



**Mang’ati v ABSA Bank Limited (Formerly Barclays Bank of Kenya Limited)
(Cause 162 of 2020) [2022] KEELRC 1232 (KLR) (21 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1232 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 162 OF 2020
L NDOLO, J
JULY 21, 2022**

BETWEEN

PIUS NGAO MANG’ATI CLAIMANT

AND

ABSA BANK LIMITED RESPONDENT

FORMERLY BARCLAYS BANK OF KENYA LIMITED

RULING

1. The subject of this ruling is the Claimant’s application brought by Notice of Motion dated 19th March 2020. By his application, the Claimant seeks the following reliefs:
 - a. That pending the hearing and determination of the claim, the Respondent, whether by itself, or its servants or agents, advocates or any other person acting for and or on their behalf, be restrained by an order of injunction from harassing and issuing threats of listing the Claimant with the Credit Reference Bureau and further repossessing, offering for sale, selling, transferring, disposing of or in any way alienating or encumbering the Claimant’s family home which is on LR No. 209/8572/115, House No. H33 Laiboni Gardens, Off Laiboni Road, Harambee Estate Phase II, Nairobi City County;
 - b. That pending the hearing and determination of the claim, the Respondent, whether by itself, or its servants or agents, advocates or any other person acting for and or on their behalf, be restrained by an order of injunction from charging on the staff loans any other rate of interest save the allowed charges for staff accounts and the staff interest rate of 6%.
2. The application is supported by the Claimant’s own affidavit and is based on the following grounds:
 - a. That the constitutional and legal rights of the Claimant have been gravely violated;



- b. That in the course of his employment with the Respondent, the Claimant had taken staff housing loans as follows; Kshs. 3,000,000 on 20th April 2012, Kshs. 3,000,000 on 5th November 2013 and Kshs. 4,600,000 on 14th May 2015, which he had been regularly paying at a staff rate of 6%;
 - c. That at the time of taking the 2nd staff housing loan of Kshs. 3,000,000 on 5th November 2013, the Respondent had agreed to accord the Claimant the loan amount which was to be payable for a period of 9 years at preferential staff rate of 6% translating to a monthly repayment of Kshs. 49,718.70;
 - d. That the Claimant had a legitimate expectation that for the duration of servicing the staff loans, he would be working with the Respondent and he would continue to service the loan at the preferential staff rate in the letter of offer;
 - e. That on 24th August 2017, the Respondent abruptly unfairly terminated the Claimant's employment without notice, leaving him with no alternative source of income;
 - f. That following the termination, the Respondent changed the rate at which the Claimant was repaying his loans from the staff rate of 6% to commercial rate, meaning that the Claimant was expected to raise Kshs. 88,238.75 for the instalments. The Respondent is further charging a penalty interest on the loan bringing the total payable to Kshs. 131,892 per month;
 - g. That as a result, the Respondent has greatly endangered the Claimant's economic and social rights to redeem his home by converting the interest rate from 6% to customer rate;
 - h. That the Claimant is willing to repay the loans at staff rate as previously agreed upon by the parties;
 - i. That if the orders sought are not granted, the Claimant risks loss of his matrimonial; home;
 - j. That it is meet and just for the purposes of justice and equity and the overarching purpose of constitutional integrity to make the orders sought.
3. The Respondent's response to the Claimant's application is by way of a replying affidavit sworn by its Head of Employee Relations and Wellness, Vaslas Odhiambo, on 21st February 2022.
 4. Odhiambo depones that the Claimant was employed by the Respondent on a fixed term contract that commenced on 1st September 2016 and terminated on 31st August 2017, by effluxion of time.
 5. Odhiambo adds that until the expiry of his employment contract, the Claimant had loan facilities which were subject to a preferential interest rate as a fringe benefit of the employment relationship.
 6. The deponent maintains that upon termination of the employment contract, the interest rate applicable to the Claimant's loan facilities was adjusted to commercial rates. He relies on the Terms and Conditions of the Personal Staff Loans which provided that the preferential interest rate would cease to apply in the event of termination of employment for whatever reason.
 7. According to Odhiambo, granting the orders sought in the application shall vary the terms of agreements voluntarily entered into by the parties, who were at all times aware of the terms of engagement, which included the Respondent's right to vary the interest rates.
 8. He states that the Claimant is no longer entitled to preferential staff interest rates which are only available to employees of the Respondent. He adds that regardless of the outcome of the proceedings in



- this matter, there is no possibility of the employer-employee relationship being re-established because the Claimant does not seek reinstatement.
9. Odhiambo accuses the Claimant of completely neglecting his obligation to make monthly repayments of loans advanced to him by the Respondent, which were secured by a legal charge over LR No. 209/8572/115, House No. 33 Laiboni Gardens, Nairobi. He states that the Claimant's default had constrained the Respondent to issue a statutory notice and a redemption notice, upon which the Claimant obtained interim orders which he had been enjoying since March 2020.
 10. The Respondent asserts its statutory right to issue notices under the Land Act, in the event of default under a legal charge. According to the Respondent, a dispute on applicable interest should not be a reason to restrain it from exercising this right.
 11. Odhiambo depones that the contention by the Claimant that he has a right to enjoy a preferential interest rate despite termination cannot remedy the fact that he is in default and has completely neglected his obligation of loan repayment. He accuses the Claimant of concealing this material fact so as to obtain interim injunctive orders.
 12. The orders sought by the Claimant fall within the province of interim injunctions and the conditions upon which such orders may be granted were set out 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 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.
 13. 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.”
 14. In opposing the application, the Respondent states that the Claimant has not demonstrated a prima facie case with a probability of success. In this regard, the Respondent points out that the Claimant was serving under a fixed term contract and that his employment came to an end by effluxion of time. The Respondent observes that the Claimant has not sought reinstatement as a remedy.
 15. The Respondent further points out that the Claimant has been in default in repayment of his loans since February 2020. The Claimant does not deny being in default in his loan repayment. In fact, he concedes that there is a penalty interest of Kshs. 131,892.
 16. The Court was referred to a number of decisions where this Court (variously constituted) has, as an interim measure, halted variation of interest rates from preferential staff rates to commercial rates. In appropriate cases, this may be a reasonable interim relief aimed at allowing the employee an opportunity to mitigate losses. I must add however, that this relief is not available to a party who has failed to pay their loan, even on the preferential staff rates.
 17. In *Elijah Arap Bii v Kenya Commercial Bank* [2001] eKLR Ringera J (as he then was) held that an employee who fails to service loans advanced by their former employer is undeserving of any equitable relief.



18. This Court reached a similar verdict in *Jacob Kelly Omondi Onyango v National Bank of Kenya* [2017] eKLR stating:

“Banks operate in a strictly regulated environment and every borrower whether an insider or the man from the street must meet their financial obligations. 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.”

19. The Claimant did not demonstrate any efforts made towards repaying his loans even on the preferential interest rates. He has been in default since February 2020 and the situation can only get worse. What is more, between the time of termination and the filing of the application, a period of over two (2) years had lapsed. This delay was not explained and it would appear that the Claimant was jolted by the issuance of statutory notices by the Respondent.

20. In the circumstances, I find and hold that the Claimant has failed to demonstrate a prima facie case and I have no reason to exercise discretion in his favour.

21. In light of this finding, I do not need to go into the second and third standards of *Giella v Cassman Brown* (supra).

22. The net result is that the Claimant’s application dated 19th March 2020 fails and is disallowed. The interim orders granted on 26th March 2020 are vacated.

23. Taking into account the Claimant’s precarious financial situation, I will not burden him with further expenses. Each party will therefore bear their own costs.

24. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF JULY 2022

LINNET NDOLO

JUDGE

Appearance:

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

Mr. Biko Angwenyi for the Respondent

