



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO 871 OF 2019**

**LILIAN RHODA ADHIAMBO.....CLAIMANT**

**VERSUS**

**BARCLAYS BANK OF KENYA LIMITED.....RESPONDENT**

**RULING**

1. By her Notice of Motion dated 18<sup>th</sup> October 2021, the Claimant seeks the following orders:

- a) An order of injunction, restraining the Respondent, whether by itself, its servants or agents from levying any bank charges or interest rate on the Claimant's loan facility, at any other rate of interest save for the allowed staff interest rate not exceeding 6% of per annum, pending the hearing and determination of the claim;
- b) An order compelling the Respondent to compute and reconcile the already overcharged interest on the Claimant's loans and amount overcharged be utilised to settle the Claimant's loans;
- c) An order of injunction restraining the Respondent, whether by itself, its servants or agents from disposing of, selling, transferring or taking possession or in any way dealing with the Claimant's property RTA L.R No. 13924 (Original No. 2144/8).

2. The Motion is supported by the Claimant's own affidavit and is based on the following grounds:

- a) The Claimant took a staff loan of Kshs. 3,860,000, a further staff loan of Kshs. 9,000,000 and a credit card advance of Kshs. 128,000, which she had been paying regularly at a staff rate of 7% and 6% respectively;
- b) The Claimant had a legitimate expectation that for the duration of the loan period, she would continue with her employment with the Respondent and continue to service the loans at preferential rates as stated in the letter of offer;
- c) The Respondent wrongfully terminated the Claimant's employment on 28<sup>th</sup> November 2019, with no justifiable reasons whatsoever, after conducting a sham disciplinary hearing. The Claimant was issued with a termination notice the following day after attending the disciplinary hearing that was improperly conducted as it had a predetermined outcome;
- d) As an employee of the Respondent, the Claimant had received several loan facilities which amounted to Kshs. 12,988,00 and the Claimant had been dutifully servicing the loan facilities from the date of disbursement to the date of unlawful and unfair termination of her employment;
- e) After the termination of the Claimant's employment and in breach of the loan facility letters of offer dated 8<sup>th</sup> July 2013 and 8<sup>th</sup> July 2015, the Respondent erroneously increased the interest rate on the loan facilities to 8.5 % plus a margin of 4% up from the staff interest rates of 6% on the loan facilities and 7% on the credit card balance respectively;
- f) The Claimant, vide a Notice of Motion application dated 20<sup>th</sup> December 2019, sought orders *inter alia* that the Respondent be restrained from charging any bank charges or interest rate on the loan facilities at 8.5% plus a margin of 4% or any other rate of interest save for the allowed charges for staff accounts and staff interest rates of 6% and 7%. However, the Court held that the prayer for interlocutory injunction lacked merit as the Claimant had not sought an order for reinstatement or re-engagement in the Memorandum of Claim dated 20<sup>th</sup> December 2019;
- g) Consequently, on 27<sup>th</sup> September 2021, the Claimant filed an amended Memorandum of Claim seeking *inter alia* that the

Claimant be reinstated on the same or similar terms and a permanent injunction be issued restraining the Respondent from charging any bank interest rates on the loan facilities at commercial rates or any other rate of interest save for the allowed charges for staff accounts and staff interest not exceeding 6% per annum;

h) The Respondent continues to charge commercial interest rates on the loan facilities at 8.5% plus a margin of 4%;

i) The Respondent deliberately failed/neglected and/or refused to amalgamate/restructure the Claimant's loans despite numerous requests by the Claimant, despite having done the same for other staff and customers;

j) The Respondent had issued a statutory notice dated 17<sup>th</sup> September 2021, giving three (3) months' notice for the Claimant to clear all outstanding loan amounts, failing which the Respondent would realise the security in exercise of its statutory power of sale;

k) The Claimant stands to lose the suit property, RTA L.R No. 13924 (Original No. 2144/8 through an irregular and invalid statutory power of sale by the Respondent and hence suffer irreparable harm;

l) The Claimant is out of employment after termination by the Respondent, with no source of income;

m) The main claim of unlawful and unfair termination of the Claimant's employment is awaiting hearing and determination before the Court;

n) The Claimant has established a prima facie case for granting of the orders of injunction against the Respondent as prayed in this application;

o) The Respondent does not stand to suffer any substantial prejudice if this Court were to grant the orders sought by the Claimant herein. In any event, the balance of convenience tilts in favour of the Claimant;

p) The Claimant is willing to continue repaying the loans at staff rates until payment in full;

q) If the orders sought herein are not granted, the Claimant risks loss of her home situated on RTA L.R No. 13924 (Original No.2144/6) and be rendered homeless with her two children;

r) It is in the interest of justice and fairness that this Court grants the orders sought.

3. In its Grounds of Opposition dated 22<sup>nd</sup> November 2021, the Respondent states that:

a) The application is *res judicata* as the issues cited therein have been heard and determined on merit by the Court in a ruling delivered on 4<sup>th</sup> March 2021;

b) Regardless of the interest rates applicable, the Claimant has altogether defaulted in the monthly repayment of the loan facilities. The Claimant intentionally failed to disclose this material fact. Due to non-disclosure of material facts by the Claimant, the *ex parte* orders ought to be set aside;

c) A dispute on the interest chargeable on a debt secured by a legal charge without more, is not a ground for restraining a chargee from exercising its statutory power of sale;

d) The application is an abuse of the court process.

4. The Respondent also filed a replying affidavit sworn by its Head of Employment Relations and Wellness Function, Vaslas Odhiambo, on 22<sup>nd</sup> November 2021.

5. Odhiambo depones that the employer-employee relationship between the Claimant and the Respondent terminated on 29<sup>th</sup> November 2019, on account of summary dismissal.

6. He points out that until the termination of her employment, the Claimant had loan facilities, which were subject to subsidised staff interest rates, this being a fringe benefit of the employment relationship.

7. Odhiambo further depones that upon termination of the employment contract, the interest rates applicable to the Claimant's loan facilities converted from the preferential staff rates to commercial rates, pursuant to the terms and conditions of staff loans which provided that the preferential interest rates would cease to apply in the event of termination of employment for whatever reason.

8. Odhiambo states that following her termination, the Claimant filed a claim together with an application dated 20<sup>th</sup> December 2019, seeking injunctive orders similar to the ones sought in the present application. The application dated 20<sup>th</sup> December 2019 was heard and dismissed by the Court in its ruling delivered on 4<sup>th</sup> March 2021.

9. According to Odhiambo, the present application is an abuse of the court process, aimed at irregularly varying the decision of the Court.

10. Odhiambo accuses the Claimant of failing to disclose that she had defaulted in repayment of the loans. He adds that arrears had accrued to Kshs. 15,404,846.80 as at 6<sup>th</sup> September 2021.

11. Odhiambo takes the view that a dispute on applicable interest rates should not be a reason for restraining the Respondent from exercising its statutory power of sale. He points out that the Claimant was not making monthly repayments and it is this failure that resulted in the issuance of a statutory notice.

12. The Claimant swore a supplementary affidavit on 15<sup>th</sup> December 2021, by which she states that she has been paying her monthly instalments in respect of her loans with the Respondent, the last payment being on 27<sup>th</sup> November 2021.

13. In response, Vaslas Odhiambo swore a further affidavit on 6<sup>th</sup> January 2022, in which he maintains that the Claimant has defaulted in settling loan facilities advanced to her and the loans continue accruing penalty interest.

14. Making reference to banking records of the accounts held by the Claimant Odhiambo states that:

a) The Respondent disbursed to the Claimant's Account No. 2028585015 loan facilities amounting to Kshs. 9,000,000. Odhiambo points out that the Claimant has been in default since 6<sup>th</sup> April 2021 and only made a payment of Kshs. 30,000 on 29<sup>th</sup> November 2021;

b) The Respondent disbursed to the Claimant's Account No. 203962564 loan facilities amounting to Kshs. 4,680,000. Odhiambo states that the Claimant has failed in discharging her loan repayment obligations since 6<sup>th</sup> April 2021 and she only made a payment of Kshs. 30,000 on 29<sup>th</sup> November 2021;

c) The Respondent also disbursed loan facilities amounting to Kshs. 3,860,000 to the Claimant's Account No. 2033835178. Odhiambo avers that since 25<sup>th</sup> February 2020, the Claimant has not made any repayments.

15. The first issue for determination before me is whether the present Motion is *res judicata* in light of a similar application heard and determined by my brother **O.N Makau J.** The first port of call is Section 7 of the Civil Procedure Act which provides that:

**7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.**

16. In the written submissions filed on behalf of the Claimant, reference was made to the decision in ***Independent Electoral & Boundaries Commission v Maina Kiai & 5 others [2017] eKLR*** where the Court of Appeal stated the following:

***“Thus for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;***

***(a) The suit or issue was directly and substantially in issue in the former suit.***

***(b) The former suit was between the same parties or parties under whom they or any of them claim.***

***(c) Those parties were litigating under the same title.***

***(d) The issue was heard and finally determined in the former suit.***

***(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”***

17. In its decision in ***John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR*** the Court of Appeal restated the rationale behind the *res judicata* rule as follows:

***“The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court's limited resources and timely determination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unravelling uncontrollably.”***

18. The Claimant's position is that the application dated 20<sup>th</sup> December 2019 was not determined on merit and the issues raised in the present Motion are therefore not *res judicata*. In pursuing this line, the Claimant clung on the conclusion reached by my brother Judge that because the Claimant had not sought reinstatement or re-engagement in her main claim, then she had not established a *prima facie* case for grant of interlocutory injunctive relief. The Claimant even went ahead to amend her claim to include a prayer for reinstatement.

19. I have had occasion to read the ruling delivered by **O.N Makau J** on 4<sup>th</sup> March 2021. In the final paragraph, the learned Judge states as follows:

***“Consequently, I find and hold that the prayer for interlocutory injunction should be declined for lack of merits. Likewise the prayer for computation and refund of the amount charged as interest above the preferential staff interest is declined because that order is in the nature of a final relief which can only be granted on merits upon trial. In the end, the entire application is dismissed with costs.”***

20. There is nothing in the aforesaid ruling to suggest that the application was determined on the basis of a technicality. The learned Judge, with whom I exercise concurrent jurisdiction, considered the application on merit and returned a verdict.

21. To allow the Claimant a second bite at the cherry on the basis of an amendment of her claim, which was informed by a finding in the ruling of 4<sup>th</sup> March 2021, would be akin to allowing a party to fix their case on the fly, which is a clear case of abuse of the court process.

22. That said, I find and hold that the issues raised in the present application are *res judicata* and there is nothing more to say about them.

23. The Claimant’s Motion dated 18<sup>th</sup> October 2021 is therefore dismissed. The interim orders granted on 20<sup>th</sup> October 2021 are vacated.

24. Each party will bear their own costs.

25. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 27<sup>TH</sup> DAY OF JANUARY 2022**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Muoki h/b for Mr. Kanjama for the Claimant

Mr. Angwenyi h/m for Mr. Mogere for the Respondent