Ndirangu v National Bank of Kenya Ltd (Cause E521 of 2022)
[2023] KEELRC 1833 (KLR) (6 July 2023) (Ruling)

Neutral citation: [2023] KEELRC 1833 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E521 OF 2022

BOM MANANI, J

JULY 6, 2023

BETWEEN

DORCAS WACUKA NDIRANGU ..... CLAIMANT

AND

NATIONAL BANK OF KENYA LTD ..... RESPONDENT

RULING

1. The application before me seeks orders of interlocutory injunction to restrain the Respondent from varying the interest rate applicable to three loan facilities currently extended to the Applicant from preferential staff interest rate to prevailing market rate. The parties to the action were in an employment relation until April 8, 2022 when the Applicant's services were terminated.

2. The Applicant avers that upon termination of the employment relation, the Respondent unilaterally varied the interest rate applicable to the three facilities with the consequence that she is exposed to the likelihood of defaulting on them given that she has not secured alternative employment after her employment contract with the Respondent was terminated. It is the Applicant's case that any such default will have the effect of exposing her assets including her home to the risk of forced sale to recover the outstanding loan balance, a matter that will occasion her irreparable loss.

3. The Respondent has opposed the application. According to the Respondent, the preferential interest rate on the facilities held by the Applicant was granted to her on the understanding that it will apply only during the currency of her employment. It is the Respondent's contention that it was at liberty to revise the interest rate applicable to the facilities from that of preferential staff rate to market rate when the employment relation between the parties came to an end.

4. According to the Respondent, the only condition that it was to satisfy before varying the applicable interest rate on the facilities from preferential to market rate after termination of the Applicant's employment contract was to issue the Applicant with the relevant notice. The Respondent contends

that this condition was complied with when it alluded to the matter in the letter of termination issued to the Applicant.

5. The Respondent asserts that the position expressed above is captured in the loan agreement between the parties which is separate and distinct from the employment contract between them. As such and in the Respondent's view, its decision to apply the prevailing market interest rate to the Applicant's facilities is lawful.

6. The Respondent further points out that the Applicant has not prayed for reinstatement to employment. As such, there is no chance that the employment relation between the parties will be restored. That being the case, there is no basis to require the Respondent to continue applying staff interest rates to the Applicant's facilities.

Analysis

7. When the application came up for hearing, the parties agreed to make their representations on the matter through written submissions. The submissions have since been filed.

8. The record shows that the Applicant has three facilities with the Respondent. The particulars of the facilities are set out in the loan agreements and correspondence between the parties and which form part of the court record.

9. On September 4, 2020, the Applicant was advanced a secured personal facility of Ksh 2,200,000.00 According to the clause on interest in the letter of offer and acceptance between the parties, the Respondent reserved the right to revise the applicable interest of 8.5% to a rate that reflects the prevailing cost of funds in the money market. However, this power was exercisable only after the Respondent serves the Applicant with a 30 days' notice of its intention to vary the applicable interest rate.

10. In respect of the other facilities, it is clear to me that although they were advanced at staff interest rate, the interest rate was amendable to change to reflect the prevailing market rate once the employment relation between the parties came to a close. However, before causing this transition, the contract between the parties obligated the Respondent to issue the Applicant with a notice of 30 days intimating its decision to transit to the prevailing market rate.

11. In effect, the transition of the interest rate on the facilities from the staff market rate to the prevailing market rate was not just pegged on the fact of termination of the contract of service between the parties. In addition, the Respondent was under obligation to issue the Applicant with the requisite notice of not less than 30 days intimating the election to transit the staff interest rate to the prevailing market rate.

12. I have considered the response by the Respondent to the application. Whilst stating that it transited the interest rate from staff to prevailing market rate upon closure of the employment relation, there is no evidence that the Respondent issued the Applicant with the requisite notice of intention to commence applying the prevailing market interest rate. The Respondent states that this communication was included in the letter of termination of employment that was issued to the Applicant. Interestingly, neither of the parties found it necessary to place the letter on the court record. As a consequence, the court is unable to verify the Respondent's assertion that it complied with the requirements as to notice.

13. The law on the grant of interlocutory orders of injunction is as discussed in the celebrated decision of *Giella v Cassman Brown* [1973] EA 358 which has been quoted with approval in a plethora of decisions. Whilst considering whether to grant an order of interlocutory injunction the court is usually concerned with three matters namely:-

a. Whether the applicant has a prima facie case with a probability of success.

b. Whether if the order of injunction is not granted, the applicant is likely to suffer irreparable damage.

c. If in doubt, the court will decide the matter on a balance of convenience.

14. At the stage at which the court is invited to pronounce itself on the existence of a *prima facie* case, it must be remembered that the matter has not been fully canvassed before it. Therefore, the breadth of the dispute remains unexplored. In determining whether there is a *prima facie* case, the court only considers the preliminary record that has been placed before it whilst exercising caution not to make any pronouncements that may appear to determine the main dispute before it.

15. Evidence of existence of a prima facie case is not the same as evidence that the case will ultimately succeed on the merits. Rather, it is evidence which tends to demonstrate infringement of an interest which entitles one to sue. This position is alluded to in *Mrao Ltd V First American Bank of Kenya Ltd & 2 others* [2003] KLR where the court observed 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.''

16. In the dispute before me, the Applicant's position is that the process leading to the decision to terminate her contract of employment violated some of the Respondent's own Human Resource Manual (HR Manual) which entitles employees to certain protections. Of significance, the Applicant contends that the warning procedure in the manual was not followed before the decision to terminate her contract. She asserts that the warning letter issued to her dated April 28, 2021 was supposed to have been recalled after her performance evaluation was reviewed from 2 to 3.11 but this was never done. Therefore, the subsequent built up warnings issued on the assumption that the warning of April 28, 2021 was valid prejudiced her position with regard to whether she was legitimately on her last warning when the decision to terminate her employment was issued.

17. In my view, the issue that the Applicant raises regarding whether the Respondent observed the warning procedure in its manual before dismissing her from employment is a grievance that suggests violation of the Applicant's procedural right in the process leading to her release from employment. It is a matter that raises a prima facie case that ought to receive an explanation at the main trial. In the premises and on the basis of the material before me, I find that the Applicant has presented a *prima facie* case.

18. The next issue is whether the Applicant is likely to suffer irreparable harm should the interlocutory injunction not issue. On this matter, the Applicant's case is that with the raise in the interest rate, there is a real likelihood of her falling into arrears on the pending facilities since she is yet to secure gainful employment from which she will get a guaranteed income to service the loans. The Applicant points out that there is real danger that her home will be sold off to settle the loan balances thus rendering her homeless.

19. The foregoing likelihood has not been disputed by the Respondent. Besides and as observed earlier, the Respondent has not demonstrated that it issued the Applicant with the requisite notice to move the facilities from the preferential staff interest rate to the prevailing commercial rates.

20. I am satisfied that a forced sale of the Applicant's home which may be triggered by a default occasioned by a variation in the interest rate to her facilities which has been implemented without evidence of notice to her in line with the agreement between the parties will occasion her substantial loss. In the

premises and on the basis of the facts before me, I find that the upward review of the Applicant's interest rate, absent evidence of issuance of a 30 days' notice to her, is irregular and will expose her to arbitrary loss of a substantial nature.

21. The Respondent has averred that the Applicant is in any event not entitled to the orders since she has not prayed for reinstatement. I think this submission was made without the benefit of studying the Applicant's Statement of Claim which has a plea for reinstatement as one of the main prayers.

22. The other thing that the Respondent raises is that the loan contracts between the parties are mutually distinct from the employment contract between them. That may be true. However, it is clear to me that there is a linkage between the two transactions. The basis for application of staff interest rates to the Applicant's loan facilities is the fact of her employment with the Respondent which is premised on the employment contract between the parties.

23. The cases referred to by the Respondent to support its position against the grant of injunction were all based on the fact that the Applicants had not prayed for reinstatement. That is not the case in the matter before me. Therefore, they are distinguishable.

24. Further, in the case of *Lilian Rhoda Adhiambo v Barclays Bank of Kenya* (2021) eKLR, it is clear to me that the loan contract between the parties provided for automatic transition from staff to commercial interest rates ones the employment relation between the Applicant and Respondent in the case lapsed. There was no requirement that this transition be preceded with the issuance of any notice by the Respondent to the Applicant. Conversely, in the case before me, the transition clause obligates the Respondent to first issue a 30 days' notice to the Applicant of the intention to transit. As I have observed earlier, evidence of issuance of this notice has not been presented to me.

Determination

25. The upshot is that I find that the Applicant has established a case that merits issuance of the orders that she seeks. Accordingly, I issue an order of temporary injunction to restrain the Respondent from implementing the transition of the interest rate on the Applicant's facilities from the preferential staff rates to the prevailing market rates pending the hearing and determination of the case.

26. Costs of the application shall abide the outcome of the case.

Dated, signed and delivered on the 6th day of July, 2023

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant/Applicant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

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