



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. E575 OF 2020

ELIAS MAUNDU MAKAU.....CLAIMANT

VERSUS

I&M BANK LIMITED.....RESPONDENT

RULING

1. The Claimant/Applicant filed the Notice of Motion Application dated 26th August 2020 seeking for Orders:

i. *Spent.*

ii. *Spent.*

iii. THAT pending the hearing of this Application *inter partes*, this Honourable Court be pleased to issue a prohibitory order restraining the Respondent, its agents or servants from acting upon its decision to recall the entire debt arising from the credit facilities extended by the Respondent to the Applicant namely house loan under the Account no. xxxxxx, staff personal loan through Account no. xxxxxx and car loan through Account no. xxxxxx.

iv. THAT pending the hearing and determination of the suit herein, this Honourable Court be pleased to issue an order compelling the Respondent to discharge its interest in the log book of the motor vehicle registration no. KCG 265Z and issue the Applicant with the said log book;

v. THAT pending the hearing and determination of the suit herein, this Honourable Court be pleased to issue an injunction restraining the Respondent, its agents or servants from alienating disposing and or selling the Applicants residential house known as Abadaire 23 in Phernom Park Estate erected on LR No. 209/21054 purchased by the house loan/mortgage under the Account no. xxxxxxxx;

vi. THAT the costs of this Application be provided for.

2. The Application is premised on the grounds that at the time of his constructive dismissal from employment, the Applicant/Claimant was servicing loans granted to him by the Respondent which he has continued to repay despite occasionally falling behind on his repayments owing to harsh economic times and his continued unemployment. That the Applicant remains current in his repayment of the credit facilities extended to him by the Respondent but the Respondent has resorted to unlawfully intimidate and harass him and has recalled the entire debt arising from the loan facilities it granted to him. That the Respondent is also proceeding to effect a Notice of Sale of the Applicant's house even though he has regularized his account by repaying all arrears and penalties levied thereon. Further, despite having repaid in full the loan for motor vehicle registration number KCG 265Z, the Respondent has declined to discharge its interest in in order to issue the Applicant with the vehicle's log book. The Applicant asserts that the Respondent having earlier led to his constructive dismissal should not be allowed to further frustrate him by using the loan facility it granted to him to punish him on account of the on-going litigation in which he seeks the legitimate determination of his rights as an employee.

3. In the Supporting Affidavit, the Claimant/Applicant avers that the Respondent had granted him credit facilities for a car, a house, insurance premium finance and for a staff personal loan. That he has repaid the car loan and insurance premium finance in full and only owes the Respondent loan repayment for his residential house at Kshs. 23,570,515.13 and the staff personal loan of Kshs. 418,838.14. He asserts that the Respondent will not be prejudiced if the orders sought herein are granted whereas he stands to suffer irreparable damage incapable of compensation by way of an award of damages should this Court not grant the prayers.

4. The Respondent filed a Notice of Preliminary Objection dated 16th September 2021 on grounds that:

(i) THAT the Honourable Court lacks jurisdiction of dealing with the loan disputes between the parties herein since the same are purely commercial and were entered into on commercial terms and dealing with them is contrary to the law.

(ii) THAT the loans were granted as employment benefits and upon termination of the employment contract the same must end since their continuity would amount to a reinstatement of the employment relationship between the parties.

(iii) THAT the loans contracts entered into between the parties have clear terms and conditions related to how the money is to be repaid back during and in the absence of an employment relationship and this Honourable Court lacks jurisdiction to interrogate commercial disputes.

(iv) THAT as a matter of justice and equity the Applicant is not entitled to use the wrong forum to preserve the status quo as regards his properties which were charged to the Respondent, his former employer which has a contractual right to recover the money borrowed by the Applicant upon default.

5. In the Grounds of Opposition dated 16th September 2021, the Respondent asserts that the Applicant has failed to honour and repay the loans as contracted and is misusing the Honourable Court to seek protection which he does not deserve as a loan defaulter. That the Applicant is therefore guilty of breaching the loan contracts which he freely entered and understood the requirements of and that it as the lender has the right to consolidate all the assets of the Applicant acquired through loans and where necessary upon default use all the assets to recover all the money due to it. That the said logbook to the said motor vehicle is thus rightfully being held as a further security for the outstanding loan liabilities owed by the Applicant and the same is not available for release to the Applicant as sought. Further, the employment contract between the parties was terminated by the Applicant and what exists between them is purely a commercial relationship based on contracts.

6. Claimant/Applicant's Submissions

The Claimant/Applicant submits that the preliminary objection by the Respondent is misplaced. He relies on the case of **Samuel Waweru v Geoffrey Muhoro Mwangi [2014] eKLR** where the learned judge cited with approval the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696**, on what constitutes a preliminary objection. The Claimant/Applicant submits that a preliminary objection should raise a pure point of law; is argued on the assumption that all the facts pleaded by the other side are correct; and cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. That *prima facie* default is a factual issue to be established by evidence from both parties as the Court is unable to determine whether this is a 'commercial' matter in which the Claimant has defaulted in his repayment obligation or whether the Court has jurisdiction to determine this prayer without first evaluating evidence from the parties. According to the Claimant/Applicant, the Respondent's Objection raises no pure point of law on its own and asserts that the issues raised herein are within the scope of the Employment Act. Moreover, the Preliminary objection does not stem from the pleadings filed by parties as affirmed by the Court in the case of **John Njuguna Kimunya v Tersiah Wachuka Kimunya & Another [2016] eKLR**. He also submits that the cause arises from the employer-employee relationship between the parties and not from a banker-customer relationship. The Claimant/Applicant submits that the court in **East African Development Bank v Hyundai Motors Kenya Limited [2006] eKLR** cited with approval the principles governing the grant or denial of the injunctive orders laid down in the celebrated case of **Giella v Cassman Brown (1973) E.A 358** where the court held as follows;

"An applicant has to demonstrate firstly, that he has a prima facie case with probability of success. Secondly, an applicant has to show that he will suffer irreparable loss or damage if the interlocutory injunction is not granted, that is that an award of damages will not adequately compensate the damage. Thirdly, if the court is in doubt on the above 2 requirements, then it will decide the application on the balance of convenience."

7. The Claimant submits that he has shown the apparent infringement of his rights by the Respondent and the high chance of success given the Respondent's failure to rebut his proof. That he has also show the irreparable harm he will suffer which cannot be compensated by an award of damages as his residential home and vehicle if sold off through auction would render him destitute. On the balance of convenience, he will suffer greater prejudice if denied the orders while the Respondent is unlikely to suffer prejudice because the additional sums owed to it arising from the grant of an order of injunction can always be computed and recovered by it should the Claimant's case fail. The Claimant/Applicant has annexed a plethora of case law supporting his case of having met the requirements for a grant of injunctive orders and asserts that the issue at hand is a clear instance of when the Honourable Court should intervene and issue the appropriate relief in such circumstances.

8. Respondent's Submissions

The Respondent submits that its case is fortified in the holding by the Court of Appeal in **National Bank of Kenya Ltd v Pipeplastic Sankolit (K) Ltd. & Another [2001] eKLR** where it was held that a Court of law cannot re-write a contract between the parties and that the parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. It submits that however none of the vitiating factors have been demonstrated by the Applicant to warrant seeking to invite the Honourable Court to interfere with the said loan agreements. That the Court in **Jim Kennedy Kiriro Njeru v Equity Bank (K) Limited [2019] eKLR** held that a loan agreement is a distinct legal obligation independent of the employment and the advantage conferred on an employee ends upon the employee's departure from the employment. It is the Respondent's submission that under the loan contracts signed by the Applicant, it was at liberty to recall the entire loan amount and treat the loan as a normal commercial loan contract attracting the market rates for commercial rates. It further refers this Court to the finding of Omollo J. in the case of **Innocent Enoce Omboko v County Assembly of Busia & Another [2021] eKLR** that when faced with controversy such as in the instant case, the court should utilise "*the Pre-Dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.*"

The Respondent submits that this Court should similarly apply the test to the Application and case before it and find that the Application contesting the loan contracts made by the Claimant herein is a commercial dispute and to separate the superficial link attempted to be created

by the Claimant between his employment cause and his loan agreements with the Respondent. It submits that the issues raised by the Applicant do not fall within the jurisdiction of this Court and should be struck out. That it is trite that in determining its jurisdiction, this Court will no doubt look at the pleadings filed and find that in light of this jurisdictional issue raised, and the fact that the dominant issue in the pleadings are questions of land and charges, it is only fair that the objection is allowed so that the proper Court has the parties ventilate the issues before it.

9. The Claimant is under siege from his erstwhile employer who seems to have begun a process in earnest of recalling loans issued to its former employee. While such a prerogative may be the right of any lender it would seem the matter has a connotation of vendetta about it. Be that as it may, the Court being mindful of the application of the pre-Dominant Purpose Test in this case shows that the transactions involving the attempt at a forced sale of the Claimant's residential house, jurisdiction lies at the Environment and Land Court as the ELC is the appropriate forum for the determination of the issues relative to the charge and the attempt at forced sale. In the premises I will decline jurisdiction to determine the matter relating to the sale of the house and transfer of the chattel to the Claimant who asserts he has completed payment for the vehicle by the obduracy of the Respondent has denied him a discharge. Those matters will be determined by the ELC Court which is best placed to deal with charges. Motion is dismissed albeit with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2021

NZIOKI WA MAKAU

JUDGE