



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 871 OF 2019**

**LILIAN RHODA ADHIAMBO.....CLAIMANT/APPLICANT**

**-VERSUS-**

**BARCLAYS BANK OF KENYA.....RESPONDENT**

**RULING**

1. The Applicant filed a Notice of Motion on 20.12.2019 seeking the following orders:

**1. Spent.**

**2. That pending the hearing and determination of the application the respondent whether by itself, or its servants or agents, advocates or any other acting for and or on their behalf be restrained by an order for injunction from charging any bank charges or interest rate on the mortgage loan facilities at 8.5% plus a margin of 4.00% or any other rate of interest save the allowed charges for staff accounts and the staff interest rate of 6.00% and 7.00% and further be restrained from issuing threats of listing the Applicant with the Credit Reference Bureau.**

**3. 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 for injunction from charging interest rate on the Mortgage Loan Facilities at 8.5% plus a margin of 4.00% or any other rate of interest save the allowed charges for staff accounts and the interest staff rate of 6.00% and 7.00% and further be restrained from issuing threats of listing the Petitioner with the Credit reference Bureau.**

**4. That this Honourable Court do issue orders compelling the Respondent to compute and refund already overcharged interests on the Applicant's loans by the time of filing of this application or this Honourable Court directs that the amount that was erroneously overcharged be utilised to settle the Applicant's staff loans.**

**5. That the Applicant be at liberty to apply for such further or other orders and/or directions as this Honourable court would deem fit and just to grant.**

**6. That costs occasioned by this application be borne by the Respondent.**

2. The application is based on grounds that:

a. The Applicant took a staff loan of Kshs. 3,860,000.00, a Staff Housing Plan totalling to Kshs. 9,600,000 and a Credit Card Balance of Kshs. 128,000,000 which she was regularly servicing at a monthly staff rate of 7.00% and 6.00% respectively.

b. The Applicant had legitimate expectation that for the duration of servicing the staff loan she would be working for the Respondent and would continue to service the loan at the staff preferential rate. However, the Respondent wrongfully and unfairly terminated her on 28.11.2019 for unjustifiable reasons and after conducting a sham hearing.

c. As an employee, the Applicant has received myriad of staff loans which brought her total facilities with the Respondent to Kshs. 12,988,000.

d. The Applicant has been religiously repaying the loan facilities from the date of disbursement to date without any default.

e. The Respondent has greatly endangered the Applicant's economic and social rights by converting the Applicant's staff loan from

staff rates of 7.00% and 6.00% to customer rate of 8.5% plus a margin of 4.00% and further violated the Applicant's legitimate expectation of repaying the loan at staff rate until payment in full.

f. The applicant is willing to continue repaying the loans at staff rate until payment in full as previously agreed upon by the parties despite her current state of unemployment.

g. If the orders sought herein are not granted, the Applicant risks to lose her career placement and further continue to strain her economic and social life.

3. The application is supported by the affidavit of the Applicant sworn on 20.12.2019 in which she deposed that she previously paid monthly instalments of Kshs. 127,000 for her two loans but the repayment is projected to escalate to Kshs. 162,479.00 after the Respondent converted the interest to 14% on 29.12.2019; that she had another staff loan balance of Kshs.4,509,906.60 she is repaying at monthly instalments of Kshs. 59,159.55 which makes her projected monthly instalment repayment to be Kshs. 221,638.70.

4. The Respondent opposed the application by a Replying Affidavit sworn by Vaslas Odhiambo, who is the Human Resource and Employee Relations Manager sworn on 21.2.2020. He admitted that the Applicant had applied for and obtained a staff loan, staff housing loan and a credit card under the Respondents agreed terms and conditions and that total financial liabilities amount to Kshs. 13,860,580.60.

5. The affiant deposed that the Applicant agreed to the Terms and Conditions of Staff Loan and the Staff Housing Loan which included the Respondent's right to vary the interest rate. He further deposed that the Respondent duly informed the Applicant in writing that the interest rate on personal loan would be adjusted to the CRB rates at 8.5% plus a margin of 4% in accordance with the Term and conditions of her Personal Staff Loans.

6. He averred that the Applicant now seeks to unfairly and unlawfully vary the terms of the covenants she entered into with the Respondent by applying for injunctive orders restraining it from exercising its legal right secured under the Loan facilities. He maintained that the Applicant is bound by her contractual obligations to the Bank and is still indebted to it.

7. He averred that the Applicant has not met the threshold for injunctive prayers as she has not demonstrated the damages she would suffer and on what basis she seeks to continue enjoying staff rates yet she is no longer a staff of the Respondent.

8. He further averred that the application has not been brought in good faith as the Applicant was lawfully dismissed on 29.11.2019 on grounds of gross misconduct and urged the application be dismissed for lack of merit.

9. The application proceeded by way of written submission.

#### **Applicant's submissions**

10. The Applicant relied on section 12 of the Employment and Labour Relations Court Act and submitted that this Court has jurisdiction to hear and determine the issues raised in the application. She further relied on **Boniface Lum Amunga Biko v National Bank of Kenya Limited [2017] eKLR** where the Court held that section 12 (2) of the Act should be read as a whole as it sets out different forms and status of labour relations.

11. For emphasis on the principle of jurisdiction, she relied on **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (1989) KLR 1** where the Court held that jurisdiction ought to be raised at the earliest opportunity and that a court of law should down its tools the moment it holds the opinion that it is without jurisdiction.

12. She submitted that this Court has the power to order the loans to remain at staff rate pending the hearing and determination of the main suit and that at the time the loan facilities were advanced to her she had legitimate expectation of enjoying the preferential interest rate of 6% until repayment in full. She relied on **Banking Insurance & Finance Union (Kenya) v National Bank of Kenya [2016] eKLR** where the Court cited the decision in **Abraham Asiago v Barclays Bank of Kenya Limited [2013] eKLR** that where an employer grants an employee a loan facility on special terms, it is entitled to vary the terms of the facility once the relationship ceases but the assumption is that the relationship was terminated within the law.

13. She submitted that it is up-to the Court to determine with finality that the employer-employee relationship between the parties did indeed end. She relied on **ELRC Cause No. 34 of 2017 Timothy John Sati v Barclays Bank Kenya Limited** where the Court held that the benefits of various loans cannot be separated to create a different set of rights outside the employment relationship.

14. She argued that she ought to continue repaying the loan on preferential terms pending the hearing and determination of both the application and the Amended Memorandum of Claim because the Respondent wrongfully and unfairly terminated her employment and that she is unable to pay due to the fact that she is no longer in her employment.

15. She submitted that the general principles and grounds upon which prohibitory injunctions are issued are derived from the case of **Giella v Cassman Brown & Co. Ltd [1973] EA 358** and submitted that she has a prima facie case with probability of success to warrant granting of the orders sought in the application. She further argued that the Respondent conducted a sham hearing and that the respondent's decision was predetermined.

16. She submitted that unless this Court grants the Orders sought. She is likely to suffer irreparable injury as she is already dismissed from employment and is unable to meet the varied terms of loan repayments. She submitted that damages would not be an adequate remedy because default in the repayment may put her in a prejudicial position as her home was used to secure the loan facility.

17. She submitted that in **Waithaka v Industrial and Commercial Development Corporation (2001) KLR** and **Suleiman v Amboseli Resort Ltd (2004) 2 KLR 589** the issue of damages was considered and it was the court's finding, in the former case that no party should be allowed to rise rough on statutory rights of another because it could pay damages.

18. She maintained that she had legitimate expectation that she would repay her staff loans from the monthly income generated from her salary. She relied on **Oindi Zaippeline & 39 Others v Karatina University & another (2014) eKLR** where the Court held that legitimate expectation is founded upon a basic principle of fairness and it ought not to be thwarted.

19. Further, she submitted that this Court should issue orders compelling the Respondent to compute and refund the already overcharged interest on the Applicant's loans by the time of filing this application or that this Court directs that the amount that was erroneously overcharged be utilized to settle the Applicant's staff loans.

20. Finally, she urged the court to allow the application with costs.

#### **Respondent's submissions**

21. The Respondent submitted that the reliefs sought by the Claimant are misplaced as the Claimant has not met the threshold for injunctive prayers and that she has not demonstrated that the damages she shall suffer are irreparable and cannot be compensated by damages. It relied on **Mrao v First American Bank** where the Court held that one must demonstrate that a right has been infringed upon by the opposing party.

22. It submitted that the Application has not been brought in good faith as the Applicant never raised the issues in the application with her Relationship Manager and now seeks to vary the terms of the duly registered charge. It maintained that the Applicant was lawfully dismissed on grounds of gross misconduct for exposing the Respondent to reputable damage, and potential financial losses through fraud.

23. It submitted that the reversion of interest rates to staff rates of 6% and 7 % is only for employees of the Respondent therefore she is not entitled to the orders sought. It persuaded the Court to consider the covenants entered into between the parties in the security documents. In support of this, it relied on **National Bank of Kenya Limited v Hamida Bana & 103 Others [2017] eKLR** where the Court cited **Damondar Jihabhai & Co Ltd & ano v Eustace Sisal Estates Ltd (1967) EA 153** in which it was held that the function of the Court is to enforce and give effect to the intention of the parties in their agreement. It further relied on the decision in **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR**.

24. It submitted that the Applicant's prayer for 40% discount on her outstanding loan balance is without merit because her loans are governed by the agreed terms and conditions of the loan facilities. She further submitted that Applicant in both the Claim and the Application has not demonstrated any interest to work with the Respondent nor has she sought orders for reinstatement to justify the prayers sought in order to benefit from staff loans.

25. In conclusion, it urged the Court to dismiss the application with costs and the orders issued on 20.12.2019 be set aside.

#### **Issues for determination and analysis**

26. Having carefully considered the pleadings, application, affidavits and the submissions by the parties, it is common ground that the applicant is a former employee of the respondent who was dismissed from service for misconduct. It is also a fact that during her tenure of office, she applied and was advanced two loans at staff preferential interest rates but upon exiting the bank, the interest rates were revised upward to the commercial rates. She now seeks to injunction to prohibit the bank from charging the said new interest and revert to the staff preferential interest rates pending trial.

27. The main issue for determination is whether the Applicant has met the threshold for grant of an interlocutory injunction. The Court of Appeal in **Giella –vs- Cassman Brown & Co. Ltd. [1973] E.A. 360** held that:

***“The conditions for the grant of an interlocutory injunction are now settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”***

#### **Prima facie case**

28. A Prima facie case was defined by the Court of Appeal in **Mrao Limited v First American Bank of Kenya limited & 2 others [2003] eKLR** as follows: -

***“...in civil cases is a case in 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.”***

29. The Applicant's contention is that she was wrongfully and unfairly terminated as a result of a sham hearing. It is also her contention that she had legitimate expectation that during the duration of servicing the staff loan, she would be working for the Respondent. For a prima facie case to be established, the applicant ought to show firstly that her employment was unfairly and unlawfully terminated and she has high chances of being reinstated, and secondly that the new high interest rates imposed on her staff loans is unlawful and in breach of the loan

agreement.

30. In this case, the applicant has not sought reinstatement or re-engagement by the respondent bank. The case is therefore distinguishable from the **Banking Insurance & Finance Union (Kenya) case** and the **Abraham Asiago case** which were cited by the applicant because in the said precedents, where the injunction was granted, claimants had sought reinstatement/ reengagement in their respective suits. Therefore I agree with the Respondent that, the applicant herein having not sought for reinstatement, it would be illogical for the court to order repayment of the loans at the preferential staff rate yet she has not shown any intention to continue serving it.

31. In **Evans Oliver Olwali v Standard Chartered Bank Limited [2018] eKLR** Ongaya J. held:

**“In the present case there was no dispute that the preferential staff interest rates subsisted on account of the employment relationship. There was no dispute that the contract of employment between the parties had been terminated. The court considers that the fringe benefit of preferential staff interest rates would resurrect only upon reinstatement or such other lawful justification after the hearing of the suit.”**

32. I have considered Clause 2 (c) of the Staff Loan Terms and Conditions which provides:

***“The Bank may charge of preferential rate of interest on the Borrower’s Loan while the Borrower remains in the employment of the Bank, but such preferential rate shall cease to apply immediately the Borrower’s employment with the Bank is terminated for whatsoever reason, unless the Bank otherwise agrees in writing.”***

33. Clause (e) of the Staff Housing Loan Terms and Conditions also provided that the Bank is to charge a preferential rate of interest while the borrower remained in the employment of the Bank. From these clauses, an employee would only enjoy the staff preferential rates during the existence of the employment relationship. It is trite law that the court’s mandate with regard to contracts is to enforce and give effect to the terms agreed between the parties to the contract. The court has no jurisdiction to rewrite the contract for the parties.

34. To fortify the foregoing view, I rely on **National Bank of Kenya Limited v Hamida Bana & 103 Others [2017] eKLR** where the Court of Appeal cited with approval **Damondar Jihabhai & Co Ltd & ano v Eustace Sisal Estates Ltd (1967) EA 153** at page 156 where Sir Newbold P held that:

***“The function of the Court is to enforce and give effect to the intention of the parties as expressed in their agreement.”***

35. Having found that the applicant has not sought reinstatement to her job and that she has not proved that the respondent has introduced the new interest rate unlawfully and in breach of the loan agreements, it is my holding that she has not established a prima facie case with probability of success. In the absence of a prima facie case, like in this case, the application loses meaning and the court need not consider irreparable injury and/or balance of convenience.

36. I gather support from the Court of Appeal decision in **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR** where it held as follows:

***“If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”***

37. Consequently, I find and hold that the prayer for interlocutory injunction should be declined for lack merits. Likewise the prayer for computation and refund of the amount charged as interest above the preferential staff interest is declined because that order is in the nature of a final relief which can only be granted on merits upon trial. In the end, the entire application is dismissed with costs.

**Dated, signed and delivered at Nairobi this 4<sup>th</sup> 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 15<sup>th</sup> 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**