



**Omwikwesakwa v Afya Sacco Ltd (Cause 872 of 2019)
[2023] KEELRC 2524 (KLR) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2524 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 872 OF 2019
NJ ABUODHA, J
OCTOBER 19, 2023**

BETWEEN

LIVINGSTONE OMWIKWESAKWA CLAIMANT

AND

AFYA SACCO LTD RESPONDENT

RULING

1. The Claimant/Applicant filed applications dated 24th May,2023 and 6th June,2023 seeking for orders that pending hearing and determination of the Applications and the main suit the court do issue a temporary injunction restraining the Respondent herein, and /or their agents or servants from alienating, selling, transferring and /or attempting to sell by way of auction or otherwise or in any way whatsoever dealing with the Claimant's property known as LR Ngong/Ngong/38885 situate at Kajiado County and interfering with the Claimant's quiet and peaceful enjoyment of their property aforesaid.
2. The Applicant also sought an order to the Respondent to provide a breakdown of the monthly installments payable by the Applicant, the principal sum due and the interest due on the loan ref. No. L020xxxx1.
3. The application was supported by the Affidavit of Livingstone Omwikwe Sakwa the Claimant/Applicant herein who averred that he was an employee of the Respondent from 1st August, 2002 to 25th June, 2019 and as a term of employment he was able to obtain a staff loan which he used to purchase land and constructed his matrimonial home. The home was secured by a legal charge registered over LR Ngong/Ngong/38885.
4. The Applicant further averred that this court had jurisdiction to entertain the suit and that pursuant to the directions of court on 25th February,2020 where Applicant was seeking similar orders on



application dated 20th December, 2019 the same was withdrawn/compromised by consent of both counsels on record to pave way for early trial of the main suit and possibility for settlement

5. The Applicant averred that the settlement failed and the Respondent was up to harass and threaten to sell the property when he depended on the salary from the Respondent to service the loan. According to the applicant, the matrimonial home was purchased as a result of employment benefits which comprised of a staff loan which was available for Respondent's staff yet the respondent unlawfully dismissed him from employment on 25th June, 2019 therefore not consistently serving his loan.
6. The Applicant averred that on 5th May, 2023 he was served with a staff loan default and notice to sell the property known as LR Ngong/ngong/38885 which property forms his matrimonial home acquired in 2010.
7. The Applicant further averred that he had established a prima facie case with high chances of success, that the loss of his family home will cause him irreparable loss that cannot be compensated by damage and that the application had been made without unreasonable delay and further that the issue of the loan facility was an issue in the main suit.
8. In reply the Respondent file a Replying Affidavit sworn on 27th June, 2023 and opposed the Claimant's Application. It averred that at the application was bad in law and an abuse of the court processes as the loan and property issues were not raised in the main suit and that this court lacked jurisdiction to issue the injunctive orders as per provisions of article 165(5)(b) and 162(2) (a) of the Constitution that the Employment and Labour Relations court should hear and determine labour relations disputes only.
9. The Respondent further averred that the issue of auctioning and selling of the Applicant's property and payment of loan facility fall within the Environment and Land Court and Co-operative Tribunal (section 76(2) Co-operative Societies Act) respectively.
10. The Respondent averred that the Applicant's Applications were res judicata for seeking similar orders as the application of 20th December, 2019 and that under section 7 of the Civil Procedure Act the application should be dismissed.
11. The Applications were dispensed of by written submissions with each party submitting in support of their respective pleadings.

Determination

12. The Court considered the applications dated 24th May, 2023 and 6th June, 2023 and the Respondents Response of 27th June, 2023 and came up with three main issues;
 - a. Whether this court has jurisdiction to entertain these Applications
 - b. Whether the Applicant's Applications are res judicata
 - c. Whether the Applicant is entitled to reliefs sought.

Whether this court has jurisdiction to entertain these Applications

13. The Employment and Labour Relations court is established by article 162(2)(a) of the Constitution. It has a reserved jurisdiction to hear and determine employment and labour relations matters. The mandate of the court is further elaborated under the Industrial Court Act of 2011 section 12(1) (a) thereof.



14. On the issue of jurisdiction, it is paramount that whenever raised, the court must establish if it has jurisdiction as was stated in the classical of *Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited* [1989] KLR 1 that jurisdiction is everything and without it the court downs its tools.
15. I note that the Applicant was the Respondent's employee and he is in this court because of the termination of his employment from where he was servicing the loan using his salary however due to the termination, he could not consistently pay for the loan facility.
16. I am further of the view that this court has jurisdiction to entertain the Applicant's Applications since it emanates from employer-employee relationship and this property was only available for the Respondent's employees and not any other person. In *Abraham Nyambane Asiago v Barclays Bank Of Kenya Limited*[2013]eKLR the court faced with the same issue as in this case in allowing the prayers for temporary injunction observed that;

In the case before me, it is not in contest that the Claimant was granted a staff housing loan because he was an employee of the Respondent. It is also factual that the reason why the Respondent has recalled the loan is that the Claimant's employment has been terminated, which termination is contested by the Claimant. It cannot therefore be that the employment and labour court has no jurisdiction to adjudicate on a matter arising from the staff housing loan. Consequently, I find that the Claimant's Notice of Motion is properly before this Court and will now proceed to deal with it on its merit.

17. Whereas the Respondent has argued that matters of auctioning and sale of the property and the loan facility should be handled by the Environment and Land Court or the Co-operative tribunal, the court does not hold the same view since there was in existence an employer-employee relationship the basis upon which the facility was granted to the claimant.

Whether the Applicant's Applications are Res judicata

18. Section 7 of the *Civil Procedure Act* provides for res judicata and this is to bar multiple suits/ applications on the same subject matter.
19. I note that there was a similar application dated 20th December, 2019 which from the court records was withdrawn on 25th February, 2020 by consent to pave way to hearing and determining the main suit and possibly settle out of court but this failed. The Court is therefore of the view that since the Respondent breached what the parties agreed on, to fast track hearing of the main suit and started issuing threats to auction the suit property, the Applicant's only recourse was the Court where the subject matter is pending. There is therefore no res judicata because the application of 20th December, 2019 was never heard on merit.

Whether the Applicant is entitled to reliefs sought.

20. The Applicant seeks injunctive orders against the auction and sale of his purchased land where he constructed a house. The Respondent financed him as its employee to purchase the land and construct a house. The applicant further sought from the respondent, a breakdown of repayment of the loan.
21. The factors to consider in whether or not to grant an interlocutory injunction are set out in the well established case of *Giella v Cassman brown* [1973] EA 358 where the following principles were set out:
 - a) That the applicant must establish a prima facie case with probability of success;



- b) That the applicant must demonstrate that he stands to suffer irreparable harm if the order is withheld; and
- c) If the court is in doubt, it should determine the application on a balance of convenience.
22. On the issue of *prima facie case* this was defined by the Court of Appeal in the case of *Mrao Limited v First American of Kenya limited & 2 others* [2003] eKLR as follows: -
- “...in civil cases 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.”
23. In this case the Respondent threatens to sell the applicant’s property on which he has built his matrimonial home. The construction was financed by the respondent who has since terminated the applicant’s service. The applicant consequently has been unable to regularly service the loan as when he was in employment. The legality, fairness or otherwise has been challenged before this Court. There is therefore a *prima facie case* with probability of success before the Court.
24. On the issue of irreparable harm the Applicant has illustrated that this property is his matrimonial home where he is staying with his young family who depends on him. If wrongfully sold, the loss cannot be compensated by award of damages as the property is dear to the applicant.
25. In conclusion the Applicant’s applications dated 24th May, 2023 and 6th June,2023 are found merited and the court orders that the Respondent and/or its agents or servants be and are hereby restrained from auctioning and or selling property known as Ngong/Ngong 38885 situate at Kajiado County until hearing and determination of the main suit.
26. Costs of the application shall abide the outcome of the main suit.
27. It is so ordered.

DATED AT NAIROBI THIS 19TH DAY OF OCTOBER, 2023 DELIVERED VIRTUALLY THIS 19TH DAY OF OCTOBER, 2023

ABUODHA JORUM NELSON

JUDGE

