



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 104 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

BEATRICE WANGUI MWIHIA.....CLAIMANT

VERSUS

BARCLAYS BANK OF KENYA.....RESPONDENT

RULING

The Petitioner/Applicant, Beatrice Wangui Mwihi, filed a Notice of Motion Application dated 29th November 2017, brought under *Articles 22, 23(3), 35 & 258 of the Constitution of Kenya; Rules 13, 19, 23, & 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedures Rules 2013; and Rules 3(1) of the Civil Procedure Rules 2010, Sections 4(1)(g) and 6 of the Fair Administrative Action Act* seeking an Order of Injunction pending the hearing and determination of the Application and Petition, restraining the Respondent, Barclays Bank of Kenya, from charging any bank charges or interest rate on the Staff Housing Loan at 10% plus a margin of 4% save the allowed charges for staff accounts and the staff interest rate of 6% and further, from issuing threats of listing her with the Credit Reference Bureau and/or repossessing or encumbering her home on LR No. 27759 Unit 160 Water Front Gardens Loresho. That she should be at liberty to apply for such further or other orders and/or directions as this court would deem fit and that costs of this application be borne by the Respondent.

The Application is founded on the grounds that:-

- a) The constitutional and legal rights of the Petitioner have been gravely violated.
- b) On 26th February 2013, the Applicant had taken a Staff Housing Loan totalling Kshs.16,650,000/= and a Credit Card Limit of Kshs.400,000/= which she had been regularly paying up at staff rate of 6% per month at monthly instalments of Kshs.113,723/=
- c) The Applicant had legitimate expectation that for the duration of servicing the staff loans, she would be working for the Respondent and she would also continue to service the loan at staff preferential rate as stated in the Letter of Offer.
- d) The Respondent has greatly endangered the Petitioner's economic and social rights and her right to redeem her home on LR No. 27759 Unit 160 Water Front Gardens Loresho by converting her staff loan from staff rate of 6% to customer rate of 10% plus a margin of 4% and further violating her expectation of repaying the loan at staff rate until payment in full.
- e) The Applicant is willing to repay the loans at staff rate as previously agreed upon by the parties despite her current state of unemployment.
- f) If the orders sought are not granted, the Applicant risks losing her matrimonial home.
- g) It is meet and just, for the purposes of justice and equity and the overarching purpose of constitutional integrity, to make the orders sought.

The Application is supported by the Petitioner's Affidavit wherein she states that the Respondent terminated her employment on 08th March 2017 for allegations of underperformance and upheld its decision when she appealed. She avers that she was to repay the loan for a period of 264 months and annexes the Letter of Offer dated 26th February 2013 marked *BWM1* but that upon termination, the Respondent revised the terms of the Staff Loan by converting the interest rate payable from the staff rate of 6% to the customer rate of 14%. That this is a financial strain on her as she is unemployed and has been unable to secure alternative employment given the negativity attached to the reasons the Respondent terminated her employment. Further, that the Respondent calculated that it would be financially convenient to pay basic damages for wrongfully and unfairly terminating her employment despite the grave harm it would cause on her career and her ability to care for her two school going children as a single mother.

She further avers that the loss of income has compromised her ability to make consistent regular payments towards her staff loans but she is willing to pay the monthly instalments at staff rate as previously agreed upon between her former employer and herself. That since she was prematurely dismissed from employment, the loans she had taken from the Respondent should continue being serviced at staff rates until the matter is fully determined and that if that is not the case, she should be given the option of 40% discount for early repayment as per Barclays Africa Group Limited Bulletin 06/2016 which she has annexed to her application and marked *MRM2*.

The application was considered ex-parte in chambers on 30th November 2017 and the following orders made:

1. That the matter be and is hereby certified urgent.
2. That pending the inter-parte hearing of the Application the Respondent whether by itself, or its servants or agents, advocates or any other person acting for and or on their behalf be and are hereby restrained by an order for injunction from charging any bank charges or interest rate on the Staff Loans at 10% plus a margin of 4% or any other rate of interest save the allowed charges for staff accounts and the staff interest rate of 6% and further be restrained from issuing threats of listing the Petitioner with the Credit Reference Bureau and further repossessing, offering for sale, selling, transferring, disposing of or in any other way alienating or encumbering her family home which is LR No. 27759 Unit 160 Water Front Gardens Loresho.
3. That the inter-partes hearing be on 14th December 2017 before any other court.

Respondent's Case

The Respondent filed a Replying Affidavit dated 20th December 2017 sworn by the Legal Officer-Recoveries and Collections Department, Castro Mutai, an employee of the Respondent who avers that the Respondent entered into a separate Agreement with the Applicant for a Staff Housing Loan which provided in *Clause 2d* therein that: "*The Bank may charge a preferential rate of interest on the Borrower's loan while the Borrower remains in the employment of the Bank, but such preferential rate shall cease to apply immediately the Borrower's employment with the Bank is terminated for whatever reason, unless the Bank agrees in writing.*" That pursuant to the foregoing, the Respondent Bank disbursed the moneys to the Applicant and charged the property known as L.R No. 27759 Unit No. 160 Water Front Gardens Loresho. That she has defaulted in repaying the outstanding balance of Kshs.6,380,516.95 particularized as at 05th December 2017 as:

- (a) Staff loan Account No. 2028945984 - Kshs.5,898,750.90
- (b) Credit Card Account No. 2032105826 - Kshs.481,766.05

He avers that the listing of a defaulter with the Credit Reference Bureau (CRB) is a standard procedure under The Banking (Credit Reference Bureau) Regulations, 2013 which makes it mandatory for banks to report loan defaulters to the CRB. That compliance with the law does not amount to harassing or intimidating a defaulting party. Further, that the loan granted was not a condition precedent of employment but was separate and distinct from her employment agreement since the loan agreement has distinct terms on repayment. That there is an implied term that the preferential rate applicable to a person who ceases to be an employee fails to apply to such an employee and that the Applicant thus ceased to enjoy the payment of low rates of interest at the time her employment was terminated as per the letter of offer. That once a property is offered as security, it becomes a commodity for sale in the event of default and that the Applicant in this case having defaulted, the respondent bank should be allowed to exercise its statutory power of sale and report the defaulting party to the CRB.

He also states that because loan agreements are commercial contracts which are separate and distinct from the contract of employment, this dispute is a commercial matter and that this court therefore lacks jurisdiction. Further, the court cannot entertain such a cause because it arose after the employer-employee relationship had been terminated. That the dispute does not fall within the purview of Section 87(2) of the Employment Act and Section 12 of the Labour Institutions Act, 2007. Further, that the Applicant has admitted to having signed the Letter of Offer which was unequivocal that preferential rates are only applicable to employees of the Respondent Bank.

Applicant's Submissions

The Claimant submits that this court has jurisdiction to hear and determine the issues raised in her application based on the fact that the loan facility in question was extended within the purview of an employer-employee relationship and not a banker-customer one. That it is up to this Court to determine with finality that the employer-employee relationship between the parties did indeed end and that pending this determination, her legitimate expectation should be maintained. She relies in the case of *Boniface Lum Amunga Biko vs National Bank of Kenya Limited* [2017] eKLR where the court in arriving at its findings took into account the case of *Wilbert Kipsang Choge & 6 others v Communications Authority of Kenya & another* [2016] eKLR and the findings that:

"...Whereas the Employment Act defines what employment is, neither itself nor Labour Relations Act define labour relations. However, labour relations can be described as the interaction between employers and employees aimed at creating a fair working environment. It concerns laws, conventions, practices and institutions that regulate the working environment. To a worker or his representative, good labour relations mean conducive working environment fair remuneration, staff welfare and freedom of association. To the employer good labour relations entails uninterrupted supply of contracted labour in order to achieve the organization's targets and objectives. To the employer staff must show dedication to work and commitment towards organizations goals and strategies.

In this regard therefore, the concept of employment and labour relations is wide and not restricted to the contract of service. With employment, there comes other relations at play such as the work benefits that require formation of relations such as the one leading to facilities such as loans, mortgage, and car and buying of agricultural land. Such relations cannot be divorced from the core employment

relationship of the employer and employee. To do so would be lose the context within which labour relations find meaning.”

Further, the court in *Christopher Onyango & Others vs Heritage Insurance Co Ltd* Cause No. 718 of 2015 explained the rationale on preferential rates that:

“...On the loans due, the Respondent has recalled all of them. However, 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 benefits of various loans. Such cannot be separated to create a different set of rights outside the employment relationship.”

She submits that injunctions are equitable remedies granted at the discretion of the Court and that she has a prima facie case with a probability of success to warrant the granting of the orders she seeks as per the principles set in the *Giella v Casman Brown & Co. Ltd* (1973) EA 358. That if the court was to decide in her favour at the end of the case, damages would not be adequate to compensate her for the loss she is likely to suffer as she risks losing her matrimonial home if this Honourable Court does not grant the interlocutory reliefs sought. That this court should also issue orders compelling the Respondent to compute and refund any overcharged interests on her loans or direct that the amount erroneously overcharged be utilised to settle her staff loans by the time of determining this Application.

Respondent’s Submissions

The Respondent submits that the Employment and Labour Relations Court has specialised jurisdiction to deal with labour related matters as mandated by Sections 4(1) and 12 of the Industrial Court Act pursuant to Article 162(2) (a) of the Constitution. That variation of interest rates payable by a former employee is not one of the disputes enunciated in section 12 of the Industrial court Act as was stated by Justice Lenaola in *Samson Onyango Ngonga v Public Service Commission & 5 Others [2013] eKLR Petition 459 of 2011*. That this court cannot order for variation of interest without referring to the Letter of Offer and the legal charges as it would then be descending on the arena of the High Court. Further, that this court has no jurisdiction to interpret a loan agreement which is a commercial dispute governed by commercial law and that Ringera J as he then was stated in the case of *Morris and Co Ltd v Kenya Commercial Bank Ltd & Others [2003] 2 EA 605* that:

“As regards interest, I can only say that it behoves parties to read the contracts they sign and to believe that the terms thereof are not mere words but covenants to be enforced. If the lender reserves to himself the right to charge such interest as he shall determine and to vary the same without reference to the borrower, so it shall be.”

That the Applicant’s preferential interest rates ceased to apply after her employment was terminated and it cites the case of *Kenya Airways vs. Donald Osewe Oluoch [2010] eKLR*, where the court held thus:

“I find the letter of employment was separate from sponsorship Bond which was a separate contract with rights and obligations on each part. There is no employer/employee relationship between the plaintiff and the defendant any more after the defendant ceased to be on employment. The cause of action is a liquidated claim in respect of Bond sum as per the contract which cannot fall within the jurisdiction of the Labour Court because there is no employer employee relationship. For those reasons the application by the defendant is dismissed with costs to the plaintiff.”

It is submitted by the Respondent that the Applicant has not satisfied the test for injunctive relief as enunciated in the *Giella v Casman Brown* case and has not demonstrated any imminent danger to the secured property or steps taken by the bank to realise the security. That she has also not shown an infringement of any right to warrant an injunctive relief against the Respondent which acted within the confines of the loan agreement to cease granting the preferential staff interest rates to the Applicant. That a Charge is a contract between the parties duly registered against the title in the Lands Office and that the interest rates can thus be varied and that the grant of the injunction will be tantamount to discharging a valid charge, that the Application lacks merit and should be dismissed with costs to the Respondent.

Determination

The first issue for determination is whether this court has jurisdiction to determine the variation of interest rates by the Respondent against the Applicant. The second issue for determination is whether the Applicant is entitled to the injunctive reliefs sought.

Article 162(2)(a) of the Constitution extends jurisdiction to the Employment and Labour Relations Court to hear and determine disputes relating to or arising out of employment between an employer and an employee. In the case of *Abraham Nyambane Asiago –v- Barclays Bank of Kenya Limited [2013] eKLR* and in the case of *Boniface Lum Amunga Biko v National Bank of Kenya Limited [2017] eKLR* the court held that employment relations is a wide concept and is not restricted to the contract of service, that this Court has jurisdiction to look into the interest rates applicable to the former employees.

In the case of *Eliud Kimaile -v- Cooperative Bank of Kenya Limited [2017] eKLR*. the court held that the Respondent 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 Respondent 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.

The Applicant can however not stop the respondent from disclosure of her credit status to a credit reference agency in circumstances where the Respondent is legally compelled to do so. The Respondent is under obligation vide Section 31(5) of the Banking Act to report the Applicant to CRB if she is in default. In the case of *Timothy John Sati vs. Barclays Bank Kenya Limited* the court stated in paragraph 10 that:

"The bank is lawfully entitled to proceed with the realisation of the charged property to recover the outstanding debt and is also obligated in law to give defaulting party details to CRB."

For the foregoing reasons, I order that pending the hearing and determination of this petition, the respondent whether by itself, or its servants or agents, advocates or any other person acting for and or on their behalf be and is hereby restrained by an order of injunction from charging interest rate on the Staff Housing Loan at 10% plus a margin of 4% or any other rate of interest save the allowed charges for staff accounts and the staff interest rate of 6%, repossessing, offering for sale, selling, transferring, disposing of or in any other manner alienating or encumbering her family home which is LR N. 27759 Unit 160 Water Front Gardens Loresho.

Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29TH DAY OF JANUARY 2019

MAUREEN ONYANGO

JUDGE