



REPUBLIC OF KENYA



KENYA LAW
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**Kunga v Credit Bank PLC (Cause E555 of 2023)
[2023] KEELRC 2814 (KLR) (9 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2814 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E555 OF 2023
L NDOLO, J
NOVEMBER 9, 2023**

BETWEEN

NANCY SILVIA AKINYI KUNGA CLAIMANT

AND

CREDIT BANK PLC RESPONDENT

RULING

1. On 14th July 2023, the Claimant filed a Statement of Claim seeking the following remedies:
 - a. A declaration that the termination of her employment by the Respondent is unlawful and unfair;
 - b. Kshs. 4,296,000 being 12 months' salary as damages for unlawful and unfair termination of employment;
 - c. Kshs. 358,000 being leave pay for 2023;
 - d. Reinstatement;
 - e. Costs plus interest.
2. Contemporaneously with the Statement of Claim, the Claimant filed a Notice of Motion dated 13th July 2023, by which she seeks the following:
 - a. A temporary injunction restraining the Respondent from appointing any person to replace the Claimant in the position of Branch Manager, Westlands Branch;
 - b. A temporary injunction restraining the Respondent from adjusting the interest rate on the Claimant's mortgage facility.
3. The application is supported by the Claimant's own affidavit and is based on the following grounds:



- a. That the Claimant was employed by the Respondent on 4th January 2019 in the position of Branch Manager, Westlands Branch, Nairobi at a monthly salary of Kshs. 358,000;
 - b. That the Claimant was accused of gross misconduct, following which the Respondent summarily dismissed her without subjecting her to fair disciplinary proceedings as required by law;
 - c. That as at the time of termination of her employment, the Claimant had taken a mortgage which she continues to service;
 - d. That the Respondent's action of summarily dismissing the Claimant is a violation of her rights as protected by Sections 41, 43, 45 and 46 of the *Employment Act*;
 - e. That the application has been made without unreasonable delay;
 - f. That it is in the interest of justice and fairness that the Court grants the orders sought.
4. The Respondent filed Grounds of Opposition dated 15th August 2023 and a replying affidavit sworn by its Head of Legal, Human Resources & Industrial Relations Department, Wainaina Francis Ngaruiya on even date.
 5. The Respondent states that it complied with all the requisite disciplinary procedures as provided by law and its Human Resource Manual.
 6. Ngaruiya gives a chronology of events leading to the termination of the Claimant's employment, starting with a report by the Claimant to him concerning an inquiry by a person known as Stephen Sanga on alleged money laundering at the Westlands Branch.
 7. Following an article published on 4th March 2023 by one Joseph Wambugu alleging that there was a money laundering scheme by various employees at the Westlands Branch, the Respondent began its own internal investigations.
 8. The Respondent claims to have received some adverse reports about the Claimant upon which she was invited for a meeting to discuss the allegations levelled against her.
 9. The Claimant was subsequently sent on paid leave from 8th March 2023 to 6th April 2023.
 10. According to the Respondent, its Security and Investigations Department and Internal Audit Department picked a number of discrepancies in transactions by two of the Respondent's employees, including the Claimant.
 11. The Claimant was issued with a letter of inquiry on 27th March 2023 to which she responded on 29th March 2023. She was subsequently issued with a show cause letter on 11th April 2023, to which she responded on 13th April 2023.
 12. The Claimant was invited to a disciplinary hearing on 3rd May 2023 at which she chose not be accompanied. The Claimant was found to have been negligent and in breach of the Respondent's policies and procedures.
 13. The Disciplinary Committee recommended the Claimant's separation from the Respondent. The Claimant was therefore issued with a termination notice on 23rd May 2023.
 14. The Respondent states that the Claimant was paid all her terminal dues, including 3 months' salary in lieu of notice. She was also issued with a certificate of service dated 8th June 2023.



15. The Respondent further states that it recently became aware of further gross misconduct by the Claimant, after the termination of her employment. A suit being Milimani HCCC No. E122 of 2023 has been brought by the Respondent against the Claimant.
16. The Respondent maintains that the Claimant has no prima facie case with any probability of success.
17. Regarding the Claimant's mortgage facility, the Respondent states that according to its Staff Loan Policy, as amended in December 2022, the interest will convert to commercial rate in the month of November 2023.
18. The Respondent asserts that it has a right to adjust interest rates on staff loans or commercial loans as it wishes as long as it is done within the law.
19. The Respondent submits that this is an issue in which the Claimant could be compensated by damages if her claim is successful. According to the Respondent, the Claimant does not stand to suffer any loss that is not capable of being compensated in damages by virtue of the interest rate being adjusted in accordance with the law and the Staff Loan Policy.
20. The Respondent terms the prayer for an order of injunction barring it from appointing a Branch Manager for its Westlands Branch as unenforceable as the Branch cannot run indefinitely without a Branch Manager.
21. The Respondent adds that it has already filled the vacancy with a new Branch Manager having been appointed on 1st June 2023.
22. The Claimant filed a further affidavit sworn on 13th September 2023, stating that prior to the incident in issue she had a clean employment record. She states that the Respondent only took up the matter after an article on alleged money laundering appeared on social media.
23. The Claimant accuses the Respondent of sacrificing her while sparing the staff directly involved in handling the transactions in issue.
24. The Claimant reiterates that she was subjected to an unfair disciplinary process. In particular, she complains that she was kept waiting for long hours and was denied access to her emails, which she needed for her defence.
25. The orders sought by the Claimant in this application fall within the realm of interlocutory injunctions and the conditions upon which such orders may be granted were established in *Giella v Cassman Brown & Co Ltd* (1973) E.A as follows:
 - a. That the applicant has a prima facie case with a probability of success;
 - b. That if the order sought is not granted, the applicant will suffer irreparable injury which cannot be adequately compensated by an award of damages;
 - c. That in case of doubt, the Court will apply the balance of convenience test.
26. In their written submissions, both parties cited the Court of Appeal decision in *Mrao v First American Bank of Kenya & 2 others* [2003] KLR where a *prima facie* case was defined as:

“a case which on the material presented the court or tribunal properly directing itself will conclude that there exists a right which has been infringed by the opposite party as to call for an explanation or a rebuttal from the latter.”



27. The Claimant lays a claim for unlawful and unfair termination of employment. She complains that she was subjected to an unfair disciplinary process and accuses the Respondent of using unfounded allegations of money laundering to punish her.
28. The affidavits sworn by the parties in this application present many contested issues of fact regarding the substantive justification and procedural fairness of the termination of the Claimant's employment. These are issues to be canvassed at the main trial and the question before the Court at this stage is what conservatory orders can issue.
29. Although the Claimant seeks reinstatement as a primary prayer, the Respondent states that another employee has already been deployed to take up the position of Manager at the Westlands Branch.
30. In the submissions filed on behalf of the Respondent, reference was made to the decision in *Habiba Ali Mursal & 4 others v Mariam Noor Abdi* [2018] eKLR where it was held that an injunction will not be granted where the action sought to be restrained has already taken place.
31. In light of the averment by the Respondent, which has not been challenged, I decline to grant an injunction regarding the filling of the position previously held by the Claimant.
32. Regarding the prayer for an injunction restraining the Respondent from adjusting the interest rate applicable to the Claimant's mortgage facility, I reiterate the finding by this Court in *Abraham Nyambane Atsiago v Barclays Bank of Kenya* [2013] eKLR that where substantive questions on the legality of termination of employment are raised, the employer's right to vary preferential interest rates is stayed, pending determination of these questions.
33. I have already made a determination that there are many contested issues regarding the substantive justification and procedural fairness of the termination of the Claimant's employment, which in my view constitute a prima facie case as defined in the *Mrao Case* (*supra*).
34. On the question of irreparable harm, I have this to say; if the interest rate applicable to the Claimant's mortgage is varied to commercial rate, there is a real likelihood of default especially because she is now out of employment. I am satisfied that the resultant consequences would not be capable of remedy by an award of damages.
35. Finally, is the balance of convenience, which was defined in *Bryan Chebii Kipkoech v Barnabas Tuitoek Bargoria & another* [2019] 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.”
36. For the reasons explained in the foregoing part of this ruling, I find and hold that the balance of convenience tilts in favour of the Claimant.
37. I therefore issue an order of injunction restraining the Respondent from converting the interest applicable to the Claimant's mortgage facility from staff rate to commercial rate, pending the hearing and determination of the main claim. This order is subject to the Claimant continuing to service her facility.
38. The costs of the application will be in the cause.
39. Orders accordingly.



DELIVERED VIRTUALLY AT NAIROBI THIS 9TH DAY OF NOVEMBER 2023.

LINNET NDOLO

JUDGE

