success; irreparable harm to the Applicant that cannot be compensated by monetary damages should the orders not be granted, and if in doubt on a balance of convenience.
47. In *Mrao Limited v First American Bank of Kenya Limited & 2 others* [2003] the Court did elaborately bring forth what constitutes a *prima facie* case, thus:
- “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 before the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed on by the opposite party as to call for an explanation or rebuttal from the latter.”
48. Appreciating that the matter herein is yet to be heard, this Court can only state in a measured way, that it notes that the Claimant/Applicant, has in the suit invited it to consider the fairness regarding his dismissal from employment. This will require the Court to consider the procedural and substantive



fairness of the dismissal. From the material placed before me and considering the above premises, I conclude that there are arguable issues that would require investigations by the Court.

49. In the upshot, I find that he has established a *prima facie* case.
50. On irreparable damage, the Claimant contended that there was no challenge by the Respondent, that the property charged in favour of the Respondent as security for the repayment of the facilities, is the property whereon he and his young family reside. That is where they call home. That if property is sold in the Bank's realization of the security in exercise of its statutory sale, the family and him, shall be rendered destitute.
51. The Claimant/Applicant reasons that if the Respondent reverts to charging the commercial rates on the outstanding liabilities, in his situation of joblessness repaying the loans will be difficult. This will lead to the auctioning of his property. I find this reasoning not unfounded.
52. One and his or her young family, being rendered destitute without a home is a damage that cannot be compensated adequately by way of damages. It is a thing which no doubt, can come with mental distress. I am satisfied that the 2<sup>nd</sup> condition has been satisfied.
53. Lastly, as Justice Maureen Onyango held in *Irene Njeri Njenga v DIB Bank Limited* [2021] eKLR, the Respondent has to its advantage the securities from the Claimant and will in addition continue to charging interest on the outstanding loan amounts. The balance of convenience thus tilts in favour of the Claimant.
54. By reason of the premises the Applicant's application herein is allowed only in the following terms:
  - a. That the Respondent, its servants or agents are restrained by way of a temporary injunction from levying any bank charges or interest on the Claimant's outstanding liabilities at any rate of interest save for the allowed staff interest of 6% per annum pending the hearing and determination of this suit. For clarity of record, this order takes effect on the March 1, 2023.
  - b. The suit herein shall be heard on a priority basis and it is hereby slated for hearing for the May 17, 2023.

**READ, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 9<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**OCHARO KEBIRA**

**JUDGE**

In the presence of

Mr. Otieno for Mr. Bongo for the Respondent.

No appearance for the Claimant.

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 has 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 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.

A signed copy will be availed to each party upon payment of Court fees.

**Ocharo Kebira**

**Judge**

