



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 424 OF 2017

FREDRICK O. KOMBIJA.....CLAIMANT/APPLICANT

VERSUS

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT

RULING

1. Before court is an application dated 10th August, 2021, brought pursuant to the provisions of Rules 17 and 28 of the Employment and Labour Relations Court (Procedure) Rules, 2016.
2. The Applicant seeks orders that:
 - i. Spent.
 - ii. Spent.
 - iii. This court be pleased to grant orders restraining the Respondent from unlawfully increasing the Applicant's bank loan interest rate from 4% per annum to 14% per annum pending the hearing and determination of the intended appeal.
 - iv. The costs of this application be provided for.
3. The application was placed before the duty Judge on 13th August, 2021, who certified the application urgent and fixed the same for interparties hearing on 21st September, 2021. Parties sought to canvass the application through written submissions.
4. The application is premised on grounds set out on the face of the application the basis of which is that the Honourable court in a judgment delivered on 27th November, 2020, did not grant orders restraining the Respondent from increasing the Applicant's bank loan interest from 4% to 14% which is the prevailing market rate.
5. The Applicant states that the reason the court did not grant the said order, is because it did issue similar orders in a ruling delivered on the 20th September, 2018, and that an appeal on the ruling was pending at the time of the Judgment.
6. The applicant's case is that the Respondent intends to expose him to an unfair and oppressive loan interest rate of 14% per annum which increase is detrimental to the Applicant who stands to suffer great financial prejudice.
7. The Respondent filed a reply to the application vide a Replying Affidavit sworn by one Stephen O. Ojanga, the Branch Manager of the Respondent on 4th October, 2021 and filed in court the same day.
8. The Respondent argues that owing to the dismissal of the Applicant from the service of the Respondent, the relationship between him and the Respondent ceased being that of an Employer and Employee. He further argues that the 4% interest rate is only applicable to employees of the Respondent.
9. The Respondent asserts that for reason that the court did not in its judgment of 20th November, 2020 issue restraining orders against converting the Applicant's interest rates from employee rate (4%) to commercial rates of 7% and recently 14%, the Respondent already effected the commercial rates on the Applicant's loan as he is no longer their employee.

The Applicant's Submissions

10. The Applicant submitted that at the time he applied for the loan subject of this application, he had planned his obligations and knew that he will have settled the loan by the time he was going to retire, if not for the unfair termination.

11. The Applicant further submitted that the loan was a benefit he was enjoying by virtue of his employment with the Respondent, but whose terms were compromised by the unfair termination meted on him by the Respondent.

12. The Applicant submitted that he has proved a prima facie case and that the balance of convenience tilts in his favour. He sought to rely on the case of *Jared Otieno v National Bank of Kenya Limited (2020) eKLR*.

The Respondent's Submissions

13. The Respondent submits that the Applicant does not have a pending appeal on the issue of interest rates and that he has not sought leave to file an appeal against the judgment of 20th November, 2020 out of time to warrant the granting of stay orders.

14. It is further submitted for the Respondent that following the judgment of 27th November, 2020, the interest rates on the Applicant's bank loan reverted to commercial rates from the date of that judgment, and as such, there is nothing for the court to stay. It is submitted that the commercial rates have been in force since January, 2021.

15. The Respondent submits that no substantial loss will be suffered by the Applicant that cannot be compensated by way of damages.

16. The Respondent argues that the Applicant has not made an offer for security which is a mandatory requirement for grant of orders of stay pending appeal. The Respondent sought to rely on the cases of *Multi Media University & Another v Prof. Gitile Naituli (2014) eKLR*, *Butt v Rent Restriction Tribunal (1979) eKLR* and *Kenya Shell Limited v Benjamin Kibiru & Anor (1986) eKLR*.

Determination

17. The court is clothed with power under the law to grant the relief of stay of execution. The applicant has however to meet the threshold set under order 42 Rule 6 of the Civil Procedure Rules.

18. To grant or not to grant orders of stay pending appeal, is a discretionary power of the court. In exercising this discretion, the court is guided by the provisions of Order 42 Rule 6 of the Civil Procedure Rules. Further, the court set the threshold for granting of stay orders in the case of *Stephen Wanjohi v Central Glass Industries Ltd Nbi HCCC No. 6726 of 1991* where it held:

“For the Court to grant stay of execution there must be:

(a) Sufficient cause.

(b) Substantial loss.

(c) No unreasonable delay and security offered for due performance of the decree.”

19. The Applicant herein being the burden bearer, must show the court that the principles herein, have been satisfied on a balance of probability to warrant the exercise of discretion in his favour.

20. On the issue of whether or not there exist sufficient cause to warrant the issuing of stay orders pending appeal, the Respondent has submitted that no appeal has been filed in relation to the interest rates subject of this application. Indeed, nothing has been produced before this court to prove that such an appeal has been filed or whether the appeal that was pending at the time of judgement has been determined and what the decision of the court on the same was. Further, the respondent's position is that the interest rates subject of this application were effected immediately the court delivered its judgment on 27th November, 2020.

21. The Respondent further proceeded to urge that for reason that the Applicant has been paying the bank loan at commercial rates of 14% since the impugned judgment, there is nothing left for the court to stay.

22. Although the Respondent has not shown that the Applicant has been servicing the loan at commercial interest rates, the Applicant being the burden bearer, has not proved that indeed he is and has been servicing the loan at the employee rate of 4%. For these reasons, the Applicant has not proved sufficient cause or that he will suffer substantial loss if the orders of stay are not granted as he has been repaying the loan for close to ten months at commercial rates. (*See Kenya Shell Ltd v Kibiru (1986) KLR, Prilscot Company Ltd v Monica Heho (2015) Eklr*)

23. The Respondent's evidence is that the 4% interest rate is applicable solely to the employees of the Respondent. By dint of the termination subject of the judgment of 27th November, 2020, the Applicant is no longer an employee of the Respondent.

24. On whether or not there was undue delay in filing the instant application and the intended appeal, the judgment subject of this application was delivered on 27th November, 2020. Today, it is one month short of a year since the impugned judgment was delivered. The delay in my view is more than unreasonable.

25. The evidence disposed by the applicant has largely fallen short of the conditions precedent to justify grant of stay orders.

26. Lastly, the order sought is that this court be pleased to grant orders restraining the Respondent from unlawfully increasing the Applicant's bank loan interest rate from 4% per annum to 14% per annum pending the hearing and determination of the intended appeal. There is no evidence that such an appeal is pending before any court nor has the Applicant sought leave to file an appeal out of time. In the circumstances, were this orders to be issued, the same will operate as permanent orders as no appeal has been filed in the suit.

27. The court concludes that the application is without merit and is hereby dismissed with costs.

28. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 4TH DAY OF NOVEMBER, 2021.

CHRISTINE N. BAARI

JUDGE

APPEARANCE:

MS. IMBAYA FOR THE APPLICANT

MR. ORIEYO FOR THE RESPONDENT

CHRISPO/CHRISTINE OMOLLO- C/A