



**Kariuki v SBM Bank (Kenya) Limited (Cause E404 of 2023)
[2023] KEELRC 2542 (KLR) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2542 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E404 OF 2023
L NDOLO, J
OCTOBER 19, 2023**

BETWEEN

ERIC KARIUKI CLAIMANT

AND

SBM BANK (KENYA) LIMITED RESPONDENT

RULING

1. By his Notice of Motion dated 16th May 2023, the Claimant seeks the following reliefs:
 - a. An interim order to freeze the Claimant’s loan with the Respondent pending the hearing and determination of the claim or until the Claimant gets another stable source of income, whichever comes earlier;
 - b. An order restraining the Respondent from converting the Claimant’s loan to market rate;
 - c. An order restraining the Respondent from initiating any recovery of the loan in issue more specifically, from instructing external debt collectors to pursue him pending the hearing and determination of the suit or until the Claimant gets another job or stable source of income, whichever comes earlier;
 - d. An order directing the Respondent to immediately delist the Claimant from the Credit Reference Bureau.

2. The Motion 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;
 - b. That one of the benefits that accrued to the Claimant by virtue of being an employee of the Respondent were loan facilities that were issued at staff rate; that is either 4% or 6% depending on the tenure of the loan;



- c. That the Respondent terminated the Claimant's employment through a redundancy exercise in December 2021;
- d. That the Claimant's loan obligation with the Respondent as at the time of his termination was Kshs. 843,899;
- e. That the Claimant is challenging the legality of the redundancy exercise that led to his loss of employment and livelihood;
- f. That prior to the sudden loss of employment, the Claimant was faithfully servicing his loan through a check off system;
- g. That the Claimant is currently jobless and he is finding it a challenge to service the loan;
- h. That the Respondent, through the termination letter, threatened to convert the loan to market rate should the Claimant default on the loan;
- i. That the Claimant is not wilfully defaulting on the loan repayment;
- j. That the Claimant has not secured another job nor is he engaged in any meaningful income generating activity to enable him fend for his young family and repay the loan;
- k. That the Claimant has not denied the loan obligations with the Respondent and he undertakes to resume repayment once he secures another employment;
- l. That the Claimant's loan is insured through a credit life insurance cover;
- m. That the credit life insurance cover was supposed to kick in immediately the Claimant lost his employment and was to cover 9 instalments translating to 9 months;
- n. That the Respondent has ignored inquiries by the Claimant on the issue of the credit life insurance that was supposed to cushion the Claimant for 9 months from the time of loss of employment/income;
- o. That the Respondent has been deducting the loan interest from the Claimant's account;
- p. That since the Claimant's account with the Respondent has since been depleted, the Respondent has made good its threat to negatively list the Claimant with the Credit Reference Bureau, and initiate other recovery measures besides the loan ballooning due to default interest and penalties;
- q. That the Respondent has negatively listed the Claimant with the Credit Reference Bureau which has negatively affected the Claimant's social and economic standing;
- r. That since the issue of the loan is directly linked to the redundancy exercise which the Claimant is challenging in court, it is imperative that the Court freezes the loan pending the hearing and determination of the suit;
- s. That the Claimant has raised serious issues regarding the termination of his employment through redundancy, he is confident that the Court will agree with him and declare the redundancy exercise unlawful;
- t. That unless the Court intervenes and freezes the loan from accruing interest and penalties and also orders the delisting of the Claimant from the Credit Reference Bureau, the Claimant's economic and social rights will be grossly prejudiced.



3. The Respondent's response is contained in a replying affidavit sworn by its Head of Employee Relations, Simon Muriithi Maina on 13th June 2023.
4. Maina depones that the Respondent acquired a heavy interim organizational structure inherited after it acquired employees from two defunct Banks namely; Fidelity Commercial Bank and Chase Bank (Kenya) Limited (In Liquidation).
5. He points out that the Respondent took over 800 employees from the two defunct Banks on a transitional organizational structure and immediately commissioned a job evaluation exercise to come up with a fit-for-purpose structure.
6. Maina further depones that the Respondent undertook a restructuring exercise to streamline its operations towards the end of the year 2021. The Respondent is said to have closed several branches after acquisition of the two Banks.
7. As part of the restructuring, the Respondent implemented a fit-for- purpose structure where some roles fell off, due to the excess number of staff who did not fit in the new structure.
8. It is deponed that the respondent initiated a Voluntary Early Separation Scheme (VESS) and also informed staff of its intention to declare redundancies if the ideal number of staff failed to apply for the VESS.
9. According to Maina, the VESS did not yield the targeted numbers, therefore forcing the Respondent to proceed with redundancy. He states that the Claimant's role did not exist in the new structure due to closure of branches.
10. The Claimant was therefore issued with a notice of termination of employment on account of redundancy, dated 6th December 2021. He was subsequently issued with a termination letter on 14th December 2021, which was to take effect on 15th January 2022.
11. Regarding the loan facility, Maina depones that the Claimant applied for a staff personal loan of Kshs. 1,100,000 on 2nd July 2020. The Claimant executed a letter of offer dated 20th July 2020, which contained the terms and conditions of the loan.
12. Maina states that as at the time of the Claimant's exit from employment, he had an outstanding loan balance of Kshs. 822,099.69. The Claimant is said to have made a commitment to continue servicing his loan at the Kshs. 21,799.35 payable on the 15th day of every month.
13. It is deponed that the Claimant did not service the loan as per his written commitment, upon which the Respondent placed the loan on moratorium for 3 months, in accordance with the terms of the redundancy program, at no extra cost to the Claimant and for his benefit to avoid accrual of interest for 3 months.
14. On the credit life insurance cover, the Respondent accuses the Claimant of failure to follow up with the insurance company and to collect any money payable for remittance to the Respondent to offset the loan.
15. The Respondent further accuses the Claimant of material non-disclosure regarding the positive actions taken by the Respondent in aid of the Claimant's transition from employment.
16. The Claimant swore a supplementary affidavit on 26th June 2023, deponing that the redundancy process that led to the termination of his employment was malicious, punitive and pre-determined as the decision to terminate his employment was made before initiation of the redundancy process.



17. The Claimant accuses the Respondent of being the author of the non-performing loan.
18. The orders sought by the Claimant fall within the province of injunctions and the conditions upon which such orders may be granted were set out in *Giella v Cassman Brown & Co Ltd* (1973) EA, 358 as follows:
 - a. That the applicant has a *prima facie* case with a probability of success;
 - b. That the applicant has demonstrated that if the order sought is not granted, they will suffer irreparable damage that cannot be compensated by an award of damages;
 - c. That in case of doubt, the balance of convenience tilts in favour of the applicant.
19. A *prima facie* case was defined by the Court of Appeal in *Mrao v First American Bank of Kenya Limited & 2 others* (2003) KLR 125 in the following terms:

“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. 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.”
20. In the written submissions filed on behalf of the Respondent, reference was made to the decision in *Nguruman v Jan Bonde Nielsen & 2 others* [2014] eKLR where it was held that the equitable remedy of injunction is granted to prevent injury that is actual, substantial and demonstrable.
21. The parties expended a lot of time either attacking or justifying the termination of the Claimant’s employment. However, the issues raised by both parties, regarding the substance and process of the termination, can only be ventilated and canvassed at the full trial.
22. What is currently before the Court is the question whether the Claimant has established a case for grant of an interlocutory injunction, whose effect would be to freeze his loan and reverse his listing at the Credit Reference Bureau.
23. By his own admission, the Claimant has fallen into arrears in repayment of his loan. What he wants the Court to do is to allow him to go into perpetual default.
24. In its decision in *Jacob Kelly Omondi Onyango v National Bank of Kenya* [2017] eKLR this Court stated the following:

“Banks operate in a strictly regulated environment and every borrower whether an insider or the man from the street must meet their financial obligations to their bank. The reasons for this are not hard to find; first, banks operate with customers’ funds which must be available on call; second, non-performing loans interfere negatively with the macro-economic stability of the country; third, to allow borrowers to go into perpetual default in loan repayments is to hand them a rope for financial suicide. Overall, it is never in the public interest to allow non-performing loans.”



25. The Court is sympathetic to the Claimant's plight but it would be utterly irresponsible to endorse a non-performing loan. The damage done to the parties and the wider public would, in my view, be irreversible.

26. For this reason, the Claimant's Motion dated 16th May 2023 is declined with costs in the cause.

27. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF OCTOBER 2023.

LINNET NDOLO

JUDGE

