



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.754 OF 2017

FLORENCE ACHIENG ASETTO.....CLAIMANT

VERSUS

FAULU MICROFINANCE BANK KENYA LIMITED.....RESPONDENT

RULING

The respondent, Faulu Microfinance Bank Kenya Limited filed undated application and Notice of Motion under the provisions of section 1A, 1B, and 3A of the Civil Procedure Act, Order 17 and 18 of the Civil Procedure Rules and seeking for orders that;

The respondent be granted leave to amend its Response to the amended Memorandum of Claim as set out in the draft Response and Counterclaim herein annexed.

The annexed amended Response and Counterclaim to the amended Memorandum of Claim be deemed by this court as duly filed upon payment of requisite court fees.

The application is supported by the Supporting Affidavit of Peter Iha the head of human capital of the respondent and on the grounds that the claimant has failed to service a loan she obtained while in the employment of the respondent and despite several reminders she has failed to repay the same. The court has directed the claimant to continue servicing her loan with the respondent vide ruling delivered on 21st March, 2018 but has failed to comply. It is only fair that the respondent be allowed to amend the response and file a counterclaim so that the court may have an opportunity to conclusively determine the dispute between the parties.

The respondent has a right to recover the loan advanced to the claimant which loan she took during her employment.

In his affidavit, Mr Iha avers that while the claimant was an employee of the respondent, she obtained loan of Ksh.5,400,000 from the respondent and expressly undertook to repay the same. The loan was advanced on the basis of the terms contained in the Loan Agreement as well as the respondent's loan policies, the human resource manual and the claimant's contract of employment. It was a term of the loan agreement that it was to be repaid through a check-off and upon termination of employment the respondent had the discretion to charge interests on the loan at commercial rates.

Mr Iha also avers that following termination of employment, the claimant was to repay the loan on commercial rates.

On 17th August, 2017 the claimant filed an application before the court requesting that she be allowed to service the loan at staff rates as opposed to the contractually agreed commercial rates. By ruling delivered on 21st March, 2018 the court directed the claimant to service the loan at staff rate of 9%.

Despite the court ruling and the loan agreement the claimant has failed to repay the loan which accumulated in interests and only fair that the respondent be allowed to amend the response and raise a counterclaim. The proposed amendment are made in good faith to ensure all issues raised are fully resolved by this court.

In reply, the claimant filed her Replying Affidavit and avers that the application by the respondent to amend the claim and file a counterclaim has taken too long as they were served with the Memorandum of Claim on 20th April, 2018. Pre-trial directions were issued on 17th December, 2018 and where the respondent was represented and a hearing date allocated

The delay of two (2) years is inordinate. This is meant to delay the hearing of the main claim after a hearing date had been secured.

The claimant also avers that the proposed amendments will alter and substitute the cause of action as the main claim relates to unfairness of termination of employment. The issues sought to be introduced relates to breach of contract on a loan agreement which is purely a commercial matter. Such will not address the unfair termination of employment. The application should be dismissed with costs.

Both parties attended and made oral submissions.

Determination

On the application, affidavits and submissions of the parties the substratum of the application by the respondent is whether the court should grant leave to amend the response to the amended claim and a counterclaim.

The respondent has relied on the provisions of the Civil Procedure Act and the Rules thereto but an application seeking leave to amend pleadings before this court should apply the provisions of Rule 14 of the Employment and Labour Relations Court (Procedure) Rules, 2016. Under these Rules, an applicant seeking to amend pleadings should apply Rule 14(6) thereof and which requires as follows;

6. A party may amend pleadings before service or before the close of pleadings:

Provided that after the close of pleadings, the party may only amend pleadings with the leave of the Court on oral or formal application, and the other party shall have a corresponding right to amend its pleadings.

A party is allowed to amend pleadings before close of pleadings. Pleadings in this instance closed on 17th December, 2018 when hearing directions issued and parties have since been allocated a hearing date for 30th November, 2020.

Such process is herein overtaken in time. Pleadings have closed.

Upon closure of pleadings, A party is allowed to amend pleadings with the leave of the court. The instant application though not based under the Court Rules is seeking for such leave.

The general rule on this subject is that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and there is no injustice if the other party can be compensated by costs. See

St. Patrick's Hill School Limited v Bank of Africa Kenya Limited [2018] eKLR and in the case of **Central Kenya Limited v Trust Bank limited (2000)2 E.A 365** the Court of Appeal held that;

A party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.

In employment and labour relations, where an employee enjoys a work/employment benefit(s) and there is a dispute, such employment benefits cannot be extricated from the employment and urged separately. To do so would be to lose sight of the core contents of the employment relationship which comes with a bundle of rights and benefits as stipulated under the Employment Act, 2007.

Where an employee enjoys a loan in the course of employment and the same is granted on terms and conditions applicable to employees and on rates which are favourable to the entire workforce by the employer, such is a benefit subject to the employment. This is unlike a loan obtained on commercial rates by an independent person or entity. The terms and conditions and applicable rates are fundamentally different. The difference is created by employment relationship or through a commercial relationship.

It is not in dispute that the claimant obtained a loan during the course of her employment with the respondent. It was on staff rates. There was a loan agreement. This loan has not been repaid in full.

By application dated 16th August, 2017 the claimant sought to have the respondent restrained from converting the loan repayment from staff rate to commercial rate. Such was an acknowledgement that there existed a staff loan repayable based on staff rates.

By a ruling dated 21st March, 2018 the court at paragraph 18 held that;

- allowing the application for the applicant [claimant] to keep paying the loan at staff rates, which I allow.

The loan due arose out of a work benefit. It cannot change on the basis that there is a loan agreement.

Section 19 (1)(g) and (h) of the Employment Act, 2007 allow an employer to deduct an amount which the employee has authorised for its deduction. The employer is also allowed to effect a deduction from the salary of an employee by way of repayment or part repayment of a loan or money advanced to her by the employer, deduct an amount due based on a written agreement and which is due.

g. any amount in which the employer has no direct or indirect beneficial interest, and which the employee has requested the employer in writing to deduct from his wages;

h. an amount due and payable by the employee under and in accordance with the terms of an agreement in writing, by way of repayment or part repayment of a loan of money made to him by the employer, not exceeding fifty percent of the wages payable to that employee after the deduction of all such other amounts as may be due from him under this section; and

Whether such money is claimed through a counterclaim or not, the law allow for the deduction of such monies due and payable from an employee to the employer.

In this case, hearing has not commenced, the leave sought to amend pleadings is found reasonable and within the provisions of Rule 14 and this shall not prejudice the claimant as there is a fair chance to reply to the Amended Response as shall be found necessary.

Accordingly, application by the respondent seeking leave to amend pleadings and to file a counterclaim is hereby found with merit and is allowed as prayed and in the following terms;

- a. The respondent shall file and serve the Amended Response within 14 days;**
- b. Upon service the claimant shall reply thereto within 14 days;**
- c. Pleadings close in 30 days; and**
- d. costs shall be in the cause.**

DELIVERED IN OPEN COURT AT NAIROBI THIS 11TH DAY OF FEBRUARY, 2021

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

..... and