REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. E034 OF 2021

(Before Hon. Lady Justice Maureen Onyango)

ROBERT OCHANDA ABUYA **CLAIMANT**

VERSUS

KENYA POWER AND LIGHTING COMPANY LIMITED **RESPONDENT**

RULING

1. By a motion dated 14th December 2020, the Claimant seeks the following order –

(i) Spent;

(ii) THAT this Honourable Court be pleased to issue an order of interim injunction restraining the Respondent whether by itself or through its agent, employees, servants, or any person acting under their authority from commencing recovery proceedings against the Claimant for the sum of Kshs.740,204.70 being the outstanding car loan amount pending the hearing and determination of the Application inter partes;

(iii) THAT this Honourable Court be pleased to issue an

order of temporary injunction restraining the Respondent whether by itself or through its agent, employees, servants, or any person acting under their authority from commencing recovery proceedings against the Claimant for the sum of Kshs.740,204.70 being the outstanding car loan amount pending the hearing and determination of this pending the hearing and determination of this suit.

(iv) THAT the Respondent be ordered to provide a detailed Statement of Accounts in respect of the Claimant's car loan;

2. The application is expressed to be made under Order 40 Rule 1, 2 and 3, Orders 51 Rule 1 of the Civil Procedure Rule, 2010, Section 14, 1B, 1C and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya and all other enabling provisions of the law.

3. The application is supported by the following grounds –

a) The Respondent purported to terminate the Claimant's Employment on 6th February 2020

b) The Claimant has since filed this suit challenging the purported termination of employment as unfair and unjustified and seeking reinstatement;

c) The Claimant during his employment had obtained a car loan in the amount of Kshs.1,000,000/= That he made regular payments in an effort to defray the loan amount;

d) The Respondent has issued a demand for the outstanding loan amount and given the Claimant 14 days to clear the outstanding amount;

e) Due to financial constraints occasioned by his current unemployed status and the ongoing COVID-19 pandemic, the Claimant is unable to come up with the sum of Kshs.740,204.70 within 14 days;

f) The Claimant is apprehensive that the Respondent will commence recovery proceedings against him which will occasion him loss and damage;

g) The Claimant shall suffer irreparable loss and immense damage should the Respondent commences recovery proceedings.

4. The application is further supported by the affidavit of Robert Ochando Abuya, the Claimant in which he substantially reiterates the grounds in support of the application.

5. The Respondent opposes the application through grounds of opposition dated 9th April 2021 in which it sets out the following grounds –

(i) THAT the Application is misconceived, scandalous, vexatious and an abuse of this Honorable Court's process.

(ii) THAT there is no explanation justifiable, plausible or otherwise discernable from the Application dated 14th December 2020 to compel the Honorable Court to grant the orders sought and the orders sought are incapable of being granted.

(iii) THAT the Respondent stands to suffer prejudice and injustice in the event that the orders sought are granted.

(iv) THAT Applicant has approached the Court with unclean hands and is therefore undeserving of any equitable remedies, having failed to settle his obligations in the Car Loan Agreement with the Respondent as and when they fell due.

(v) THAT the Applicant's application herein is a nullity, lack both legal and factual merit and ought to be dismissed with costs to the Respondent.

6. The Respondent further filed a replying affidavit of David Mondani, an employee of the Respondent in which he states that the termination of the Claimant's employment was occasioned by his engagement in fraudulent activities contrary to the Company's Code of Conduct and was thus based on valid reasons.

7. The Affiant further deposes that the terms of the loan agreement advanced to the Claimant provided that the same be registered in the joint names of the Applicant and the Respondent, and that the Respondent wild arrange for insurance of the said motor vehicle through its insurers for the entire duration of the loan.

8. It is deposed that the Court cannot shield the Claimant from meeting his financial obligations. That the Claimant retains the possession and user of the said motor vehicle without meeting his financial obligations.

9. It is further deponed that the loss of his employment and the outbreak of the COVID-19 pandemic are not valid grounds for grant of the orders sought.

10. Further, that the Claimant does not meet the threshold for grant of the orders sought; that the Claimant has not demonstrated that if the orders sought are not granted, he will suffer irreparable harm that cannot be compensated by way of damages. That no evidence has been placed before the Court to show that the Respondent cannot compensate the Claimant should the Court determine the suit in his favour.

11. The application was disposed of by way of written submissions.

12. The issues for determination are whether the Applicant meets the threshold for grant of the orders sought and whether the Applicant is entitled to the said orders.

13. The principles for grant of the temporary injunctive orders were set out in the case of **Giella v Cassman Brown** being that first, the Applicant must demonstrate that there is a prima facie case with probability of success. Secondly, that the Applicant will suffer irreparable loss should the orders not be granted and thirdly, that when the Court is in doubt, the application would be determined based on a balance of convenience.

14. Prima facie case was defined in **Civil Appeal No. 77 of 2012, Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR** cited by the Claimant herein as

"We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The Applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."

15. In the instant case, it is the submission of the Claimant that the Respondent has placed the Claimant in dire financial straits by dismissing him from service and thereafter demanding payment from him. That this is sufficient demonstration of prima facie case to warrant the grant of the orders sought.

16. The Respondent on the other hand submits that the Claimant was terminated from employment on engagement in fraudulent activities. On his termination letter, the Claimant was given 14 days to pay his outstanding liabilities including the car loan or give a plan on how he intends to settle the loan. The Claimant failed to give a proposal and neglected to pay the outstanding loan as per the Car Loan agreement and filed the suit to avoid his financial obligations to pay the balance. The Claimant states that he is unable to pay the loan due to the unemployment and COVID-19 pandemic. That this is unjustifiable as the Claimant has a duty to honour his obligation of payment of the loan. That injunction is not given as a matter of Right, it must be earned. The Claimant has not established any prima facie case.

17. That in the case of **Peter Mutisya Musembi & another v National Bank of Kenya Limited [2016] eKLR**, the Court stated the following;

> *"... I find that the totality of the facts do not disclose a prima fade case in that the loan granted and repayment thereof is premised on a separate contract from the contract of employment. That the 1st Claimant is contractually bound by the charge which is governed by the Land Act, 2012. That the 1st Claimant is contractually bound to service his loan facility whether he is in employment or not and the Respondent has a right to realize the securities if the 1st Claimant is in default in respect of the loan."*

18. It is the opinion of the Court that at this stage of the proceedings it is not possible to determine whether or not the Claimant has a prima facie case with a high probability of success as the averments by both parties have to be tested by way of evidence.

19. On the second principle of irreparable harm, the Claimant submits that since he was the Respondent's former employee seeking reinstatement and/or in the alternative damages for unfair termination, he is apprehensive that the Respondent's intention to commence recovery proceedings against him for the sum of Kshs.740,204.70 being the outstanding car loan amount will subject him to irreparable loss and immense damage as the Claimant currently unemployed and reeling from the effects of the ongoing COVID-19 pandemic and thus unable to come up with the outstanding sum of Kshs740,204.70 within the period of time demanded.

20. That the current financial distress of the Claimant is a direct result of the Respondent's unlawful actions. That the intended recovery of the sums by the Respondent would cause not only financial embarrassment to the Applicant but to mental anguish which is predicated by the Respondent's unlawful actions. That such mental anguish would not be adequately remedied by damages.

21. For emphasis the Applicant relies on **Halsbury's Laws of England, Third Edition, Volume 21, paragraph 739, page 352** which reads:-

> *"It is the very first principle of injunction low that primo facie the Court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the Court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question"* [As cited in **Succession Cause No. 374 of 2010: Francis Muriithi Ndirangu v Ruth Wanjiku Nderitu [2016] eKLR**].

22. For the Respondent it is submitted that the term irreparable harm basically refers to harm or injury that cannot be adequately compensated by any amount of monetary award or one which cannot be reversed to the state before the damage. The Respondent submits that in legal parlance, irreparable harm has been defined as follows: -

> *"A legal concept that argues that the type of harm threatened cannot be corrected through monetary compensation or conditions that cannot be put back to the way they were."*

23. It is submitted that the Applicant has not shown that he would suffer irreparable harm which cannot be compensated through damages. He has not demonstrated that the loss would not be remedied by an award of damages unless the orders prayed for are granted as such, he has not established a prima facie case.

24. It is further submitted that the concept of irreparable harm seeks to protect the prima facie case established by the Applicant from being rendered nugatory, and as stated the Applicant has not established a prima facie case herein.

25. In support of the above position, the Respondent relied on the case of **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR** where the Court of Appeal held that:

> *"If the applicant establishes a prima facie case that alone is not sufficient to grant an interlocutory injunction, the Court must further be satisfied that the injury the applicant will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."*

26. That the Court of Appeal further held that:

> *"On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate,*

prim facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

27. The Respondent further relied on the case of **Elijah Kipng'eno Arap Bii v Kenya Commercial Bank Limited [2001] eKLR,** where the Court stated the following;

"*Is the applicant's probable injury capable of being adequately compensated in damages? 1 have no doubt that it is. The applicant has known all along that the securities he offered for his charge debt would be realized if default was made in the repayment. As 1 have said severally, once property is offered as security it by that very fact becomes a commodity for sale. And there is no commodity for sale whose loss cannot be compensated adequately in damages."*

28. This position was reiterated in the case of **John Kinyanjui Gateru v Family Bank Ltd [2016] eKLR**, where the Court held as follows;

"*The counter-claim is allowed to the extent that the Respondent is entitled to repossess from the Claimant its security motor vehicle KBH 314N in view of default and upon the submission that the vehicle has since been in an accident and written off, the duty is upon the Claimant to ensure the owing dues to the Respondent in terms and loan facilities advanced are repaid as directed."*

29. As submitted by the Respondent, the motor vehicle that is the subject of the instant application was obtained through

a loan advanced to the Applicant by the Respondent.

30. Among the terms of the advance is that the same is registered in the joint names of the Respondent and the Claimant until payment n full. The motor vehicle therefore is jointly owned by the Respondent and the Claimant until the Claimant has fully paid the loan in respect thereof.

31. The Applicant therefore does not own the car, his only claim to the car being what he has paid for it which is Kshs.259,795.30. The Respondent on the other hand has a stake of Kshs.740,205.70.

32. As stated by the Applicant in his pleadings, he is unable to come up with the said sum of Kshs.740,205.20. There is no guarantee that the Applicant will be reinstated even should he be successful in his claim. The only security the Respondent can rely on is the motor vehicle.

33. The Applicant has not demonstrated that he would suffer irreparable harm should the vehicle be repossessed by the Respondent. He can adequately be compensated for the loss thereof should the Court later find in his favour.

34. For the foregoing reasons, I find that the Applicant has not demonstrated irreparable harm he will suffer should the orders not be granted. On the contrary, the Respondent has more to lose should the orders be granted.

35. The balance of convenience therefore tilts in favour of the Respondent.

36. The upshot is that the application is without merit and is accordingly dismissed. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 19TH DAY OF NOVEMBER 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 15th March 2020 and subsequent directions of 21st 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 has 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