



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE E400 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

IRENE NJERI NJENGA..... CLAIMANT

VERSUS

DIB BANK KENYA LIMITED..... RESPONDENT

RULING

1. Before me for determination is an Application dated 17<sup>th</sup> August 2020. The Applicant seeks orders THAT:

(i) THAT for the reasons stated in the Certificate of Urgency filed herewith, this Application be certified as urgent and service thereof be dispensed with in the first instance.

(ii) THAT pending the inter partes hearing and determination of this Application, an injunction do issue directed at the Respondent

a) Restraining it from levying any charges, penalties or interest for delayed repayments and instalments on the accounts and financial facilities advanced to the Claimant during her employment with the Respondent and in particular Account Numbers [...], [...] and [...] held with the Respondent.

b) Restraining it from adjusting, altering or in any manner changing the rebated and preferential terms of the accounts and financial facilities advanced to the Claimant during her employment with the Respondent and in particular Account Numbers [...], [...] and [...] held with the Respondent.

c) Restraining it from commencing or continuing with any recovery proceedings against the Applicant in respect of the accounts and financial facilities advanced to the Claimant during her employment with the Respondent in particular Account Numbers [...], [...] and [...] held with the Respondent.

(iii) THAT pending the inter partes hearing and determination of the Claim filed herein, an injunction do issue directed at the Respondent

a) Restraining it from levying any charges, penalties or interest for delayed repayments and instalments on the accounts and financial facilities advanced to the Claimant during her employment with the Respondent and in particular Account Numbers [...], [...] and [...] held with the Respondent.

b) Restraining it from adjusting, altering or in any manner changing the rebated and preferential terms of the accounts and financial facilities advanced to the Claimant during her employment with the Respondent and in particular Account Numbers [...], [...] and [...] held with the Respondent.

c) Restraining it from commencing or continuing with any recovery' proceedings against the Applicant in respect of the accounts and financial facilities advanced to the Claimant during her employment with the Respondent in particular Account Numbers [...], [...] and [...] held with the Respondent.

(iv) THAT this Court be pleased to issue any other Order that serves the ends of justice in the circumstances of the case.

2. The application is based on the grounds set out on the face of the Notice of Motion Application and the supporting affidavit of **IREEN NJERI NJENGA**, the Applicant sworn on the 17<sup>TH</sup> August 2020.

3. The Claimant avers that she was employed by the Respondent in the year 2015 and accepted the contract of service on 3<sup>rd</sup> September 2015. Pursuant to the contract the Claimant avers that she was entitled to several benefits including loans and financial facilities at preferential rates which were repayable from deductions on her monthly salary. The Claimant relying on the terms of employment and the Human Resource policy obtained and operated the following accounts and facilities with the Respondent.

ITEM	TYPE OF LOAN AND APPLICABLE PROFIT RATE	ACCOUNT DETAILS	AMOUNT OUTSTANDING AS AT 14 <sup>TH</sup> JULY 2020
1	A personal loan at the rate of 7% per annum	[...]	4,079,432.03
2	A car loan at the rate of 7% per annum	[...]	678,215.54
3	A home mortgage payable over a 20 year period at the rate of 5% per annum	[...]	13,155,204.49

4. The said loans were secured by the Claimant's Matrimonial and family property. The Claimant states that she expected to work for the Respondent until she reached the age of retirement being (60) years which would have been until 30<sup>th</sup> September 2040.

5. She further states that on 14<sup>th</sup> July 2020, her employment was terminated and the Respondent demanded that she immediately addresses the manner in which she wished to clear the liabilities accrued on the subject accounts which stood at Kshs.17,912,852.

6. The Claimant states that the termination was unlawful and in contravention of Articles 28 and 41 of the Constitution of Kenya and has invoked her right to sue the Respondent for unfair and unlawful termination of employment which she believes has a high chance of success.

7. The Claimant states that she is apprehensive that the Respondent will not offer her any respite on the accrued liabilities and may commence recovery proceedings and cease the accorded preferential rates. She contends that any alteration to the terms of the subject facilities will be highly prejudicial to her as it will drive up the costs of payment and eliminate any chance to settle the same.

8. Claimant urges the court to grant the injunction orders sought as failure to which the Respondent may proceed to change the terms of the subject facilities and begin recovery proceedings.

#### **Respondent's Case**

9. Respondent opposed the application by way of a Replying Affidavit sworn by **NJERI WAITIMO** the Respondent's Company Secretary sworn on 21<sup>st</sup> August 2020.

10. The Affiant avers that the Claimant was an employee of the Respondent but her term of service was terminated on 14<sup>th</sup> July 2020 for failure to meet the performance targets. She further states that the Claimant had been advanced loan facilities and signed the offer letters that contained a condition that the facilities were made available to her in accordance with the Human Resource Policy. She further states that lending to insiders such as members of staff is regulated under the Banking Act, the prudential guidelines on corporate governance (CBK/PG/02), the prudential guidelines on prohibited business (CBK/PG/0'7) and the Respondent's credit policy and the Respondent will be exposed to the risk of regulatory intervention on account of maintaining preferential rates to the Claimant as she is no longer its employee.

11. The Affiant states that the orders sought are premature, anticipatory and would result in unlawfully fettering the Respondent's right to recover monies advanced in the event of default.

12. The Respondent prays that the application be dismissed with costs.

#### **Rejoinder**

13. In a rejoinder the Claimant swore a further affidavit on 31<sup>st</sup> August 2020 in which she reiterates the contents of the supporting affidavit. She adds that she was never accorded a performance appraisal as required by the Respondent's Human Resource Policy. That therefore her termination could not be based on performance as alleged by the Respondent.

#### **Submissions**

14. Parties took directions to dispose of the application by way of written submissions and the same were highlighted on 17<sup>th</sup> May 2021.

#### **Claimant's Submissions**

15. The Claimant in her submissions urges the court to invoke its discretion to prevent the Respondent from varying the terms of her staff loan accounts, Levying charges and commencing recovery proceedings against the facilities. She relies on the holding of Mbaru J. in **Esther Mbinya Musau v National Bank of Kenya [2015] eKLR** where the Judge stated as follows at paragraphs 26-27 of her decision on a similar application where the Claimant sought to salvage a ballooning debt and her family home,

*26. The matters herein stem from an employment relationship between the parties and cannot be separated so as to have the issues with regard to the issues in dispute heard by separate court. I find the Claimant while in the employment of the Respondent was advanced various loan facilities as an employee and claims continued preferential interest rates on that basis. Such cannot be*

separated from the suit herein as the determination of one affects the other. Without going into the merits of the issues in dispute, I find the court has jurisdiction over the dispute based on the foundational relationship between the parties herein was employment and labour relations.

27. I therefore find that pending the determination of the issues in dispute herein, the Respondent should not change the terms and conditions of the staff Loan Policy with regard to the Claimant and an interlocutory injunction should issue herein.

16. The Claimant further submits that it has a prima facie case with good chances of success and invites the court to apply the Standard laid down in **Mrao Ltd v First American Bank of Kenya Limited & 2 other (2003)** as to what constitutes a prima facie case i.e. that

*“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.”*

17. The Claimant submits that she will suffer irreparable damage should the application not be allowed which include falling into ballooning debt as a consequence of inability to pay her staff loan and being listed as a credit risk impacting on her ability to borrow and diminishing her employability as a banker.

18. The Claimant submits that the balance of convenience tilts in her favor as she will suffer unduly should the orders sought not be granted while the Respondent will not suffer any prejudice should the application be allowed.

19. The Claimant further relied in the case of **John Kinyanjui Gateru v Family Bank Limited [2016] eKLR** where upon hearing the suit on its merits the Court ordered that the loans advance to the Claimant be repaid on preferential terms as the benefit was only truncated by an unprocedural termination of employment.

20. The Judge stated as follows at paragraphs 64-65 of its decision.

*"64. The only linkage here is that save for the procedural unfairness in the Claimant's dismissal, he should have remained in employment and enjoyed the payment of his loan facility at a staff rate. The rationale is set out in **Christopher Onyango & Others versus Heritage Insurance Co. Ltd, Cause No. 781 of 2015** thus:*

*“... the employment relationship generates rights and obligations. Such are to be found in the employment contract, human resource policy, and the law. The common denominator is - employment. Within such employment, the Claimant enjoyed the benefits of various loans. Such cannot be separated to create a different set of rights outside the employment relationship.”*

21. The Claimant urges the court to exercise its discretion and allow the application as prayed.

#### **Respondent's Submissions**

22. The Respondent submits that the Claimant in her application seeks anticipatory and injunctive orders which prevent legal avenues open to the Respondent in the event the Claimant defaults at an uncertain future point. The Respondent submits that the staff financing is on contractual basis and is a benefit contingent on employment. It further submits that the human resource policy is categorical that upon staff separation all the outstanding finance provided must be converted to prevailing customer rate. The Respondent submits that it is trite law that a court should not rewrite contracts between parties and relies in the Court of Appeal decision in **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR**, where the court declined the Claimant's invitation to re-write the contracts.

23. It further relies on the decision in **Evans Oliver Olwali v Standard Chartered Bank Ltd [2018] eKLR**, where the Judge held that preferential staff interest rates subsisted on account of the employment relationship. The Judge stated that:

*"First, the Court is bound by the holding of the Court of Appeal in **Erick V J Makokha & 4 Others v Lawrence Sagini & 2 Others (1994) eKLR** and as applied in **Fadhil Luma Kisua & Another v Kenya Ports Authority [2015] eKLR** (Onesmus Makau J) thus, "The contract of employment having gone, the fringe benefits of subsidized housing went with it." 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 full hearing of the suit".*

24. The Respondent further submits that the applicant has not demonstrated that it shall suffer irreparable harm that cannot be compensated with an award of damages, it relies in the case of Ongaya J. in **Evans Oliver Olwali v Standard Chartered Bank Limited [2018] eKLR**:

*"Third, the Court has considered the prayers in the statement of claim and returns that as submitted for the Respondent, if the temporary injunction is not granted, the Claimant would not thereby suffer irreparable harm beyond compensation by damages because the difference in the interest rates could be compensated by way of a monetary award".*

25. The Respondent submit that the Claimant's purported exposure will be purely financial that can be compensated while the Respondent risk regulatory exposure in maintaining preferential staff rates to a customer who is not an employee.

#### **Analysis and determination**

26. I have considered the submissions by the parties and the issue arising for determination is whether the Applicant meets the threshold for grant of the orders sought.

27. The issue in dispute in the memorandum of claim is the termination of the Claimant's employment and terminal benefits. The Claimant also seeks an order to restrain the Respondent from levying interest and other charges on the loan facilities advanced to the Claimant as an employment benefit while she was in the employment of the Respondent.

28. The threshold for grant of injunctions were set out in the celebrated case of **Giella v Cassman Brown** being a prima facie case with probability of success; irreparable harm to the Applicant that cannot be compensated by monetary damages should the orders not be granted, and if in doubt, on a balance of convenience.

29. Prima facie case as defined in **Mrao v First American Bank** includes but is not confined to an arguable case. In the case before me, there are arguable issues that would require investigation by the Court based on the pleadings before the Court as the Claimant avers that the termination of her employment was unfair while the Respondent denies the same.

30. I thus find that the Applicant has established a prima facie case.

31. On the second limb, the Applicant has pleaded that one of the securities she has charged to the Respondent is her matrimonial home. Needless to say, the loss of a matrimonial home would occasion the Claimant harm that may not be capable of being compensated by way of damages. On the other hand, the Respondent has to its advantage the securities from the Claimant and will in addition continue charging interest on the outstanding loan amounts. The benefit of doubt would thus tilt in favour of the Claimant.

32. The Respondent has referred to the decisions in **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR** and **Evans Oliver Olwali v Standard Chartered Bank Limited [2018] eKLR**. I find both of them not relevant to the determination of the instant application as they do not relate to stay pending hearing of suit but will be relevant in the final determination of the main suit.

33. As was held in the case of **Christopher Onyango & Others v Heritage Insurance Company Ltd** cited by the Claimant, the Court pointed out, which I agree with, that employment benefits such as loans cannot be separated to create a different set of rights outside the employment relationship.

34. Retaining the preferential interest rates available to the Claimant as a benefit of her employment can only be determined when the Court makes a final determination on the claim upon taking evidence from the parties.

35. It is for these reasons that I make the following orders –

**(1) THAT an injunction do and is hereby issued directed at the Respondent**

**a) Restraining the Respondent from adjusting, altering or in any manner changing the rebated and preferential terms of the accounts and financial facilities advanced to the Claimant during her employment with the Respondent and in particular Account Numbers [...], [...] and [...] held with the Respondent.**

36. **The above orders shall however be on condition that the Claimant continues to service the loans in accordance with the contracts in respect of the same failing which the Respondent shall be at liberty to exercise its rights of recovery of the same by way of liquidation of the securities that it is holding.**

37. The costs of this application shall be in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23<sup>RD</sup> DAY OF JULY 2021**

**MAUREEN ONYANGO**

**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> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**