



Mulinge v Cooperative Bank of Kenya Limited (Employment and Labour Relations Cause E200 of 2022) [2023] KEELRC 847 (KLR) (13 April 2023) (Ruling)

Neutral citation: [2023] KEELRC 847 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E200 OF 2022**

L NDOLO, J

APRIL 13, 2023

BETWEEN

AARON JUMA MULINGE CLAIMANT

AND

COOPERATIVE BANK OF KENYA LIMITED RESPONDENT

RULING

1. The subject of this ruling is the Claimant's application dated March 2, 2022.
2. The matter was initially handled by my brother, Ocharo Kebira J who recused himself on the ground that the deponent to the Respondent's replying affidavit is personally known to him. The file was placed before me on March 2, 2023, by which time the parties had filed written submissions on the Claimant's application dated March 2, 2022.
3. By his application, the Claimant seeks an injunction, restraining the Respondent from reviewing the interest applicable to his property loan and personal loan facilities from staff rates to commercial rates.
4. In the alternative, the Claimant seeks an order directing that he continues to service the said property loan and personal loan at the staff rates of 6% and 8% respectively.
5. The application is supported by the Claimant's own affidavit and is based on the following grounds:
 - a. That the Claimant is a former employee of the Respondent, whose employment was terminated through summary dismissal;
 - b. That prior to the said termination of employment, the Claimant had enjoyed employee benefits and more specifically, financial subsidies and incentives, which allowed him to service his loans and diligently discharge his financial obligations to the Respondent;



- c. That since the termination of employment, the Respondent intends to review and/or has reviewed the interest rates for a property loan and a personal loan granted to the Claimant from 6% to 13% and 8% to 13% respectively;
 - d. That the move to review the interest rates is contrary to Clause 9.1.1(e) of the Respondent's Staff Manual which provides for non-conversion of interest rates for employees who have worked for the Respondent Company for a period of ten years and above;
 - e. That the Claimant has worked for the Respondent for a period exceeding ten years beginning from October 10, 2011 to December 1, 2021, when his employment was unlawfully terminated;
 - f. That the said termination of employment has financially crippled and encumbered the Claimant, hence making it strenuous to service the loans as expected and any increase in the interest rates will highly prejudice him;
 - g. That the Respondent's action will occasion arrears in respect of the loans, to the detriment of the Claimant, who is struggling to take care of his sick spouse;
 - h. That should the said action by the Respondent proceed as scheduled, the Claimant stands to suffer irreparable harm and anguish, by being rendered homeless for defaulting in the loan repayment, as he relies exclusively on the security property, which is a matrimonial home for him and his family, and no amount of damages will be sufficient compensation in the given circumstances;
 - i. That the Claimant is still unemployed, which fact is well within the knowledge of the Respondent;
 - j. That the Claimant is fully committed to service the loan facilities as per the prior agreed favourable terms under which he was legitimately granted the loans;
 - k. That the orders sought are incapable of causing prejudice to the Respondent in any manner whatsoever, for reasons that the Claimant remains committed to repaying the loan amounts fully and in the unlikely event that the suit is unsuccessful, the subject property whose value is appreciating, shall still be available as security which the Respondent may realise in due course;
 - l. That the Claimant has a prima facie case as demonstrated herein;
 - m. That it is in the interest of justice and fairness that the application is allowed and the orders sought granted.
6. The Respondent's response is contained in a replying affidavit sworn by Lawrence Karanja on May 9, 2022.
7. Karanja, who describes himself as the Head of Legal Services Department, terms the Claimant as a vexatious litigator and forum shopper. In this regard, Karanja points out that the Claimant had filed the following suits against the Respondent Bank citing similar facts and seeking similar reliefs:
- a. Nairobi ELRC Petition No 184 of 2021: Aaron Juma Mulinge v The Cooperative Bank of Kenya Limited; and
 - b. Nairobi CMELRC No 427 of 2022: Aaron Juma Mulinge v The Cooperative Bank of Kenya Limited.



8. Karanja takes the view that the Court lacks jurisdiction to grant the orders sought by the Claimant in this application. He terms the issue in dispute in the application as a private contractual one, independent of the employment dispute raised in the main claim.
9. Karanja states that during his employment with the Respondent, the Claimant applied for staff loans, with the condition that upon leaving employment for any reason other than retirement, commercial interest rates would be charged.
10. He further states that in taking up the loan facilities, the Claimant was aware that the preferential staff interest rates were an exclusive benefit afforded to him by virtue of being an employee of the Respondent, which benefit attracted a fringe benefit tax paid by the Bank on the Claimant's behalf.
11. The Respondent concedes that Clause 9 of the Staff Manual on outstanding loans, had a prospective effect for employees with a continuous service of ten (10) years and above.
12. In this regard, Karanja makes reference to Clause 9.1.1 (2)(e) of the Staff Manual which provides that:

After attaining ten years of service the staff interest rate may be applicable on outstanding loans upon submission and acceptance by the Bank of an acceptable repayment plan.
13. Karanja however depones that the Claimant has neither submitted any request for the staff rates to be maintained on his loan facilities nor has he offered any proposal to the Bank setting out a repayment plan.
14. He further depones that the Claimant has not sought an order of reinstatement and cannot therefore seek to prevent the conversion of his loan interest to commercial rates.
15. The first issue for determination is whether this Court has jurisdiction to entertain the Claimant's application. The Respondent submits that because the issue in dispute arises out of a loan agreement between the parties, then the proper adjudication forum is the commercial court. On his part, the Claimant submits that the issue of applicable interest rates is inextricably intertwined with the termination of his employment, which he challenges in the main claim.
16. The jurisdiction of this Court is anchored in Article 162(2)(a) of the Constitution which provides that:
 - (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-
 - a. Employment and labour relations; and
 - b.
17. Pursuant to this constitutional edict, Parliament enacted the Employment and Labour Relations Court Act, which at Section 12(1) provides as follows:
 12. Jurisdiction of the Court
 - (1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including-
 - a. Disputes relating to or arising out of employment between an employer and an employee;
 - b.



18. In its decision in [*Abraham Nyambane Asiago v Barcays Bank of Kenya Limited \[2013\] eKLR*](#), this Court had occasion to determine the question as to what constitutes a dispute relating to or arising out of employment between an employer and an employee and returned as follows:

' By its nature, the employment relationship generates a multiplicity of rights and obligations, some of which are not to be found in the express provisions of the employment contract. In my view, all these fall under employment and labour relations as intended by the law makers. To rule otherwise would be to create a situation where an employer or an employee traverses different courts to enforce different rights arising from the employment relationship. That in my view could not have been the intention of the legislators.'

19. In the present case, I agree with the Claimant that the loan agreement by which he was granted the loan facilities that are the subject of this application, was inextricably tied to his employment contract. For this reason, I find and hold that the jurisdiction to adjudicate on the terms of the loan agreement, including the applicable interest rates resides in this Court.

20. That settled, I will now proceed to consider the Claimant's application on merit.

21. The Claimant seeks an order in the nature of an interlocutory injunction. The conditions upon which such an order may be granted were restated by the Court of Appeal in its decision in [*Nguruman Limited v Jan Bonde Nielsen & 2 others \[2014\] eKLR*](#) in the following terms:

' In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- a. Establish his case only at a prima facie level;
- b. Demonstrate irreparable injury if a temporary injunction is not granted; and
- c. Allay any doubts as to (b) by showing that the balance of convenience is in his favour.'

22. In the same decision, the Court of Appeal affirmed that the foregoing three conditions are to be applied as separate hurdles which the applicant must surmount sequentially.

23. A prima facie case was defined by the Court of Appeal in [*Mrao v First American Bank Kenya Limited & 2 others \[2003\] KLR, 123*](#) 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 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.'

24. In the more recent case of *Nguruman Limited* (supra) the Appellate Court stated the following:

' We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The standard of proof of that prima facie case is on a balance of or, as otherwise put, on a preponderance



of probabilities. This means no more than that the court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.'

25. By his Memorandum of Claim dated March 2, 2022, the Claimant challenges the dismissal, upon which the Respondent sought to vary the interest rates applicable to his loan facilities. In its decision in Abraham Nyambane Asiago (supra) this Court held that while an employer reserves the right to vary loan interest rates upon termination of employment, there is the basic assumption that the termination is effected within the law. The Respondent is yet to file its Response and there is no telling what its defence to the Claimant's claim will be.
26. Moreover, according to the Respondent's Staff Manual, the Claimant could, subject to certain conditions, qualify to continue enjoying the preferential interest rates on account of his length of service.
27. All these are issues to be fully canvassed at the trial. In the meantime, it is safe to retain the interest payable on the Claimant's loan facilities at the preferential staff rates.
28. Regarding the question whether the Claimant would suffer irreparable harm if the orders sought are not granted, I have no difficulty in reaching the conclusion that conversion of the interest to commercial rates would expose the Claimant to default and potential loss of the property offered as security. Such an eventuality, would in my view, result in an irredeemable harm to the Claimant.
29. The final hurdle relates to the balance of convenience, which was defined in *Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR* as follows:

' The meaning of balance of convenience in favour of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favour of the plaintiff, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendant if an injunction is granted but the suit is ultimately dismissed.'
30. Having found that the Claimant has established a prima facie case and being convinced that he would suffer irreparable injury if the orders sought are not granted, coupled with his commitment to continue servicing his loan facilities at the preferential staff rates, I find that the balance of convenience tilts in his favour.
31. Before signing off this ruling I need to address an allegation made by the Respondent that the Claimant is a vexatious litigator. This allegation is based on the fact that the Claimant had filed two previous suits; being Nairobi ELRC Petition No 184 of 2021 and Nairobi CMELRC No 427 of 2022.
32. In his written submissions, the Claimant explains that he had filed Petition No 184 of 2021 to avert his dismissal and that CMELRC No 427 of 2022 had been filed in error and had since been withdrawn.
33. Although this may not be the most elegant way of litigating, it is not a ground for banishing a party as a vexatious litigator. This is all I will say on this issue.
34. Finally, I make the following orders:
 - a. That an order of injunction be and is hereby issued restraining the Respondent from varying the interest applicable to the Claimant's loan facilities from staff rates to commercial rates, pending the hearing and determination of the main claim;
 - b. That the Claimant shall continue servicing the loan facilities at applicable staff rates pending the hearing and determination of the claim.



c. The costs of the application will be in the cause.

35. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF APRIL 2023

LINNET NDOLO

JUDGE

Appearance:

Mr. Nyaga for the Claimant

Mr. Nyanhoga for the Respondent

