



**REPUBLIC OF KENYA**

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

**CAUSE NO. 2310 OF 2015**

**PETER JUMA SIMIYU.....CLAIMANT**

**- VERSUS -**

**JAMII BORA BANK LTD.....RESPONDENT/APPLICANT**

(Before Hon. Justice Byram Ongaya on Friday 23<sup>rd</sup> October, 2020)

**RULING**

The applicant is Jamii Bora Bank Limited. It filed an application on 30.09.2020 through Robson Harris & Company Advocates. The application is under Article 50 of the Constitution of Kenya, Sections 1A, 1B, 3, 3A, 63(e), and 95 of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 22 rule 51 and 52, order 42 rule 6, order 50 rules 1, 5 and 7, order 51 rule 1 of Civil Procedure Rules 2010 and all enabling provisions of the law. The substantive prayers subject of this ruling are for orders:

- 1) That the Honourable Court be pleased to issue orders restraining the claimant either by himself, servants or agents forthwith from taking steps in any manner whatsoever to harass, blackmail, ransom, attach, intimidate, trespass upon or otherwise interfere with the applicant at its official premises, business or property pending the hearing and determination of the application inter-parties.
- 2) That costs be awarded to the applicant.

The application is based on the annexed affidavit of Vallence Mmuka.

The application flows from the judgment delivered on 24.07.2020. The Court entered judgment for parties and ordered as follows:

- 1) The declaration that the termination of the contract of service herein was unfair and unlawful.
- 2) The respondent to pay the claimant a sum of **Kshs.2, 175, 543.58** (less due PAYE).
- 3) The claimant to pay the respondent a sum of **Kshs. 1, 139, 220.17** plus interest thereon at 10.5% as claimed and prayed for.
- 4) For avoidance of doubt parties to set off the amounts as awarded and balance be paid to deserving party as appropriately and such payable amount be included in the decree herein as per parties' reconciliation and agreement in drawing the decree.
- 5) The respondent to pay 50% of the claimant's costs of the suit and each party to bear own costs of the counterclaim.
- 6) In view of the prevailing Covid 19 situation, there be stay of execution until 01.10.2020.

The applicant's case is that in an attempt to have the amounts set-off as directed by the Court, the parties have reached a deadlock and have in the circumstances been unable to arrive at an amicable or logical agreement as to amounts to be set off as a result of diverse interpretation of the judgment rendered on 24.07.2020. Upon filing of the application on 30.09.2020 an interim order of stay of execution was granted as had been prayed for and is in place.

The applicant's further case is that the claimant computes in his favour an outstanding Kshs. 916, 705.29 payable to him after the set off as directed in the judgment. The applicant's computation returns that the amount due to the claimant is Kshs. 125, 911.54 after the set off.

The claimant opposed the application by filing his replying affidavit sworn on 14.10.2020 and filed through Kihangá & Company Advocates. The claimant also filed grounds of opposition on 08.10.2020 that the application is premature as the formal decree had not been extracted, the application is predicated only to seeking of stay of execution orders and nothing more, and the applicant is guilty of material non-disclosure

of material facts. The claimant's case is that there exists contention on computation of interest arising out of the loan facility. The claimant's further case is as follows. The applicant is a regulated bank under the Central Bank Act and abides by the law and the Banking (Amendment) Act. The Central Bank has issued the Prudential Credit Guidelines which provide for loan classification criteria, provisioning guidelines, suspension of interest, write-off procedures and renegotiated loans. A loan due for repayment past 5 years and is unsecured is classified as total loss 100% and all interest chargeable under the loan becomes incapable of recovery. The interest in issue cannot be reported under the guidelines. The applicant is seeking unjust enrichment. Since 04.11.2013 (date of loan application form as exhibited as D.11(A), no recovery proceedings were commenced against the claimant and even as counterclaim was filed on 27.03.2019. The counter claim was for a liquidated claim and not for a secured facility. The Court declared dismissal was unfair and if any interest is to run, the same can only be from the date of the judgment. The Court would not have jurisdiction over a commercial transaction for recovery of a loan with interest as it would fall outside the employment dispute. Further, the interest on the principal loan should not be allowed to exceed the principal loan amount under the in-dumplum rule under section 44 of the Banking Act so that where the loan and interest merge the loan automatically stops by operation law.

The Court has considered the submissions made. The Court considers that the application cannot be an avenue for the parties to reopen the litigation and introduce a new suit contrary to their pleadings. It is clear to the Court that it was ordered thus, "**3. The claimant to pay the respondent a sum of Kshs. 1, 139, 220.17 plus interest thereon at 10.5% as claimed and prayed for.**" The applicant at paragraph 24 of the counterclaim pleaded that as at 01.03.2017 the outstanding loan was Kshs. 1,139,220.17. At paragraph 27 thereof the applicant claimed against the claimant outstanding loan amount of Kshs. 1,139,220.17 as at 01.03.2017 due and owing to the respondent (the applicant). The applicant then prayed for the sum of Kshs. 1, 139, 220.17 plus interest thereon at the rate of 10.5% per annum until payment in full. The court then ordered per order (3) in the judgment. It is clear to the Court that the applicant was awarded as prayed for and the prayer was never for a retroactive application of the interest rate of 10.5%. The interest applied effective the date of the judgment. The Court needs not repeat that a party must be bound by the pleadings and the applicant is bound accordingly.

As for the PAYE rates applicable, it should be clear that the rates applicable are as at the date of the judgment.

In view of the interim orders of stay of execution and all circumstances of the case, stay of execution in order 6 in the judgment is extended to 01.12.2020.

In conclusion, the application dated 30.09.2020 is hereby determined with orders:

- 1) The applicant was awarded as prayed for and the prayer was never for a retroactive application of the interest rate of 10.5% and the interest applied effective the date of the judgment and in view of the interim stay orders, from the date of this ruling (and after the set off the balance being in favour of the claimant, no interest would therefore be due).
- 2) The PAYE rates applicable are as at the date of the judgment.
- 3) The stay of execution in order 6 in the judgment is extended to 01.12.2020.
- 4) The parties to conclude the computation in 7 days and any arithmetic differences be resolved by the deputy registrar.
- 5) Each party to bear own costs of the application.

**Signed, dated and delivered by the court at Nairobi by video-link this Friday 23<sup>rd</sup> October, 2020.**

**BYRAM ONGAYA**

**JUDGE**