



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO E046 OF 2022**

**MARK THEOPHIL ODERO ADOYO.....CLAIMANT**

**VERSUS**

**DIB BANK KENYA LIMITED.....RESPONDENT**

**RULING**

1. By his Notice of Motion dated 27<sup>th</sup> January 2022, the Claimant seeks the following interim reliefs:

- a) An order of injunction restraining the Respondent, its agents and/or servants or any person acting on its behalf from varying, adjusting or increasing the interest rate on the facilities granted to the Claimant during his employment from staff rate to commercial rates in Accounts No. 001IJMD191150002 and 001IJMD191150001 held with the Respondent, pending hearing and determination of the suit;
- b) An order of injunction restraining the Respondent, its agents and/or servants or any person acting on its behalf from in any way harassing and/or victimising the Claimant with regard to the facilities granted to the Claimant during his employment at staff rate, pending the hearing and determination of the suit.

2. The Claimant further asks that the suit be heard on priority basis.

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

- a) The Claimant is a former employee of the Respondent, having been employed in 2017 as the Head of E-Channels. During his employment, the Claimant was advanced, as part of the terms of employment, two loan facilities in the sum of Kshs. 4,000,000 and Kshs. 2,100,000 respectively, which were secured by both his matrimonial home and ancestral land;
- b) That during the pendency of his employment with the Respondent, due to a change in leadership, the Claimant was subjected to harassment, humiliation and degradation, with an aim of creating untenable work conditions to lower his productivity. As a result, the Claimant raised these concerns with the Respondent's overall governing body, the Board Governance and Remuneration Committee;
- c) The Claimant, upon objecting to his treatment at the Respondent Bank, was unprocedurally terminated as a form of retaliation to his protest on the conditions he was facing at the workplace;
- d) The Claimant has a *prima facie* case, with a chance of success for the following reasons *inter alia*:
  - i) He was not given a hearing, as is required by law, before his termination;
  - ii) He never received any notice to show cause neither was he presented with any notice that his employment was at risk of termination;
  - iii) His termination was a form of retaliation by his former employer;
  - iv) His terminal dues have been wrongfully and illegally withheld by the Respondent.
- e) The Respondent has declined and/or refused to release the Claimant's terminal benefits and to issue a Certificate of Service as

required under Section 51 of the Employment Act, 2007 despite the Claimant having gone through clearance procedures. The wrongful and unlawful withholding of terminal dues and Certificate of Service is malicious and a further retaliation by the Respondent and a gross violation of the Claimant's right to fair labour practices guaranteed under Article 41(1) of the Constitution;

f) The Respondent, aware that the Claimant may proceed to court, has engaged in further retaliation through its agents and servants who have been harassing the Claimant regarding the aforesaid loan facilities, despite illegally and unlawfully holding his terminal dues. The Claimant is bound to suffer irreparable damage and loss as he may lose his matrimonial home and ancestral land on account of a conspiracy by the Respondent's officers, to illegally withhold his terminal dues, which he can use to offset the loan and this injury and loss to his family cannot be adequately compensated through damages;

g) The facilities have been secured by the Claimant's matrimonial home and ancestral land and the Respondent's deliberate attempt to frustrate the Claimant, by withholding his terminal dues will render the Claimant and his family destitute in furtherance of the Respondent's scheme to retaliate against the Claimant;

h) Unless the Court intervenes, the Claimant will be subjected to an unfair and unjust practice of paying advanced facilities at a commercial rate, by the Respondent, which unprocedurally and abruptly terminated the services of the Claimant devoid of set laws and legal procedures, allowing the Respondent to benefit from its own wrongdoing;

i) Unless the Court intervenes, the Claimant will be forced to pay the higher interest rates, without the benefit of substantially reducing his principal amount by offsetting his terminal dues and this Court ought to grant orders sought in order to prevent the Respondent from benefitting from such a predatory practice;

j) It is in the interest of justice that the orders sought be granted.

4. In his affidavit in support of the Motion, the Claimant states that he was ready and willing to continue servicing the loan facilities at the preferential rate.

5. The Respondent Bank opposes the Claimant's Motion by a replying affidavit sworn by its Legal Manager, Farida Ghazi, on 8<sup>th</sup> February 2022.

6. Ghazi states that the Claimant's application has been filed belatedly and has been overtaken by events for the following reasons:

a) That it is the Claimant's own evidence, and indeed the factual situation that the services of the Claimant were terminated via a letter dated 31<sup>st</sup> March 2021;

b) That the Claimant at paragraph 13 of his affidavit avers that he did receive a letter on 8<sup>th</sup> June 2021, notifying him of the reverting of the facilities to commercial rates, with effect from 8<sup>th</sup> July 2021;

c) That the implication of the above notification is that the commercial rates have already been effected for a period close to one year, which information has always been well within the knowledge of the Claimant.

7. Ghazi depones that the Facility Letters issued by the Respondent to its employees set out the rates which would apply to the facility during the period of employment and further, the facility conditions provided *inter alia*, that upon leaving the Bank's employment, the Claimant would enjoy the staff rates for a grace period of 3 months after which the facilities would revert to commercial rates.

8. Ghazi further depones that these conditions required the Claimant to either pay off the loan facilities at the time of leaving employment, or in the alternative, to avail a proposal for settlement of the outstanding balance, and it is in that regard that the applicable rates would change to commercially applicable rates, upon the lapse of the grace period.

9. She adds that the above stated terms were known to the Claimant and other employees from commencement and they were not only commercial in nature, but also a distinct and separate kind of legal relationship that binds the parties to the agreement.

10. It is also deponed that through the letter of termination, the Claimant was notified of the outstanding amounts on his facilities and the benefits payable to him, and he was called upon to give a proposal as to how the said loan amount would be settled. According to Ghazi, the balance outstanding on the loan accounts exceeded the benefits payable to the Claimant, in which case the Bank would have the right of setoff, as more particularly set out in the Facility Letters.

11. Ghazi states that it is as a result of the Claimant's failure to comply with the above stated request, by specifically failing to render a proposal, that the Bank notified him of the change of the applicable rates on the outstanding balance and the said rates had been applicable since the said notification.

12. The Respondent terms the Claimant's application as an afterthought, seeking to have the Claimant avoid his commercial obligations, while he was aware of the fact that he was no longer an employee of the Bank and hence he could not seek to benefit from a privilege extended to employees.

13. Regarding the termination of the Claimant's employment, Ghazi states that there was a justifiable reason for it and that the Claimant was taken through due process.

14. By his application, the Claimant seeks interlocutory injunctive orders and in considering his plea, the place to begin is ***Giella v Cassman Brown & Co Ltd (1973) E.A*** where the conditions upon which such an order may be granted were set 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 would not adequately be compensated by an award of damages;*
- c) *That in case of doubt, the Court will apply the balance of convenience test.*

15. A *prima facie* case was defined by the Court of Appeal in ***Mrao v First American Bank of Kenya & 2 others [2003] KLR*** 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.”***

16. The Claimant lays a claim for unlawful and unfair termination of employment. In particular, he complains that he was not afforded an opportunity to be heard, prior to the termination. Further, the Claimant accuses the Respondent of withholding his terminal dues, which if properly applied, would have gone towards reducing his loan burden.

17. In defending its action to withhold the Claimant’s terminal dues, the Respondent states that the Claimant has not presented a loan repayment plan as required. The Court was however unable to understand why the Respondent did not apply the terminal dues to offset part of the loan balance, which as stated by Ghazi, was permissible under the Facility Letters.

18. The Respondent pursued the argument that the loan agreement under which the loan facilities were extended to the Claimant, was distinct from the Claimant’s employment contract. The Respondent therefore took the view that the termination of the Claimant’s employment did not in any way affect the terms of the loan agreement, which included a provision that the applicable interest would revert to commercial rates, upon the Claimant’s exit from the Respondent’s employment.

19. While it is true that the subject loans were granted upon execution of a stand-alone agreement, the provision of preferential interest rates on the basis of the Claimant’s employment created an indefeasible nexus between the Claimant’s employment and the loan facilities.

20. In ***Banking Insurance & Finance Union (Kenya) v Consolidated Bank of Kenya Limited (Industrial Court Cause No 900 of 2012) Rika J*** stated the following:

***“The loan agreement in the context of this dispute flowed from an employment relationship. The dispute over the charge created to secure the staff loan, is a matter of employment.”***

21. Taking a similar path, this Court, in its decision in ***Abraham Nyambane Atsiago v Barclays Bank of Kenya [2013] eKLR*** stated:

***“By its nature, the employment relationship generates a multiplicity of rights and obligations, some of which are not to be found in the express provisions of the employment contract. In my view, all these fall under employment and labour relations as intended by the law makers. To rule otherwise would be to create a situation where an employer or an employee traverses different courts to enforce different rights arising from the employment relationship. That in my view could not have been the intention of the legislators.”***

22. In the ***Atsiago Case*** (supra) the Court went further to hold that an employer’s right to vary preferential interest rates extended to an employee, whose employment has been terminated, is pegged on the termination being lawful. It follows therefore that where substantive questions on the legality of the termination are raised, the employer’s right in this regard is stayed, pending determination of these questions.

23. In my view, the issues raised by the Claimant regarding the termination of his employment and the Respondent’s failure to release his terminal dues constitute a *prima facie* case as defined in ***Mrao*** (supra).

24. Regarding the issue of irreparable injury, I have this to say; by levying commercial interest rates on the Claimant’s loan facilities, while withholding his terminal dues, the Respondent has exposed the Claimant to the risk of default and consequent loss of his property offered as security.

25. The Claimant states that the charged property are his matrimonial home and ancestral land, which if seized, would be irreplaceable. Moreover, if the Court eventually finds that the termination of the Claimant’s employment was in fact unlawful, the applicable damages, which are regulated by statute, would not adequately compensate the Claimant for the loss incurred with regard to the loan facilities.

26. As to the balance of convenience, the Court notes that the Claimant has been diligent in repaying his loans, even in the midst of his loss of income and the Respondent’s callous action of withholding his terminal dues. Such a party ought to be supported so as not to fall into arrears. The balance of convenience therefore tilts in favour of the Claimant.

27. In the end, I allow the Claimant’s application and issue an order of injunction restraining the Respondent, its agents and/or servants or any person acting on its behalf from varying, adjusting or increasing the interest rate on the facilities granted to the Claimant during his employment from staff rate to commercial rates in Accounts No. 001IJMD191150002 and 001IJMD191150001 held with the Respondent,

pending hearing and determination of the main claim.

28. The costs of this application will be in the cause.

29. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 10<sup>TH</sup> DAY OF MARCH 2022**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Mbeche for the Claimant

Mr. Maondo for the Respondent