



**Maiyo v Kenya Commercial Bank & another; William Osiemo t/a William Auctioneers  
(Interested Party) (Cause 632 of 2019) [2022] KEELRC 36 (KLR) (12 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 36 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 632 OF 2019**

**L NDOLO, J**

**MAY 12, 2022**

**BETWEEN**

**EVERLYN CHEROTICH MAIYO ..... CLAIMANT**

**AND**

**KENYA COMMERCIAL BANK ..... 1<sup>ST</sup> RESPONDENT**

**KEVIN ASWANI ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**WILLIAM OSIEMO T/A WILLIAM AUCTIONEERS ..... INTERESTED PARTY**

**RULING**

1. By her Notice of Motion dated 22<sup>nd</sup> September 2021, the Claimant seeks a temporary injunction restraining the 1<sup>st</sup> Respondent, its agents, employees and/or servants and/or anyone else whatsoever claiming in their name, including but not limited to the intended Interested Party herein, from auctioning, advertising, selling, transferring, disposing of and/or dealing with L.R. Kitale Municipality Block 15/Koitogos/1537, Naisambu Estate, Kibormet Area, Transzoia County (the suit property) pending determination of the suit.
2. The Motion is supported by the Claimant's own affidavits and is based on the following grounds:
  - a. That the Claimant was an employee of the 1<sup>st</sup> Respondent from 9<sup>th</sup> June 2009 until the year 2019 when she was constructively dismissed;
  - b. That while working for the 1<sup>st</sup> Respondent, the Claimant took out a mortgage which she was servicing using her salary by check-off system;
  - c. That the Claimant is the proprietor of the property known as L.R. Kitale Municipality Block 15/Koitogos/1537, Naisambu Estate, Kibormet Area, Transzoia County;



- d. That as a result of the constructive dismissal, whose legality/fairness is live for determination by this Court, the Claimant has not been consistent in servicing her loan facility as she was using check-off system to repay the loan;
  - e. That the Claimant has received information that the 1<sup>st</sup> Respondent intends to sell the suit property, with a reserve price of Kshs. 5,250,000;
  - f. That unless the order sought is granted, the Claimant will suffer irreparable damage.
3. The Respondents' response is by way of a replying affidavit sworn by the 1<sup>st</sup> Respondent's Head of Employee Relations & Wellness, Robley Ngoje on 31<sup>st</sup> January 2022.
  4. The 1<sup>st</sup> Respondent challenges the jurisdiction of this Court to determine the issues raised in the Claimant's application on the ground that they relate to the exercise of the statutory power of sale by a chargee and are within the purview of the Commercial Division of the High Court.
  5. Ngoje depones that in light of the circumstances surrounding the Claimant's exit from the Respondent's employment through resignation, the issue is not an employment dispute.
  6. He states that following the Claimant's resignation, the Bank notified her of the requirement to pay one month's salary in lieu of notice. Further, the Claimant was notified of her obligation to make good her liabilities with the Bank.
  7. The 1<sup>st</sup> Respondent maintains that the Claimant was fully aware of her obligation to clear her outstanding debts and to continue servicing her loans.
  8. Ngoje states that following acceptance of her resignation, the Claimant purported to rescind the resignation vide an email dated 21<sup>st</sup> May 2019. However, by letter dated 4<sup>th</sup> June 2019, the 1<sup>st</sup> Respondent informed the Claimant that her request to revoke her resignation had been declined.
  9. Regarding the Claimant's outstanding liabilities, Ngoje states that during the course of her employment, the Claimant had obtained 2 secured loans; the first being a staff mortgage in the sum of Kshs. 4,960,965.25 whose outstanding balance stood at Kshs. 5,133,963.30 and the second being a loan in the sum of Kshs. 1,123,809.00, with an outstanding balance of Kshs. 1,117,696.19.
  10. Ngoje further states that the Claimant's loans were secured by a charge over her property L.R. Kitale Municipality Block 15/Koitogos/1537 for the sum of Kshs. 4,800,000.00 and a further charge for the sum of Kshs. 700,000.00
  11. He adds that the Claimant had failed to service the loan facilities, which had consequently accrued arrears. The 1<sup>st</sup> Respondent had therefore commenced the process of exercising its statutory power of sale as provided under Clause 9 of the charge dated 31<sup>st</sup> December 2015 and further charge dated 24<sup>th</sup> January 2017.
  12. The 1<sup>st</sup> Respondent maintains that it had complied with the law by issuing the appropriate notices under the *Land Act* and undertaking valuation of the subject property as required under the Act.
  13. The first issue for determination in this application is whether this Court has jurisdiction to entertain the application. The 1<sup>st</sup> Respondent takes the view that because the subject matter has to do with the exercise of the statutory power of sale, then the proper adjudicative forum ought to be the Commercial Division of the High Court.



14. The jurisdiction of this Court is anchored in Article 162(2)(a) of the *Constitution* which provides as follows:

162(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-

- a. employment and labour relations and
- b. ...;

15. Pursuant to this constitutional provision, Section 12(1) (a) of the *Employment and Labour Relations Court Act* provides:

12(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including-

- a. disputes relating to or arising out of employment between an employer and an employee;
- b. ...;

16. In its decision in *Abraham Nyambane Atsiago v Barclays Bank of Kenya* [2013] eKLR this Court determined the question as to what constitutes a dispute ‘relating to or arising out of employment between an employer and an employee’ as follows:

“The question then is what constitutes a dispute relating to or arising out of employment between an employer and an employee. Is it confined to issues that are ordinarily found in employment contracts or does it extend to all matters emanating from the employment relationship?

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.”

17. In an earlier decision in *Banking Insurance & Finance Union (Kenya) v Consolidated Bank of Kenya Limited* (Cause No 900 of 2012) Rika J held as follows:

“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. The Environment and Land Court is not entirely divested of jurisdiction, but would in the view of this Court not be the appropriate forum...to determine the final issues that may arise out of this dispute.”

18. This Court is fully aware that loans advanced by banks to their employees are regulated at the macro-economic level. However, the terms under which these loans are granted are controlled by the existence of an employment relationship between the parties. It is on this basis that employees enjoy preferential



interest rates, as an employment benefit. It cannot therefore be said that the rights and obligations arising from these arrangements are beyond the jurisdiction of this Court.

19. I am therefore persuaded that if the dominant cause of action arises from employment, then the jurisdiction of this Court extends beyond the black letter of the employment contract, to cover auxiliary matters such as loans granted to employees by virtue of their employment. This is what is before the Court in the present application, which I will now proceed to consider on merit.
20. The Claimant's plea falls within the province of injunctions and the conditions upon which such an order may be granted were settled in *Giella v Cassman Brown & Co Ltd* (1973) EA, 358 as follows:
  - a. That the applicant has a prima facie case with a probability of success;
  - b. That the applicant has demonstrated that if the order sought is not granted, they will suffer irreparable damage that cannot be compensated by an award of damages;
  - c. That in case of doubt, the balance of convenience tilts in favour of the applicant.
21. A prima facie case was defined by the Court of Appeal in *Mrao v First American Bank of Kenya Limited & 2 others* (2003) KLR 125 in the following terms:

“A prima facie case in a civil application includes but is not confined to a ‘genuine and arguable case.’ It is a case 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. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.”
22. It is on record that since leaving the Respondent's employment, the Claimant has not paid her loans, even on the preferential staff rates, and by her application, she invites the Court to endorse this perpetual default.
23. Faced with a similar situation in *Elijah A rap Bii v Kenya Commercial Bank* [2001] eKLR Ringera J (as he then was) held that a person who fails to service loans advanced by their former employer is undeserving of any equitable relief.
24. The Respondent referred to the decision in *Jim Kennedy Kiriro v Equity Bank (K) Limited* [2019] eKLR where it was held that a party who makes no effort to rectify a default in loan repayment does not merit an injunctive order in their favour.
25. In its decision in *Jacob Kelly Omondi Onyango v National Bank of Kenya* [2017] eKLR this Court stated the following:

“Banks operate in a strictly regulated environment and every borrower whether an insider or the man from the street must meet their financial obligations to their bank. The reasons for this are not hard to find; first, banks operate with customers' funds which must be available on call; second, non-performing loans interfere negatively with the macro-economic stability of the country; third, to allow borrowers to go into perpetual default in



loan repayments is to hand them a rope for financial suicide. Overall, it is never in the public interest to allow non-performing loans.”

26. In the ultimate, I find that the Claimant has failed to establish a case for grant of the orders sought. Her application dated 22<sup>nd</sup> September 2021 is therefore declined with costs in the cause. The interim orders granted on 19<sup>th</sup> October 2021 are vacated.

27. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 12<sup>TH</sup> DAY OF MAY 2022**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Mogaka for the Claimant

Miss Nzuki for the Respondents

