



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**

**PETITION NO. 128 OF 2018**

**ANTHONY KIBANDI WATUKU.....CLAIMANT**

**VERSUS**

**INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION.....RESPONDENT**

**RULING**

1. Anthony Kibandi Watuku (applicant) filed a Petition against the Industrial & Commercial Development Corporation (Respondent) on 3 December 2018 alleging violation of his right to fair labour practices (failure to be promoted, bias in performance appraisals, unmerited warnings, unfair deductions, surcharge, withholding of salary increments, failure to pay special duty allowance and bonuses, overtime, accrued leave, withholding of terminal dues) and constructive dismissal.
2. The applicant also alleged that he was treated unfairly and his rights to property, economic and social security, fair administrative action as well as to human dignity were violated.
3. In the Petition, the applicant sought
  - (a) A declaration that the Petitioners fundamental rights under Articles 26, 28, 40, 41, 43 and 47 of the Constitution of Kenya 2010 have been and continue to be infringed by the Respondent.
  - (b) Special damages of a cumulative sum of Kshs 10,003,929/90 as itemised at paragraph 125 of the Petition.
  - (c) General damages for gross violation of fundamental rights.
  - (d) Interest on (b) at court rates from the date of filing suit until payment in full.
  - (e) Interest on (c) at court rates from the date of judgment until payment in full.
  - (f) Costs for the suit and interest thereon at court rates.
  - (g) Any other appropriate relief that the Honourable Court shall deem fit to grant to protect the Petitioner's fundamental rights.
4. The Court gave directions on 21 March 2019 and 4 April 2019. The directions included an order to the Respondent to file and serve an Answer to the Petition.
5. On 13 June 2019, the applicant suggested that the Petition proceeds on the basis of the record and submissions to be filed.
6. On 12 July 2019, the Respondent filed a Motion seeking an order striking out the Petition for being an abuse of the court process.
7. The Court directed that the Motion be canvassed together with the Petition and directed that Agreed Issues be filed and a hearing date be taken in the registry.
8. There is nothing on record to suggest that the applicant thereafter attempted to secure a hearing date.
9. A year later, on 10 June 2020, the applicant filed a motion under a certificate of urgency seeking orders

1. ...

2. **THAT** a conservatory order of temporary injunction be and is hereby issued restraining the Respondent whether by itself, agents, servants, employees, nominees or any other person whatsoever from conducting the statutory sale of the property known as LR NO. THIKA MUNICIPALITY/BLOCK18/1681 registered in the names of Cecilia Wambui Watuku pending the hearing and determination of this application inter partes.

3. **THAT** a conservatory order of temporary injunction be and is hereby issued restraining the Respondent whether by itself, agents, servants, employees, nominees or any other person whatsoever from conducting the statutory sale of the property known as LR NO. THIKA MUNICIPALITY/BLOCK18/1681 registered in the names of Cecilia Wambui Watuku pending the hearing and determination of the Petition filed herein.

4. **THAT** the costs of this application abide the outcome of the Petition.

10. When the motion was placed before the Court on 16 June 2020, it directed the Respondent to file and serve a response thereto and thereafter the filing and exchange of any further affidavit by the applicant, and submissions.

11. The Respondent, as a result, filed its Grounds of Opposition and a replying affidavit sworn by the Human Resources Manager, Faith Nene on 22 June 2020.

12. In a letter to the Court dated 14 July 2020, the Respondent indicated that it was unable to file submissions because the applicant had failed to file/serve his submissions.

### **Background**

13. The facts underpinning the application appear not to be in dispute.

14. The applicant took a house loan of Kshs 1,250,000/- from the Respondent while still in employment, and he serviced the loan until he gave notice of resignation dated 7 April 2017, at which point the loan balance was Kshs 908,335/90 (as of 7 November 2019 the loan balance was Kshs 1,277,912/90).

15. After the separation, and without any income the applicant did not service the loan and on 7 November 2019, the Respondent issued a notice of intended statutory sale of the charged property under section 90 of the Land Act, 2012.

16. The notice prompted the applicant to move the Court, and in seeking the *conservatory order of temporary injunction*, the applicant asserted that lacking any other income, he had not been able to service the loan and were the intended sale to proceed he (and the mother) were likely to suffer *egregious loss and prejudice*. It was averred that the mother would be rendered homeless.

17. The determination of the Petition and the intended statutory sale, the applicant contended were intertwined.

18. The applicant prayed to the Court to preserve the equity of redemption until the determination of the Petition as he and the mother who stays in the charged property stood to suffer a substantial loss.

19. On jurisdiction to grant the order(s) sought, the applicant invoked Article 23(3) of the Constitution, Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, section 12(3) of the Employment and Labour Relations Court Act, 2011 and the interests of justice.

20. The Respondent in opposing the application contended that the subject matter of the application, the property was not the subject of the pending Petition, the beneficiary of the application was not a party in the Petition and that no sufficient grounds had been demonstrated to warrant the grant of the orders sought.

21. The Court has considered the motion and affidavits and come to the conclusion that the order(s) sought should be declined.

22. Firstly, the Respondent sent the notice to the applicant on 7 November 2019. The applicant only moved the Court in June 2020, some 8 or so months later. No explanation was tendered for such a delay.

23. Secondly, the applicant never sought an injunctive order in regard to the property in the Petition though the applicant indeed referred to the house loan in the body of the Petition in which he admitted that he had 12 months after separation to clear the loan and further alleged breach of contract on the part of the Respondent.

24. There is a long chain of case law that an injunctive order cannot issue where such a prayer was not pleaded in the Statement of Claim (see *Ngorika Farmers Co-operative Society Ltd v John Kiarie and 2 Ors (2006) e KLR*; *Kihara v Barclays Bank of Kenya Ltd (2001) 2 EA 420*; **HCCC No.1780 of 2000 (UR) *Southern Credit Banking Corp Ltd v Charles Wachira Ngundo*** and *Nthenya Muia Mutio v Ndeto Kyalo (2012) eKLR*).

25. Thirdly, there is a substantive body of law relating to charges and mortgages, and it would not be legally prudent for the Court to intervene in such circumstances as obtain herein where the substance of the dispute relates to an employment relationship (and not charges and mortgages).

