



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO.626 OF 2019

SAMUEL GACHEHA CHEGE.....APPLICANT

-VERSUS-

KENYA WOMEN MICROFINANCE BANK.....RESPONDENT

RULING

1. The Applicant filed a Notice of Motion on 19.8.2019 seeking the following orders:

a. Spent.

b. THAT pending inter-partes hearing of the application herein the Claimant be allowed to remit the balance of the Mortgage Title No. Juja/Kiaura Block 2/254 located at Chai Estate Juja in the sum of Kshs. 1,610,796.41/- at the preferential rates set out and contained in the Respondent's Human Resources Policies and Procedures Manual and in particular Clause 5 (ii).

c. THAT consequent to the grant of prayer (b) above and pending the hearing and determination of the suit herein he Claimant be allowed to remit the balance of the Mortgage for Title No. Juja/ Kiaura Block 2/254 located at Chai Estate –Juja in the sum of Kshs. 1,610,796.41/- at the preferential rates set out and contained in the Respondent's Human Resources Policies and Procedures Manual and in particular Clause 5 (ii).

d. THAT further consequent to the grant of prayers (b) and (c) above the Respondent do release to the Claimant the sum of Kshs. 1,032,626.84/- being the undisputed sums in respect of the claimant's terminal dues.

e. That the costs of the application be in the cause.

2. The application is premised on grounds that:

a. The Applicant worked for the Respondent in various capacities for a period of 16^{1/2} years before his resignation in April, 2019.

b. Upon his resignation, he sought for the application of his terminal dues within the enabling provisions of the Respondent's Human Resource Policies and Procedures Manual.

c. As part of his benefits for long service was the application of preferential rates in respect of his mortgage as provided by Clause 5 (ii) of the Manual.

d. The Respondent has declined, in a discriminatory, blatantly unfair and inequitable manner to apply the said preferential rates thus necessitating the suit.

e. The Respondent has declined to process the Applicant's terminal dues as long as the issue that is subject to this Honourable Court's adjudication is pending, which position is to the great detriment of the Applicant and his family.

f. The Applicant seeks to have his terminal dues, not affected by the instant suit released to him pending a determination by the Court of this matter on its merits and further that he be allowed to pay and remit his monthly mortgage payments at the preferential; rate of Kshs. 12, 928.05 + 415.53 (mortgage insurance) per month.

g. It is in the interest of justice for the orders sought to be granted pending the hearing and determination of this suit.

3. The application is supported by the affidavit of the Applicant sworn on 19.9.2019 in which he reiterated the grounds on the face of the motion.

4. The Respondent opposed the application by a Replying Affidavit sworn on 15.10.2019 by Catherine Wanjiku mwangi, its General Manager- Human Resource. In brief, the affiant confirmed that the Applicant resigned from his position of Regional Manager Nairobi West on 10.4.2019 and that as at that time, the Applicant had several loans advanced by the Respondent for which he entered into agreements relative to the said loans.

5. The said loans included a company and Product Loan of Kshs. 278,467 which was secured by his terminal benefits, NIC Loan of Kshs. 962,175.94 which was guaranteed by the Respondent through ESOP units purchased by the Applicant, and Motor Vehicle Insurance Loan of Kshs. 35,659.75 of which the chattel is registered in the joint names of the Applicant and the Respondent. Further, he had a Mortgage plus mortgage insurance which property was charged to the Respondent. Finally, he had Uaminifu Loan borrowed under agreed terms with the Uaminifu Sacco which is a separate legal entity from the Respondent.

6. She averred that though the HR Policies allow for the granting of loans at preferential rates to employees, the policies allow for extension of the preferential rates of repayment to staff who have exited amicably based on their period of service. However, she averred that the Respondent has the right to recover amounts owed from the employee's terminal dues upon termination, and if there is still an outstanding balance, the same is subject to the terms of preferential rate based on the period of service.

7. She admitted that the Claimant borrowed a mortgage of Kshs. 1,800,000 which was granted by the offer letter dated 10.4.2015. She stated that the said mortgage offer letter contained terms specific to the special contract but denied that it formed part of the contract of employment. She averred that after the Applicant's resignation, the Respondent tabulated all the terminal dues payable to him and deducted the loans owing leaving Kshs. 1,032,626.84 payable to him upon signing of the clearance form. She contended further that the Respondent has since prepared a discharge of charge over the Juja/Kiaura Block 2/254 in favour of the claimant.

8. She further averred that the amount of Kshs. 1,032,626.84 is only available to the Applicant after net of all liabilities owed to the Respondent including the mortgage facility and only after signing the Bank Clearance Form; and that the Respondent has no objection to reinstating the loan with an outstanding balance of Kshs. 1,613,705.14 and allowing the Claimant to continue enjoying the preferential rates of employment. According to her the consequence of reinstating the loan gives the Respondent the concomitant right of invoking Clause 2.1 (b) of the mortgage offer letter and deem all terminal dues, deposits and savings held in the Applicant's account as forming part of the loan security until payment in full.

9. The Application was heard by way of written submissions.

Applicant's submissions

10. The Applicant submitted that this court has jurisdiction to determine this suit and relied on **Banking Insurance and Finance Union v Consolidated Bank of Kenya Limited [2020] eKLR** and **Abraham Nyambane Asiago v Barclays Bank of Kenya Limited [2013] eKLR** where the Court held that it has jurisdiction to hear matters pertaining to interest rates applicable to loans advanced by employers to their employees after separation.

11. He submitted that after resigning from employment, he sought permission to repay the loan at the preferential rates but this request was rejected by the Respondent vide its letter dated 26.6.2019. He contended that he worked for the Respondent for over 15 years, and as such he met the criteria under Clause 5 (ii) of the Human Resource Policies and Procedures Manual to enable him enjoy preferential interest rate for the whole loan period. He argued that there is great danger that the loan may revert to commercial rates which in his view constitutes a prima facie case since the question for determination by the Court is whether or not preferential interest rates should apply to his loans.

12. He further submitted that the Respondent has not shown how it will be prejudiced if the loan is serviced at preferential rates until the matter is heard and determined. He reiterated his averments relied on his Affidavit sworn on 6.11.2019 that, the Respondent has not suggested that the sum of Kshs. 1,032,626.84 has been erroneously tabulated. He argued that withholding the net of his terminal dues has the resultant effect of severely punishing him as he is currently unemployed and is reliant on the said monies to make ends meet. Therefore, he urged the Court to find the application is merited and allow it with cost.

Respondent's submissions

13. The Respondent submitted that the preferential rates only apply to mortgage or home purchasing and or improvement loans. It further submitted that under the HR Policy Manual it has the right of set off against the terminal dues of its employees at termination of employment whereby the employee is paid the net of the amounts owed to it.

14. It argued that the Applicant cannot re-write or unilaterally vary the loan agreement and he must remember that he is bound by the loan agreement which provides that all his terminal dues be held by the Respondent. It restated it has no objection to reinstating the loan of Kshs. 1,610,796.41 and allow repayment at preferential interest rates as prayed, but the consequence of this is that it has the right of invoking Clause 2.1 (b) of the letter of offer dated 10.4.2015 and deem all the deposits and savings held in the Applicant's account as forming part of the loan security until payment in full.

15. It admitted that the Claim for the amount of Kshs. 1,032,626.84 is undisputed but stated it is only available after the Applicant signs the Clearance Form which he has refused to do. Therefore, it submitted that for it to release the said sums to the Applicant, he must clear as this will be on the premise that it has utilised the available security and released the property from any encumbrance.

16. It submitted that there is no mischief as it is operating as per the terms of the contract with good faith and contended that the Applicant

cleverly omitted exhibiting the letter of offer in respect of the subject loan or disclosing that certain terms exist that govern the offer and repayment of the said loan. It opposed to granting of the order sought because releasing the money sought amounts to releasing part of the security for the loan and exposing it to unforeseeable risk. Therefore it submitted that the Applicant has not come to court with clean hands and prayed for the application to be dismissed with costs.

Issues for determination

17. The Applicant resigned from employment on 10.4.2019 and his resignation was accepted by the Respondent vide its letter which might have been erroneously dated 9.4.2019. The parties admit that at the time of his employment the Applicant applied for several loans which were approved by various institutions. He now prays for an order that pending the hearing and determination of the suit, he be allowed to remit the balance of his house mortgage totalling to Kshs.1,610,796.41 at preferential rates as contained in the Respondent's Human Resources Policies and Procedures Manual clause 5(ii). He further prays for the undisputed sum of Kshs.1,032,626.84 in respect of his terminal dues be released to him. The main issue for determination is whether the application has merits.

18. The Applicant averred that the Respondent declined to apply the preferential rate on his loan and pay him terminal dues in breach of his contract and on the basis of discrimination against him. It is his case that under clause 5(ii) of the HR Policy Manual, he is entitled to repay his loan at preferential rates and the respondent is not entitled to offset the loans against his terminal dues. However, the respondent's case is that that upon the resignation, it exercised its right of set off by deducting all the loan balances due to it from the Applicant's terminal dues but the Claimant refused to clear with it and collect the net sum of Kshs. 1,032,626.84.

19. I have considered the contentions by the two parties and also Clause 5 (ii) of the Kenya Women Microfinance Bank Limited's (KWFT) Human Resources Policies and Procedures Manual which provides as follows:

"Separation/termination of employment

i) On termination of staff employment, KWFT has the right of set off. Amounts owed to KWFT will be recovered from the terminal dues payable to the staff. The staff will thus be paid net of the amounts owed to KWFT.

ii) On amicable separation from KWFT, staff will be given preferential terms as set out below before commercial terms are effected

Years of continuous service by staff in KWFT ***Period before conversion to commercial terms***

<i>Above 15 years</i>	<i>Until loan maturity i.e Preferential staff terms remain over term of the loan</i>
<i>Above 10 years</i>	<i>1 year</i>
<i>Above 5 to 9.99 years</i>	<i>6 months</i>
<i>2 to 4.99 years</i>	<i>3 months</i>

Note: The preferential terms will not be applicable in the event of staff dismissal/termination by the employer.

However, during the preferential terms, the loan must be serviced i.e the monthly instalments must continue being paid failure to which the loan will immediately revert to commercial terms and the property sold to recover the loan balance. The staff will receive the balance of the proceeds if any after recovery of the loan balance, interest, penalties and other applicable charges. The property title shall then be discharged.

iii)..."

20. The Certificate of Employment issued to the Applicant indicates that he was employed on 4.11.2002. At the time of his resignation on 10.4.2019 the Applicant had completed 16 years of service which was above the 15 years set out under Clause 5 (ii) of the Policies and Procedures Manual. Therefore, he is rightfully entitled to repay his facility at the preferential staff terms for the term of the loan.

21. The Respondent stated that the Applicant cleverly omitted to produce the Letter of Offer dated 10.4.2015 which sets out terms of the loan contract. It referred to Clause 2 of the Said Letter of Offer which provides:

"Security

2.1 The Bank shall be provided with the following securities:

(a) A First Party Legal Charge in favour of the Bank, over the property and improvements more particularly described as

JUJA/KIAURA BLOCK 2/254 registered in the name of SAMUEL GACHEHA CHEGE: (hereinafter referred to as the "Borrower")

(b) All terminal benefits, deposits and/or savings of the Borrower, held by the Bank.

And/or such other security as the Bank shall from time to time be required to secure the Borrower's obligations hereunder."

22. From the above clause, one of the terms and conditions of the facility was that the Applicant's terminal dues formed part of the security provided to the Respondent. The Applicant now wants the release of his terminal dues and for him to continue repaying the loan at staff preferential rates. In my view, the applicant must appreciate what parties agreed in their loan contract and also the contract of employment. **Clause 5(i) of the HR Policy Manual** expressly entitles the respondent to set off any liabilities owed by exiting employee from his terminal dues. Likewise, the **Clause 2.1 (b) of the Letter of Offer** listed terminal dues as part of the security for the loan advanced to the claimant in respect of the home mortgage.

23. In view of the foregoing observations, I find that the applicant has not proved on a balance of probability that the respondent has acted in breach of either the HR Policy Manual or the loan agreement or both. The respondent has exercised its rights under the said Clauses of the HR Manual and the Letter of Offer. One party cannot be allowed to exercise a right which is not provided for under the contract, nor does the court exist to re-write a contract for the parties but to enforce what they have voluntarily bound themselves to.

24. I gather support from the Court of Appeal decision in **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR** where it was held that:

"Stepping into the shoes of the appellant bank the learned judge decided that a large part of the interest would or could be waived. This, in our view, is a serious misdirection on the part of the learned judge. A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.

As was stated by Shah JA in the case of Fina Bank Limited vs Spares & Industries Limited (Civil Appeal No 51 of 2000) (unreported):

"It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain..."

25. In this case the applicant did not state that he signed the Letter of Offer through fraud, coercion, or under undue influence and as the Court has no basis to interfere with the parties' voluntary agreement. Having carefully considered the material presented to the court by the parties, it is clear as the day that the claimant is to blame for failing to collect the kshs. 1,032,796.41, plus his security documents duly discharged. Consequently, it is my holding that the application has no merits and it stands dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY MARCH, 2021.

ONESMUS N MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE