



Jubilous v Cooperative Bank of Kenya Ltd (Employment and Labour Relations Cause 030 of 2023) [2023] KEELRC 3270 (KLR) (11 December 2023) (Ruling)

Neutral citation: [2023] KEELRC 3270 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE 030 OF 2023
HS WASILWA, J
DECEMBER 11, 2023**

BETWEEN

KIPTOO JUBILOUS CLAIMANT

AND

COOPERATIVE BANK OF KENYA LTD RESPONDENT

RULING

1. This ruling is in respect of the Claimant/ Applicant’s Notice of motion dated 16th December, 2022, brought under Section 12 (4) of the [Employment and Labour Relations Court Act](#), Section 17 and 28 of [Employment and Labour Relations Court \(Procedure\) Rules](#) 2016, Section 74 of the [Labour Relations Act](#) No. 14 of 2007 and all other enabling provisions of the law, seeking for the following orders; -
 1. That the Honourable Court be pleased to certify this application as being urgent and the same be heard ex-parte in the first instance and service be dispensed with.
 2. That the Honourable Court do issue an interim ex-parte orders restraining the Respondents by themselves and/or their agents and/or principals from selling and/or attempting to sell by public and/or private auction the property of Jubilous Kiptoo, Title Number Kapsabet/ Kapsabet Block 4 (lemook ‘A’)/35, until the hearing and determination of this application inter-partes.
 3. That this Honourable Court do issue an order prohibiting the Respondents themselves and/or by their recognized agents and/or principals from selling and/or attempting to sell and/or auction the properties of Jubilous Kiptoo, Title Number Kapsabet/Kapsabet Block 4 (Lemook ‘A’)/35, until the claim (ELRCC/E308/2022) before this court is heard and determined.
 4. That this Honourable Court do issue an injunctive order compelling the Respondents to stop the already envisaged sale of property of JUbilous Kiptoo, Title Number Kapsabet/Kapsabet



Block 4 (Lemook 'A')/35, by public/private action until the hearing and determination of this application inter-parties.

5. That this Honourable court do issue an order compelling the Respondents/Chargee to stop and reverse charging commercial interest rate on all loans secured by the charge property Jubilous Kiptoo, Title Number Kapsabet/Kapsabet Block 4 (Lemook 'A')/35, until the claim (ELRCC/E308 of 2022) is heard and determined.
 6. That this Honourable court do issue an order compelling the Respondents/Chargee to stop charging interest and reverse interest already loaded on loans/advances to Mr. Jubilous Kiptoo (Applicant/Chargor) until the claim in Cause No. E308 of 2022 is heard and determined.
 7. That this Honourable Court do issue restraining orders to the Respondent/Chargee from demanding loans repayments by the Applicant/Chargor until the claim in Cause No. 308/2022 is heard and determined.
 8. That this Honourable Court do award costs in favour of the Applicants as foresaid.
2. The application is based on the grounds on the face of the application and the supporting affidavit of the Applicant, sworn on 16th December, 2022.
 3. The applicant states that he was employed by the Respondent on 11th April, 2011 as a clerk and confirmed on permanent basis on 3rd July, 2012, then terminated on 17th February, 2020 on the basis of unsatisfactory performance.
 4. He stated that his employer, the Respondent had signed a Collective Bargaining Agreement which provided interalia for Owner occupier house allowance. On the strength of that CBA, he applied for various facilities including Residential property mortgage of Kshs 3,600,000, Commercial staff loan of Kshs. 900,000 and personal loan of Kshs 460,000 which were to be recovered for the remained of the employment period which was 60 years or within 25 years, which ever was earlier. He stated that the terms of engagement with the Respondent was based on her employment and the interest rate for staff members was at 6%.
 5. The Applicant states that the loan facilities listed above were secured by charging his title reference number Kapsabet/Kapsabet Block 4 (Lemook 'A')/35 and the that he was to repay the loan on monthly installment of Kshs. 43,586.84/=.
 6. The Applicant serviced the said loan until his termination when he lost his monthly salary and was unable to service the said loan. That he immediately protested the termination on being unfair by filling this case which is pending hearing and determination.
 7. He states that upon being terminated, the Respondent demanded for full payment of the loan facilities by its letter of 11/10/2022 , which was to be paid in three months and the full loan was due by 10/01/2023 which is too short a period to raise the full amount subjecting the claimant to servitude.
 8. He stated that since the matter of unfair/unlawful termination of employment is pending before the Court, he stands to suffer irreparable loss, damage and injury to his reputation.
 9. He contends that the Respondent who is the Chargee will not suffer any prejudice as the said loan is fully secured by the suit property.
 10. He contends that if the Respondent/Chargee is allowed to proceed with the sale or auction of the Applicant's/Chargor's property, it would be highly prejudicial and punitive to him.



11. He states that the Respondent's/Chargee's behavior and hurry in attempting to sell by auction the Applicant/Chargor's property is bad in law since it pre-empts the outcome of the claim already in court.
12. The Applicant/Chargor in the aforesaid statement of claim is destined to suffer irreparable loss if this application is not granted and he will be subjected to unnecessary miserable life due to the double jeopardy of losing employment and property.
13. The Application is opposed by the Respondent who filed a replying affidavit deposed upon by Duncan Matisero, the Legal manager of the Respondent, on the 12th January, 2023.
14. The affiant stated that the averment contained from paragraph 1.1 to 1.7 of the Claimant's Supporting Affidavit is true save that the staff rate of interest of 6%p.a. charged on the said loans was subject to change to commercial rate upon the termination and/or cessation of the Claimant's employment with the Bank for any reason other than retirement.
15. He stated that indeed the Bank issued the Claimant three months' notice of its intention to exercise its statutory power of sale owing to the Claimant's default. He added that the allegation that the claimant will suffer immense loss if the property is sold has no legal basis whatsoever as he has defaulted in the repayment of the loan facility aforesaid.
16. He states that it was a term of the Charge registered over title No. Kapsabet/Kapsabet Block, 4[Lemmok "A"/35 | "the Suit Property") that in the event of default, the Claimant to pay the loan amount on demand. Further that the Bank would be at Liberty, among others, to exercise its statutory power of sale. This fact was in the knowledge of the Claimant, and therefore the Claimant's allegation that he would suffer immense loss has no merits whatsoever. Also that the Claimant's claim against the Bank for the alleged unfair and unlawful termination is pending cannot be a ground for an injunction order.
17. The deponent states that the claimant's loans are not being serviced as such they continue to accrue interest which stood at Kshs 6,454,533.76 as at 17th February, 2020, which will diminish the value of the security held by the Respondent owing to the accrual of interest.
18. He states that based on the facts herein the allegations that the claimant's case has high probability of success is not true and at any rate, the same cannot be a basis to support an injunctive order.
19. The affiant states that under section 49(1)(c) of the Employment Act, 2007, the maximum compensation for wrongful dismissal and unfair termination is the equivalent of a number of months' wages or salary not exceeding twelve months of the gross monthly wage/salary of the employee at the time of dismissal.
20. Consequently, that the Claimant at the time of his dismissal was earning a gross salary of Kshs.168,098.85 and therefore the maximum award for compensation in the event his claim succeeds is Kshs.2,017,186.20, so that even if the Claimant eventually succeeds, the maximum compensation payable to him would be the said sum of Kshs. 2,017,816.20, which is far much below the debt amount due and owing from him.
21. He states that the bank will suffer immense loss if the orders sought are granted because, as stated in the preceding paragraph, the value of the security held by the Bank would be diminished and/or diluted by the further accrual of interest since the loan is not being serviced.



22. In conclusion, the deponent states that the Applicant has not met and/or satisfied the principles set out in the celebrated case *Giella vs Cassman Brown & Co. Ltd* [1973], EA 358 to warrant an injunction order being granted.
23. He therefore prayed for the application to be dismissed with costs.
24. Directions were taken for the application to be canvassed by written submissions

Applicant's Submissions.

25. The applicant submitted that he was employed by the Respondent and as an employee, he was offered various loan facilities under employee terms which interest rates were at 6%. That upon termination, which is contested and subject for determination in this claim, the Respondent changed the interest rates to commercial rates of 13% and on 27th June, 2022, the Respondent demand for full payment of the loan within 3 months, failure to which, they would proceed and liquidate the security deposited with the Bank.
26. The Applicant argued that the move made by the Respondent is unfair because the termination, the cause of all his troubles, was unfair because it is based on allegations of unsatisfactory performance which was not substantiated and the proper disciplinary procedure was not followed.
27. It was submitted that this Court has powers to grant the prayers sought as was held in the case of *Banking Insurance and Finance Union v Consolidated Bank of Kenya Limited* [2020] eKLR. Consequently, he urged this Court to grant the orders sought restraining the respondent from selling the applicant's property Title Number Kapsabet/Kapsabet Block 4 (Lemook 'A')/35 and charging interest rates above the 6% or the current prevailing staff interest rates pending the hearing and determination of the main claim.

Respondent's Submissions

28. The Respondent submitted on two prayers on the application; That this Honourable Court do issue an injunctive order compelling the Respondent to stop the already envisaged sale of property Title No Kapsabet/ Kapsabet Block 4 (Lemook 'A')/35 by public/ private auction until the hearing and determination of this application inter-parties and the prayer that this Honourable Court do issue an order compelling the Respondent/ Chargee to stop and reverse charging commercial interest rate an all loans secured by the charged property Title No. Kapsabet/ Kapsabet Block 4 (Lemook 'A')/35 until the claim in the (ELRCC/E308 of 2022) is heard and determined.
29. It was submitted that the applicant admitted to taking up loan facilities adding up to Kshs.4,960,000/ and that he was repaying the same by monthly instalment of Kshs.43,586.84 but that upon termination he has not services the said loan till date. It is argued that as at 17th February, 2020, the amount due and owing from the Claimant was Kshs.6,454,533.76. Therefore, that it is evident that the Applicant does not deny being indebted to the Respondent but is only objecting to the Respondent's right to exercise its statutory power of sale, because he expects that the award that he is likely to be given by this Honourable Court at the final determination of his claim herein will go towards the payment of the said loan.



30. Flowing from these facts, the Respondent cited the case of *East African Development Bank v Hyundai Motors Kenya Limited* [2006], where the Court of Appeal cited with approval the case of *Giella v Cassman Brown Ltd* (1973) EA that set the conditions for granting of an interlocutory to include:

“First, the Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory Order will not normally issue unless the Applicant might suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide the application on the balance of convenience.”

31. Accordingly, it was submitted that the Applicant has not satisfied the said principles/conditions to warrant an injunction order of this Honourable Court.

32. The Respondent went further and submitted on the three condition and argued on whether the applicant has a prima facie case, that the Applicant has not met and/or satisfied the said condition in that he has himself admitted being indebted to the bank. Secondly, the Applicant in his application is seeking to tie the Respondent’s right of statutory power of sale by relying on the likely award that he might be granted by this Honourable Court at the final determination of his claim.

33. Based on the above, the Respondent submitted that the award that this Honourable Court may at the end of the hearing and determination of the claim herein is a matter of the Court’s discretion and which in other words means that the Court may or may not make any award in his favour. It is therefore not within the powers of the Claimant to argue that Court has to award him damages at the final determination of his claim and which he will apply to pay off the loan.

34. It was also submitted that even if the claimant succeeds in his claim, Section 49 (1)(c) of the *Employment Act*, 2007 provides for a maximum compensation that may be award to an employee in case of wrongful and unfair termination of employment. It provides that in case of wrongful and unfair termination, the Court may award the equivalent of a number of months’ wages or salary not exceeding 12 months which translates to Kshs. 2,017,186.20 for the claimant who was paid a monthly gross salary of Kshs. 168,098.85. which amount cannot fully repay the loan owing which stood at Kshs. 6,454,533.76 as at 17th February, 2020.

35. With regard to the argument that the claimant should be allowed interest rate of 6% on the loan owing, the Respondent submitted that as per the letter of offer and in particular the Special Conditions set out at page 2 of each of the said letters of offer, sub-paragraph b thereof provides that

“b. Upon leaving he bank’s service for any reason other than retirement a commercial rate of interest will be charged.”

36. Accordingly, that the parties are bound by the terms of their contract and the Applicant having accepted the said condition and his termination of employment not having occurred through retirement, he is bound to pay interest at commercial rate, since he lost the privilege and/or benefit upon his termination. To support this view, the Respondent cited the case of *National Bank Of Kenya Ltd Pipeplastic Samkolit (K) Ltd & Another* [2001]eKLR, where the Court of Appeal while dealing with a similar issue expressed itself thus:

“A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved...”

37. Therefore, that since the loan was not procured by any form of coercion, fraud or undue influence and being that the claimant was terminated and not retired, he ought to pay the said loan as per the



agreement, as such the applicant has not satisfied the condition that he has a prima facie case with a probability of success to warrant an injunction order of this Honourable Court and his application must therefore fail.

38. On the second limb of suffering irreparable loss, it was argued that there is nothing unique with the suit property reference number Kapsaret/Kapsaret Block 4{Lemmok "A"}/35. Therefore, if the Applicant's claim ever succeeds, an award of damages would be an adequate remedy and the Respondent being a financial institution would be in a position to meet such an award. Furthermore, that the Applicant has not deponed to any intrinsic value attaching to the said property and at any rate, the Applicant having charged the same to the bank to secure the said loan facilities, the same became a commercial commodity for sale in case of default. To support this argument, they relied on the case of *AL-Jalal Enterprises Limited v Gulf African Bank Limited* [2014]eKLR, where the Court cited the case of *Bii v Kenya Commercial Bank Ltd* [2001] KLR 458, where Justice Ringera [as he then was] while dealing with an injunction application expressed himself thus:

“Once a property is offered as security it by that very fact becomes a commodity for sale. There is no commodity for sale whose loss cannot be compensated by damages.”

39. With regard to the third principle, the Respondent submitted that if an injunction order is granted, the value of the security held by the bank would be diminished and/or diluted by the further accrual of interest since the loan is not being serviced and that by itself would expose the Respondent greatly. Secondly, that if an injunction order is granted, the said sum of Kshs.6,454,533.73 due and owing to the Respondent continue to attract further interest and consequent to which the Applicant himself would be called upon to pay a higher amount , which would similarly expose him to higher cost.
40. It was therefore argued that the balance of convenience tilts in favor of the Respondent as against the Applicant which in effect means that an injunction order should not issue.
41. Accordingly, the Respondent prayed for the application to be dismissed with costs for failing to meet the three conditions set out in Giella's case [supra].
42. I have examined all the averments and submissions of the parties herein.
43. The reason the claimant relies upon to seek the orders sought is that he has a pending matter before this court on unfair termination.
44. It is indeed true that the claimant has sued his employer for unfair termination which claim is still pending before this court.
45. In the interim he seeks not to be punished by sale of his land which is charged to his employer for the loan pending.
46. As it were, the employer still has a charge on the land in question.
47. The employer will still have a chance to exercise her statutory power of sale if the claim fails or if it does not realize its full value.
48. In the circumstances of the case, I see no prejudice that the employer, the respondent will suffer if the orders sought are granted.
49. I therefore exercise my discretion and allow the application by granting an injunction to prohibit the respondents by themselves and/or by their recognized agents and/or principals from selling and/or attempting to sell and or auction the properties of Jubilous Kiptoo, Title No. Kapsabet/Kapsabet Block 4 (Lemook 'A') 35 until this claim is heard and determined.



50. Costs in the cause.

RULING DELIVERED VIRTUALLY THIS 11TH DAY OF DECEMBER, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Mubea holding brief for Kimondo for Respondent

Claimant – absent

Court Assistant – Fred

