



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 466 OF 2018

FELIX NDEREBA MWANGI.....CLAIMANT

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....RESPONDENT

RULING

1. On 16th July 2018, the Claimant filed a Memorandum of Claim seeking relief for unfair termination of employment. The Respondent filed a Memorandum of Response on 21st June 2019.
2. The matter opened for hearing of the main claim on 7th July 2021, when I took the Claimant's case. Defence hearing is slated for 24th November 2021 before my successor in Mombasa Employment and Labour Relations Court.
3. In between close of pleadings and the first *viva voce* hearing, the Claimant was served with a statutory notice of sale of his property known as L.R No. Mainland North/II/4946 (CR.27516), which was held as collateral for a loan facility advanced to the Claimant by the Respondent.
4. The Claimant therefore filed a Notice of Motion under Certificate of Urgency dated 24th May 2021, seeking to stop the sale. It is this Motion that is the subject of this ruling.
5. The Motion is supported by the Claimant's own affidavit and is founded on the following grounds:
 - a) That the Claimant secured a loan with the Respondent while he was still in employment;
 - b) That the Claimant was dismissed from his employment unfairly on 7th September 2017;
 - c) That the Respondent revised the terms of payment of the said loan, making it impossible for the Claimant to repay the same;
 - d) That the Claimant then filed the present suit against the Respondent claiming compensation and damages for unfair termination, to enable him repay the said loan;
 - e) That the Claimant has an arguable case with a high probability of success;
 - f) That unless the application is granted, the Respondent will proceed with the sale, to the Claimant's detriment;
 - g) That substantial loss will result to the Claimant unless the order sought is granted;
 - h) That the application ought to be granted in the interest of equity and justice.
6. The Respondent's response to the application is by way of a replying affidavit sworn by its Legal Recovery Officer, Samuel Njuguna on 16th July 2021.
7. Njuguna depones that the Claimant had, by virtue of his employment and prior to the termination, obtained a loan facility from the Respondent in the sum of Kshs. 3,150,000.

8. Njuguna further depones that the Claimant had not been servicing the loan since November 2017, necessitating the Respondent to commence recovery process as per the contractual agreement.

9. According to Njuguna, the recovery of the outstanding loan has no nexus with the Claimant's claim.

10. The issue for determination in this application is whether the Claimant has made out a case for an order stopping the sale of his property known as L.R No. Mainland North/II/4946 (CR.27516), by the Respondent.

11. The order sought by the Claimant falls within the domain of injunctions and the conditions upon which such orders may be granted were set 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 harm, which would not be adequately compensated by an award of damages;
- c) That the balance of convenience tilts in favour of the applicant.

12. It is important to state here that the Claimant's plea before the Court does not include retention of the interest rates attached to the subject loan at the preferential staff rates. What the Claimant is asking the Court to do is to restrain the Respondent from pursuing payment of the loan until the main claim is heard and determined.

13. The Respondent states and the Claimant does not deny that the loan has not been serviced since November 2017. This means that the loan has been non-performing for close to four (4) years and the Claimant has not offered any loan restructuring plan.

14. In *Elijah Arap Bii v Kenya Commercial Bank [2001] eKLR Ringera J* (as he then was) held that a claimant who fails to service loans advanced by their former employer is undeserving of equitable relief.

15. Employees who receive debt facilities from their employers must be prepared to perform the contracts giving rise to those facilities. The only temporary relief the Court may grant is to hold the interest rates as agreed at inception, pending determination of the claim for unlawful termination. It is therefore not enough to say; *'I lost my job through the fault of the employer and the employer should therefore not ask me to pay my loan.'*

16. In its decision in *Jacob Kelly Omondi Onyango v National Bank of Kenya [2017] eKLR* this Court stated the following:

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

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.”

17. By his application, the Claimant wants to go into perpetual default and the Court will not facilitate him to do so.

18. In the result, the application dated 24th May 2021 is disallowed with costs in the cause.

19. The interim orders granted on 10th June 2021 are vacated.

20. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OCTOBER 2021

LINNET NDOLO

JUDGE

Appearance:

Mr. Oyas h/b Mr. Obonyo for the Claimant

Mr. Masese for the Respondent