



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO. 2330 OF 2017**

*(Before Hon. Lady Justice Maureen Onyango)*

**BANKING INSURANCE AND FINANCE UNION KENYA.....CLAIMANT**

**VERSUS**

**CONSOLIDATED BANK OF KENYA LIMITED.....RESPONDENT**

**RULING**

The grievants namely: Pharis Ayah Etyang and Helidy Waturi Kimathi were employees of the Respondent. As a result of this employment relationship, they entered into loan agreement with the Respondent wherein the interest rate was set at a preferential staff rate of 6% per annum. They were dismissed from employment on 7<sup>th</sup> May 2018 and thereafter, the interest rate was converted to commercial rates being 13% per annum.

Additionally, the Respondent issued to Mr. Etyang with a notice of its intention to sell his property. Aggrieved by the Respondent's actions, the Applicant filed this application on their behalf, seeking the following reliefs-

- a. Spent.
- b. That this Court be pleased to issue interim *ex parte* orders restraining the Respondent herein from selling or attempting to sell property No. North Teso/Kocholia/2778 of Pharis Ayah Etyang and to further stop the Respondent herein from charging commercial rates of interests on the outstanding loans of Mr. Pharis Ayah Etyang, Helidy Waturi Kimathi or any other employee but to revert to the original preferential interest rates as long as this suit is still pending hearing and determination before this Court until this Application is heard and determined *inter partes*.
- c. That the Court do order the Respondent to refund Kshs.102,554.89 to Mr. Pharis Ayah Etyang and Kshs.340,830.95 to Helidy Waturi Kimani or any other employee being excess amount so erroneously recovered from them as a result of the market rate (commercial) rates of interests being charged on the outstanding loans after their unfair and unlawful loss of employment,
- d. That the Court do award costs of this Application to the Applicant.

The Application is supported by the grounds set out on the face of the motion and by the supporting affidavit of Joseph Ole Tipape sworn on 29<sup>th</sup> August 2019 and the supplementary affidavit of Tom Odero Sworn on 13<sup>th</sup> September 2019. The Respondent has opposed the application vide the replying affidavit of Albert B. A. Anjichi sworn on 6<sup>th</sup> September 2019.

**The Applicant's Case**

The Applicant avers that upon the termination of the grievants' employment on 7<sup>th</sup> May 2018, the interest rate was reviewed to 13% together with a default interest at the rate of 10% compounded daily until payment in full. As a result, Mr. Etyang was forced to repay his loan at the monthly rate of Kshs.29,949.01 and Kshs.1,617.18 as opposed to the monthly rate of Kshs.23,654.60 and Kshs.1,521.10 which he had been paying before his employment was terminated.

It is averred that Mr. Etyang and Ms. Kimathi have been paying the monthly rate of Kshs.6,390.89 and 19,655.80 for sixteen months, totalling to Kshs.102,254.24 and 340,830.95 up to date of filing the application, respectively.

The Applicant avers that they have sought the reliefs of reinstatement, re-engagement and compensation, hence it is premature for the Respondent to charge interest at prevailing market rates. As such, the Respondent's action amounts to pre-empting the Court's decision that the orders sought will not be granted.

The Applicant avers that the Respondent stands to suffer no irreparable loss or prejudice if the application is allowed.

### **Respondent's Case**

For the Respondent it is deposed that it was an unequivocal term of the loan agreement between it and the grievants that upon their dismissal from employment, the interest rate would immediately revert to the prevailing commercial rate, to which they agreed. Therefore, they are bound by the said terms unless they can prove that the same was accepted under undue influence, duress or coercion. Further, the respondent deposes that it was an implied term that an employee only enjoyed the advantages appurtenant to the facility as long as they remained employed by the Respondent.

The Respondent deposes that Mr. Etyang is in default and as at 5<sup>th</sup> September 2019, he had an outstanding balance of Kshs.71,487.10. The Respondent further deposes that Ms. Kimathi is not in arrears and has been making the requisite payment.

It deposes that due to Mr. Etyang's default, he was served with a 90 days' notice pursuant to Section 90(1) of the Land Act. Upon the expiry of the said notice, he was served with a 40 days' notice pursuant to Section 96(2) of the Land Act, prior to the intended sale.

The Affiant avers that the loan granted to the grievants was separate and distinct and not a condition precedent to the employment relationship.

It is the position of the respondent that this Court lacks the jurisdiction to hear this matter as the cause of action arose after the grievants' employment had been terminated. Further, the respondent urges that a charge is a contract between the parties, duly registered against the title and the issuance of the injunction order will amount to a discharge of the charge.

It is the Respondent's averment that the Applicant has not provided sufficient justification to warrant the setting aside of the customer rate applicable once an employee leaves the service of the Respondent. The respondent urges the Court to dismiss the application with costs.

### **The Applicant's Rejoinder**

In response to the averments made in the Respondent's affidavit, Tom Odero made the following averments: that the staff loan facilities and favourable interest rates offered to the grievants were based on their employment relationship with the Respondent.

He deposes that the loans were to be paid at the rate of 6% if the grievants worked until retirement. It is further averred that the Respondent will only gain if the loan is repaid using the enhanced market rates and will lose nothing if the grievants continue to service their loans at the staff rate of 6%. That the grievants on the other hand stand to suffer irreparable damage and loss since they cannot recover the property after it is disposed of especially in the event they are reinstated or re-engaged.

The Application was disposed of by way of oral submissions by the parties' counsels in open Court.

### **The Applicant's Submissions**

Mr. Odero, for the Applicant, submitted that the grievants have been unable to service their loans after the interest was increased from 6% to 13%. He further submitted that the Respondent's actions are premature as the loan is fully secured with the relevant documents being in its custody.

It was also his submission that Courts have made decisions which buttress the Applicant's position that banks should wait until the Court determines whether the Claimant was right or wrong. He relied on the case of **Beatrice Wangui Mwhia vs. Barclays Bank of Kenya [2019] eKLR** to fortify his argument.

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

Mr. Kabugu, counsel for the Respondent, submitted that the two grievants willingly entered into the loan agreement whose term was that once an employee was dismissed from employment the interest rate would revert to commercial rates. It was his submission that this Court cannot rewrite the contract and should only give effect to the spirit of the same. He relied on the case of **Sammy Japheth Kavuku vs. Equity Bank Limited & Another [2014] eKLR** where the Court held that it could not rewrite the parties' contract.

It was counsel's submission that the Applicant had not satisfied the principles set out in **Giella vs. Cassman Brown and Company Limited [1973] EA** as there is no *prima facie* case and the balance of convenience tilts in the Respondent's favour. He submitted that it is trite law that once a borrower offers a security, it becomes a commodity for sale in the event of default as the bank has the power to recover the outstanding loan. It was his submission that the Respondent had followed the requisite procedure.

Counsel urged this Court not to issue amorphous orders which were not in the interest of justice, such as the one sought in prayer 2 of the application.

### **The Applicant's Rejoinder**

In response to Mr. Kabugu's submissions, Mr. Odero submitted that the loan offered to the two grievants was issued to them by virtue of being the Respondent's employees, as such, the same was not a commercial loan.

He submitted that the interim orders were very specific as they referred to specific properties and that the issue of other employees was varied by the judge. He further submitted that this Court had the jurisdiction to hear this matter as the loan agreement emanated from an employment relationship. He cited the case of **Abraham Nyambane Asiago vs. Barclays of Bank of Kenya Limited [2013] eKLR**.

### **Analysis and Determination**

After examining the application, the grounds and the supporting affidavit as well as the replying affidavit and the authorities cited by both parties, the issues for determination are whether this Court has the jurisdiction to hear and determine this matter and whether the Applicant is entitled to the orders sought.

Section 12(1)(a) of the Employment and Labour Relations Court Act gives this Court the jurisdiction to hear and determine disputes relating to or arising out of employment relationships between an employer and an employee. In the case of **Abraham Nyambane Asiago vs. Barclays Bank of Kenya Limited [2013]** the Court held that the employment relationship is a wide concept which cannot be restricted to the contract of service hence this Court has the jurisdiction to hear matters pertaining to the interest rates applicable to former employees. As the respondent has submitted, the preferential rates of interest were given to the employees because of their employment relationship with the bank. Thus it was an employment benefit. It is thus within the jurisdiction of this court.

### **Reliefs Sought**

#### **i. Injunction**

It is the Applicant's case that the Respondent ought to wait for the hearing and determination of this suit since an order for reinstatement or re-engagement would mean that the grievants continue to service their loans at the preferential interest rates. The Respondent, on the other hand, has submitted that granting the orders sought would be tantamount to rewriting the parties' contract.

The Applicant is challenging the lawfulness and fairness of the grievants' employment terminations and has sought the relief of reinstatement and re-engagement of the grievants. The Court in **Eliud Kimaile vs. Co-operative Bank of Kenya Limited [2017] eKLR** held that an employer could only vary the preferential interest rates granted to a former employee if the termination of the employment was done in accordance with the law.

Considering the reliefs sought by the Applicant and the fact that this Court is yet to determine whether the termination of the grievants' employment was lawful and fair, the two grievants would suffer irreparable harm should their houses be sold due to their inability to service the loans at the enhanced commercial interest rates. The grievants would thus suffer irreparable damage and loss. Further, whether the Respondent can vary the interest rates is dependent on whether the termination was lawful and fair, a fact which will only be determined once the suit has heard and finalised.

I thus find that the claimant has a prima facie case and that the grievants will suffer irreparable harm should the orders of say not be granted.

#### **ii. Refund**

The claimant has prayed for the refund of Kshs.102,554.89 and Kshs.340,830.95, respectively to the grievants paid by them as a consequence of the enhanced interest rate charged on their loans. The grievants have however not stated that they have overpaid the loans. A court cannot order a refund to a person who still owes money to a lender. The only relief that can be granted under such circumstances is to credit the respective accounts of the grievants with the funds paid as a consequence of the enhanced interest. The prayer for refund of the money paid by the grievants over and above the amounts due under their respective loan balances is thus rejected.

### **Orders**

For the foregoing the court makes the following orders: -

1. That the respondent be and is hereby restrained from selling the property No. North Teso/Kocholia/2778 in the name of Pharis Ayah Etyang pending hearing and determination of this suit.
2. That the respondent be and is hereby restrained from charging interest rates above 6% or the rate of interest applicable to employees of the respondent pending hearing and determination of this suit.
3. That the grievants do continue servicing the loans in accordance with the terms of the loan agreement pending hearing and determination of this suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23<sup>RD</sup> DAY OF APRIL 2020**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court of 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 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**