



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 248 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

LINDA WERE.....CLAIMANT

VERSUS

SANLAM LIFE INSURANCE LIMITED (Formerly

known as PAN AFRICA LIFE ASSURANCE LIMITED)...1ST RESPONDENTS

SANLAM KENYA PLC..... 2ND RESPONDENTS

RULING

By her application dated 17th June 2020, the Claimant seeks the following orders –

1. This Application be certified urgent and that the same be heard on a priority basis.
2. Pending the inter partes hearing of this application, the Respondents or their servants or agents or any other person acting in that behalf be restrained from reviewing, revising, converting, or changing or from continuing to review, revise, convert or change the preferential rates of interest previously enjoyed by the Claimant while in the employment of the Respondents to market rates, in respect of a mortgage facility advanced to the claimant by Stanbic Bank Kenya Limited under the Respondents' staff mortgage scheme pending the hearing and final determination of this suit. For clarity and greater certainty, the Respondents be ordered to ensure that Stanbic Bank Kenya Limited applies the preferential rate to the Claimant's mortgage facility pending the hearing and determination of this application.
3. Pending the inter partes hearing of this application, the Respondents or their servants or agents or any other person acting in that behalf be restrained from cancelling the Group Mortgage Assurance Scheme and in particular the retrenchment cover of 9 months. In the event that the Respondents may have cancelled the retrenchment cover at the point of issuance of this order, such cancellation be stayed pending the hearing and determination of this application.
4. Pending the hearing of this suit, the Respondents or their servants or agents or any other person acting in that behalf be restrained from reviewing, revising, converting, or changing or from continuing to review, revise, convert or change the preferential rates of interest previously enjoyed by the Claimant while in the employment of the Respondents to market rates, in respect of a mortgage facility advanced to the claimant by Stanbic Bank Kenya Limited under the Respondents' staff mortgage scheme pending the hearing and final determination of this suit. For clarity and greater certainty, the Respondents be ordered to ensure that Stanbic Bank Kenya Limited applies the preferential rate to the Claimant's mortgage facility pending the hearing and determination of this suit.
5. Pending the hearing of this suit, the Respondents or their servants or agents or any other person acting in that behalf be restrained from cancelling the Group Mortgage Assurance Scheme with particular reference to the Claimant and in particular the Respondents be restrained from cancelling the retrenchment cover of 9 months. In the event that the Respondents may have cancelled the retrenchment cover at the point of issuance of this order, such cancellation be stayed pending the hearing and determination of this suit.
6. The Respondents be compelled to render full and proper accounts of the entire Long Term Retention Scheme (LTRS) from 1st January 2007 to 12th November 2019, and the accounts to include without limitation, the annual allocated awards, the type and manner of investments of the allocated annual awards and the returns thereof, the annual pay outs and a full statement of account of the vested amount payable to the Claimant within the meaning of clause 2.8 of the LTRS Terms and Conditions. For clarity and

greater certainty, the accounts to be rendered pursuant to this order to include not only the Claimant's accounts, but accounts for the entire LTRS Scheme for purposes of comparison and verification.

7. Upon the rendering of accounts as prayed in 4 above, the Claimant be paid the vested amount payable to her pursuant to clause 2.8 of the LTRS Terms and Conditions together with interest thereon from 2nd December 2019 when the amount became payable until payment in full.

8. This Court be pleased to issue any other relief that it may deem fit and just to grant.

9. The costs for this Application be borne by the Respondents.

The application is filed under the provisions of Sections 3 and 12 of the Employment and Labour Relations Act, Rule 17 of the Employment and Labour Relations (Procedure) Rules 2016, Order 20 of the Civil Procedure Rules 2010, the Inherent Powers of the Court and all enabling provisions of the law.

It is supported by the grounds on the face thereof and the affidavit of the claimant/applicant in which she states that she was declared redundant by the Respondents on or about 12th November 2019, which redundancy she terms unlawful and unfair for reasons stated on the face of the application.

She states that while in the employment of the Respondents she was a beneficiary of a staff mortgage scheme which provided that employees who are declared redundant would repay loans at preferential staff rates until payment in full, as set out in a letter dated 19th 2011 and reiterated in the Respondents' Human Resource and Procedures 2016 Manual (HR Policy). That in a demonstration of bad faith, the Respondents unilaterally and unlawfully amended the HR Policy in June 2019, a few months before her redundancy, revised the interest rate provisions in the mortgage scheme to the effect that outstanding loans for employees declared redundant would attract interest at prevailing company staff interest rates for 3 months only then revert to terms of contract between the employer and financier. That she was coerced/influenced to unduly acknowledge receipt of the changes which she never at any point agreed to.

The claimant states that she took a loan of Kshs.19,360,000 in 2018 from the mortgage scheme which is operated in partnership with the Stanbic Bank Kenya Limited and that her decision to take the loan was informed by the prevailing terms of the HR Policy on preferential interest rates which were applicable notwithstanding termination of employment. That she therefore had legitimate expectation which would be breached by applying commercial rates of interest.

The Claimant further states that the charges would amount to discrimination of ex-employees in violation of Article 27 of the Constitution.

The Claimant further states that as part of the mortgage scheme she was covered under a Group Mortgage Assurance Scheme which provided a cover for 9 months' mortgage repayments. That the Respondents cancelled the policy without consulting or informing her. That this has resulted in her being required to repay the mortgage from 15th June 2020. The Claimant states that she will not be able to pay the resultant mortgage repayment rate of Kshs.218,992.20 per month.

The Claimant further avers that the Respondents has wrongly computed her Long Term Retention Scheme (LTRS) entitlement and withheld a sum of Kshs.11 million payable under the LTRS which has exacerbated her inability to meet her financial obligations in the short term, including mortgage repayment.

She further avers that her severance package was wrongly computed as she was treated discriminately as compared to the past practice of the Respondents under which it paid two months' pay for every year worked.

The Claimant is apprehensive that unless the orders sought are granted, she may lose the mortgaged house which is key to her livelihood as it is the security for the mortgage. That she is further likely to suffer embarrassment by being listed by the Credit Reference Bureau (CRB) as a result of possible default, which in turn would affect her reputation, employability and ability to engage in business.

She avers that she has met the test for grant of the orders sought being that –

a. She has established a prima facie case with a probability of success and it is important that the substratum of the suit is preserved by granting the prayers sought herein.

b. Damages (in so far as the mortgage interest rate claim is concerned) will not be an adequate remedy and the Claimant thus stands to suffer irreparable loss and harm if the prayers sought herein are not granted.

c. The balance of convenience tilts in favour of the Claimant and in granting the orders sought.

She avers that it is in the interest of justice that the orders sought herein be granted to avoid substantial loss and damage that would otherwise be faced by the Claimant.

In her written submissions in support of the application dated 27th July 2020 and the supplementary submissions dated 31st August 2020, the claimant reiterates the averments of fact as stated on the grounds and affidavit in support of the application. She further submits that she has met the conditions for grant of the interlocutory injunctive orders sought as set out in the case of **Giella v Cassman Brown and Company Limited (1973) EA 358** where the court stated –

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

The Claimant further submits that she has demonstrated that she has a prima facie case with probability of success relying on the case of **Mrao Limited v First American Bank of Kenya and 2 Others (2003) KLR 125** in which the Court of Appeal defined a prima facie case as follows –

"A prima facie case in a Civil Case include but is not confined to a "genuine or arguable" case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."

That she has established the termination of her employment was unfair, relying on the decision in **Kenya Airways Limited v Aviation and Allied Workers Union Kenya and 3 Others (2014) eKLR** and the case of **Mary Nyawira Karimi v Pure Circle (K) Limited [2018] eKLR**. In the latter case Mbaru J. observed: -

"Indeed as submitted by the Respondents, in the case of Kenya Airways Limited v AAWU & Others, cited above, the Court of Appeal held that where there is a redundancy the employer must ensure two fundamental requires of substantive justification for the same and procedural fairness.

Section 40(1) of the Act gives the requirements and conditions precedent to a redundancy. The employer must justify the redundancy."

She further submits that the redundancy was not substantially justified relying on the case of **Anne Njambi v Mediamax Network Limited [2020] eKLR**, that the redundancy was not procedurally fair as provided in Section 40(1)(b) and (c) in terms of lack of consultation of employees and the selection criteria.

She further relied on the Article 15 of the **Supplementary Provisions to the ILO Recommendation No. 119 – Termination of Employment Recommendation, 1963**, concerning reduction of the work force also provides that: -

(1) The selection of workers to be affected by a reduction of the work force should be made according to precise criteria, which it is desirable should be established wherever possible in advance, and which give due weight both to the interests of the undertaking, establishment or service and to the interests of the workers.

She further submitted that the redundancy did not comply with the Respondents' HR Policy Manual which provides at Clause 9.6 that the same should be objective, transparent and fair based on the skills required to meet the Respondents' existing and anticipated business needs and strategic objectives.

The claimant also relied on the decision in **Gerrishom Mukhutsi Obayo v Dsv Air and Sea Limited [2018] eKLR**, where the Court held that:

"The Court of Appeal in Kenya Airways Limited v Aviation and Allied Workers Union Kenya case held that where a redundancy selection criteria is non-existent or opaque the statutory threshold cannot be said to have been met.

That the selection criteria employed by the Respondents in the process of redundancy was neither objective nor open criteria hence it did not meet the statutory threshold as envisaged under Section 40(1)(c) of the Employment Act."

She also relied on the case of **Reginald Asibwa & Another v Kenya Airways Limited [2018] eKLR** where the court observed –

"...The notice as explained above allows the parties to consult over the redundancy situation and reach an understanding that that was the only way out of the parties. It also gives the employee a soft landing space as he seeks for an alternative avenue on how to absorb the situation. Payment of salary in lieu of notice does not cushion the employee as the law anticipates consultation..."

She further relied on the case of **Anne Njambi Ngugi** (supra) where Radido J. held that –

"where there are genuine and valid redundancy reasons, discussions with the employees should include possibilities of pay cuts and other roles before the ultimate decision to dismiss is taken."

It is further the Claimant's submissions that she has demonstrated that the amendment of the Respondents' HR Policy Manual was unlawful stating that in the case of **Christopher Onyango & Others v Heritage Insurance Co. Ltd, Cause No. 781 of 2015**, Mbaru J. quoted the case of **Jared Otieno Opiata v National Bank of Kenya Limited [2020] eKLR** where the court held that;

"...the employment relationship generates rights and obligations. Such are to be found in the employment contract, human resource policy, and the law. The common denominator is – employment. Within such employment, the Claimant enjoyed the benefits of various loans. Such cannot be separated to create a different set of rights outside the employment relationship..."

She submits that Radido J. in the case of **Maxwell Miyawa & 7 others v Judicial Service Commission [2017] eKLR** opined that there should be mutual agreement between the employer for a variation of an employment contract to be lawful and that a unilateral variation of an employment contract without consent of the employee would amount to breach of contract. The Court held that –

“33. A long chain of authorities on the common law suggest that for a variation of an employment contract to be lawful, there should be mutual agreement between the employer and the employee (or their representatives where there is organised labour).

...

42. The Employment Act, 2007 appears to contemplate consultations between an employer and employee where the essential of an employment contract are being altered.

43. The essential of a contract in this respect would include duration of contract, job description, identity of the employer, place and hours of work and remuneration among others.”

That Article 47 of the Constitution as read with the Fair Administration of Action Act demand fair administrative action and guarantees the right to fair administrative action to every person. That in this case the respondent should have included consulting and seeking the Claimant’s agreement on the detrimental changes. That Article 41 of the Constitution which guarantees the right to fair labour practice is instructive in this regard.

She submits that the Claimant was only informed that a presentation was made to staff when she was away on her annual leave as can be confirmed by the email dated 17th July, 2019 from Rosemary Muchiri who stated; *“Hi Linda, while you were away on leave, we did a presentation to staff on the above. Please comply with the acknowledgement so that we can share the final report.”* No presentation was individually made to the Claimant. The Respondents were only keen on having the Claimant sign the acknowledgement. She did not also agree to the variation of the terms of the HR Manual.

She submits that in the case of **Beatrice Wangui Mwhia v Barclays Bank of Kenya [2019] eKLR**, this Court in granting similar orders as those sought by the Claimant herein cited with approval the dictum in the case of **Eliud Kimaile v Cooperative Bank of Kenya Limited [2017] eKLR** in which it was held that:

“The Respondents can only vary the preferential interest rates granted to the Applicant, its former employee if it terminated her employment under the law. The court is yet to hear and determine the Applicant’s petition in the instant case and so whether or not the Respondents can vary the interest rates is also dependent on whether or not the termination of employment was lawful and fair. As the applicant has submitted, she risks losing her family home if the orders sought are not granted. It is my opinion that she has satisfied that she is likely to suffer loss that cannot be compensated by way of damages should the orders sought not be granted.”

That Wasilwa J. in **Banking, Insurance and Finance Union v Barclays Bank of Kenya Limited [2017] eKLR**, in determining whether an employer could continue altering interest rates from staff loan rate to commercial rates when there was a pending claim on unlawful termination of employee’s employment, held that:

“10. In the instant case, the Applicants have filed suit claiming unfair termination. This suit is pending before this Court. The contention is yet to be resolved. Should then the Respondents be allowed to continue to alter the interest rates midstream?”

The court added that –

“11. It is yet to be demonstrated before Court who is the wrong doer. However in determining this application so that the lesser injurious actions results, I note that the grievant have dutifully continued to service their loans at the staff rates despite termination. This is commendable. For the Respondents to move further and seek to levy interest at commercial rates will be adding salt to injury especially so that the Applicants are claiming unfair termination.

12. In cases where it is alleged that the Respondents is the author of the problem facing the Applicant, it would be unfair for the Court to overlook this aspect. The lesser evil be not to punish the Applicant at this stage given his seemingly weaker position than to punish him by altering the interest rate payable at this stage and later discover they were unfairly terminated. In my view the balance of convenient tilts in favour of allowing the application than not allowing it.

13. I therefore allow the application by the Applicant in part and order that the interest rate payable against the loans taken up by the grievant to remain at staff rates until this case is heard and determined. Other prayers sought in the application to be levied within the main claim.”

That Mbaru J. in the case of **Chris Kisire Chepkoi v National Bank of Kenya Limited [2017] eKLR** stated that; -

“Therefore, the claimant has filed suit and the issues in dispute are the unfair termination of his employment, unfair rescheduling of stall loan; non-payment of terminal dues and damages; and costs of his suit. The claim is based on alleged termination of employment on 13th April, 2016 over allegations and incidents that took place while the claimant was on leave.

...The court is therefore required to interrogate the claims and address as to whether there is any element of proof of the matters set

out in dispute. The requirement that all contracts of employment be terminated within the law is mandatory pursuant to the provisions of section 41, 43, 45 and 47 of the Employment Act, 2007. Until there is a determination of the same, to make the claimant lose a benefit that was available within his employment which has now been terminated and the same alleged to be unfair would be to deny him a fair hearing before this court. Such would remove the claimant from his employment with the Respondents and deny him work benefits that were denied of him upon the termination of such employment...”

That in the case of **Boniface Lum Amunga Biko v National Bank of Kenya Limited [2017] eKLR**, the court stated:

“...24. Before the court can determine the suit before it, the same relating to a case of unfair termination of employment of the claimant, to allow the Respondents to apply high or higher interest rates on the loan facilities advanced to the Claimant while in employment would be to strip him the dignity of man and subject him to adverse circumstances. However, where the court makes a finding that indeed the Respondents was justified in terminating the employment of the claimant, the due loan facilities can be recalled with all applicable and appropriate interest rates based on the date of termination. As such, the orders sought are merited at this point to enable the court address the main suit and give appropriate final orders to the parties. Such I find will help in meeting the ends of justice and the application by the Claimant is therefore found to have merit...”

That is **Nazarene Nyaga & 78 Others v Barclays Bank of Kenya [2018] eKLR**, Abuodha J. in determining whether an employee could still continue repaying his staff loans at the company’s rates even after termination of employment, held that:

“11. In the interim the claimants seek the suspension of conversion of their loan rates from staff to commercial rates. The Respondents granted these loans to the claimants as employees hence the staff rates. Assuming each and every employee were to work till retirement, the loan would have been paid until completion at staff rates. In the circumstances the Respondents will only gain at the enhanced rates but lose nothing if the claimants most of whom were employees of longstanding, were to continue servicing their loans at staff rates as the dispute over the voluntariness or otherwise of the VES process is adjudicated upon by the court.

...

13. In the circumstances, the court will order that the claimants continue to pay their loans at staff rates pending the hearing and determination of the claim herein. The Respondents however does reserve the right to initiate recovery process as per the terms of individual contracts in case of default.”

The Claimant submitted further that the reduction of the duration and/or cancellation of the retrenchment cover was unlawful relying on the case of **Mohawk Limited v Leo Investments Limited [2009] eKLR** in which the High Court, Havelock J. cited with approval the case of **Solle v Butcher [1949] 2 ALL ER 1107 at page 1119** which is a widely cited English case on the subject of mistakes. The High Court declined to allow a party to rely on their own unilateral mistake and held that

“This cannot have been a mistake which can render a consent order to be set aside, because a party cannot rely on his own mistake to discharge his own mistakes... For those reasons I do not think Mr. Omogeni made a mistake in his mind, and even if he did, he cannot rely on his own mistake to nullify the consent, because the mistake was not mutual.”

She also relied on the case of **Mwangi Ngumo v Kenya Institute of Management [2012] eKLR** the court addressed the contra *preferentum* rule as follows; -

“22. The contract itself, it appears was drawn by the Respondents. And if it was not drawn by the Respondents it has not been shown or argued that the Respondents entered into it under duress or coercion. I do agree with the Claimant that any ambiguities in the contract should be construed against the party who drew the contract and that party is the Respondents. This is what has been referred to as the contra *preferentem* rule and which was applied in the case of **Horne Coupur v Velletta & Co. 2010 BCSC 483**, relied on by the Claimant.”

The claimant submits that if she loses her house she will suffer irreparable harm relying on the case of **Eliud Kimaile v Cooperative Bank of Kenya Limited [2017] supra**

She further submits that the balance of convenience falls in favour of granting the orders sought in the application.

Respondents’ Submissions

In its submissions the Respondent states that the claimant has never been an employee of the 2nd respondent, who is therefore non-suited. That the staff mortgage scheme was facilitated by Stanbic Bank Kenya Limited which afforded the claimant preferential interest rates by virtue of her employment by the 1st respondent. That the claimant was also a participant in LTS which scheme aimed at recognising contributions of key employees by giving them a financial incentive.

It is the submission of the Respondent that the claimant’s application does not satisfy the test in **Giella v Cassman Brown**. It is further the submission of the respondent that prayers 2 and 4 of the application cannot be enforced by reason that the mortgage facility in question is between the Claimant and the Stanbic Bank which is not a party to these proceedings The Respondents relied on the case of **Erick J Makokha & 4 Others v Lawrence Saqini & 2 Others [1994] eKLR** in which the Court of Appeal held that a court ought not to issue orders that are incapable of enforcement.

The Respondent avers that the claimant is asking it to take measures with respect to a contract that it is not a party to. That this would be akin to the court rewriting the mortgage facility between the Claimant, the Bank and third party. The Respondents relied on the following cases: **National Bank of Kenya Ltd v Pipeplastic Samkolit (KI Ltd & Another [2002] EA 503** and **DI Koisoqat Tea Estate Ltd v Eritrea Orthodox Tewahedo Church Ltd [2015] eKLR**.

The Respondents further submit that the claimant is bound by the terms of agreement between her and Stanbic Bank which she unequivocally agreed to abide by. That the change of the interest rates, which is the alleged infringement, was implemented by Stanbic Bank pursuant to the terms of the mortgage facility. It has nothing to do with the Respondents.

That to that extent, the Respondents have no power to vary and/or change any of the terms to the mortgage agreement to which they are not parties.

That the allegations by the Claimant that she had an expectation that she would repay the loan at preferential rates because of the letter of 19th January 2011 and clause 12.7 of the First Respondent's previous HR Manual is false and misleading.

That the Claimant signed an acknowledgment form by which she agreed that the revised HR Manual superseded all prior HR Manuals, practices, presentations or statements regarding the terms and conditions of her employment including the letter of 19th January 2011.

The Respondents further submit that the orders sought cannot be issued at an interlocutory stage purely on the allegation that the Claimant's employment was unfairly terminated, as the court has not made any determination to that effect.

The Respondents relied on the case of **Michael Alwema Kilumbi v Barclays Bank of Kenya Limited [2018] eKLR** in which the Court in dismissing a similar application, held that:

"The only reason advanced by the claimant in support of the application is that his employment was terminated unfairly and that the respondent converted the loan terms to commercial rates. These are not valid grounds as the issue whether or not the termination of the claimant's employment was unfair is the subject for determination in his claim. No finding has been made that the termination of employment was unfair."

That the Court of the Appeal in the case in **Erick V J Makokha & 4 Others v Lawrence Saqini & 2 Others** (above) held that a fringe benefit lapses upon termination of employment.

The Respondents submit further, that the authorities which the Claimant relies upon to support the issuance of orders being **Beatrice Wanqui Mwhia v Barclays Bank of Kenya [2019] eKLR; Eliud Kimaile v Cooperative Bank of Kenya Limited [2017] eKLR; Banking, Insurance and Finance Union v Barclays Bank of Kenya Limited [2017] eKLR; Chris Kisire Chepkoi v National Bank of Kenya Limited [2017] eKLR; Boniface Lum Amunqa Biko v National Bank of Kenya Limited [2017] eKLR** and **Nazarene Nyaqa & 78 Others v Barclays Bank of Kenya [2018] eKLR** are not applicable in this matter. This is because in all these authorities the Respondent employers managed the mortgage schemes and as such the injunctive orders were capable of enforcement against them.

The Respondents submit that the Claimant is not entitled to interlocutory relief with respect to the claims relating to the preferential mortgage interest and urge the Court to dismiss the application.

On the prayer in respect to Retrenchment Assurance Cover, the respondent submits that the retrenchment cover has not been cancelled, but rather, that it has lapsed. To that extent there is nothing to be stayed as sought by the Claimant and the orders sought cannot issue.

The Respondents further submit that in their Replying Affidavit, they explained that the renewal letter dated 5th December 2018 erroneously stated that the cover would run for a period of nine months after the Claimant was declared redundant. That the aforementioned renewal letter cannot be interpreted in a manner that would contradict or override the terms and conditions of the Master Policy, or rewrite its terms, as the Claimant would want the court to do.

That contrary to the Claimant's allegations, the Claimant has always known that the cover governed by the Master Policy and its terms and conditions prevail.

That the principles of mistake and *contra preferendum* rule do not apply in this case as the letter of renewal did not create any legal obligations.

On this assertion the Respondents relied on the case of **Elisha Akech Chienq & Another v National Housing Corporation [2008] eKLR** in which the court held that an invitation to treat creates no legal obligations and that mistake cannot be inferred where a party was not obliged to enter into a contractual agreement.

On LTS the Respondent submits that they have already provided the Claimant's LTRS accounts in the Replying Affidavit and to that extent, there is no basis for the prayers sought, or for the same being granted.

With regard to the Claimant's submission that she was in the scheme for 12 years and as such she is entitled to allocations for 12 years and not 8 years, the Respondents submit that the allocation of awards was discretionary and that the terms and conditions of the LTRS as set out at paragraph 5 of page 7 of exhibit LW-1 produced in the Supporting Affidavit expressly provide that:

"Annual allocations made to a participating employee must be justified each year and it therefore does not necessarily follow that

an employee will receive an allocation in a subsequent year purely because they participated in the scheme previously."

That as such the Claimant's allegations that she was entitled to additional awards is therefore baseless.

The Respondents submit that the Claimant has failed to satisfy the requirements of Order 20, Rule 1 in that there is a preliminary question to be determined during trial, with respect to the LTRS accounts.

The Respondents relied on the case of **Edermann Property Ltd v Development Bank of Kenya Limited [2015] eKLR** in which the Court declined to allow an application under Order 20, Rule 1 on the basis that the debt was disputed by the respondent and the amount claimed by the Claimant was baseless and not verified.

To buttress this point, the Respondents aver that they cannot provide statements of account of other members of the LTRS, as sought by the Claimant, noting that those are confidential accounts of persons who are not party to the suit.

The Respondents submit that the Claimant's allegations that she is owed about KES. 15,000,000 is not based on the LTRS terms and conditions.

The respondents aver that the authorities relied upon by the Claimant, **Eurocraft Agencies Limited v Tradewinds Express Limited & Another [2009] eKLR** and **Vincent Muema Mutuku v Rift Valley Railways (Kenya) Limited [2015] eKLR** are distinguishable in that in those authorities there were no preliminary questions to be determined.

The Respondents submit that the Claimant has failed to demonstrate that she is entitled to any of the prayers sought in the application.

Determination

I have considered the submissions by both parties and the authorities cited. The issues for determination are whether the Applicant has established a prima facie case that would warrant this court to grant the orders sought.

The principles for grant of interlocutory injunctive orders were set in the case of **Giella v Cassman Brown Co. Ltd** (supra). The Applicant must first establish a prima facie case with a probability of success. The Applicant must further demonstrate that she will suffer irreparable harm that cannot be compensated with an award of damages. If the court is in doubt, then the application would be decided on a balance of convenience.

In the instant application the Applicant has alleged that her redundancy did not meet the minimum requirements set by the law. Secondly that the Applicant has increased the interest rates for her mortgage facility beyond the rate agreed upon in the contract and thirdly that the Applicant unilaterally withdrew the mortgage protection insurance that would have seen her mortgage repayments paid for up to 9 months should she not manage to secure alternative employment or income source within the period. The applicant further faults the calculation of LTS and seeks full accounts thereof.

It is the Respondents' position that the orders sought by the Applicant are incapable of being granted as the mortgage facility is by a third party and that if granted such orders would be incapable of enforcement. Further that the court would be rewriting the contract for the parties.

A prima facie case was defined in **Mrao v First American Bank** as one where the court properly directing itself on the material before it, will conclude that there exists a right which has been infringed by the opposite party as to call for an explanation or rebuttal.

In the instant application, the applicant admits that the loan facility is with a third party who is not a party to the instant suit. She has not demonstrated how the Respondents can compel the financier to charge staff interest rates to the applicant after she left employment.

The HR Policy Manual she relies on was amended before she exited employment. Further, there is no evidence that the Group Mortgage Assurance Retrenchment Cover is in place. The applicant has further not denied that the Respondents have supplied the accounts she seeks in the replying affidavit.

I find that the Applicant has not demonstrated a prima facie case as against the Respondents to justify the grant of the orders sought.

I have further noted that although the Applicant's employment was terminated by letter dated 12th November 2019, it was not until June 2020 that the suit herein was filed. The delay in coming to court on such allegedly grave violations have not been explained by the Applicant. I do not find the prayers merited.

For the foregoing reasons the application is without merit and is dismissed. Costs will be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF SEPTEMBER 2020

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