



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO 1993 OF 2016

ANGELIQUE BENNAARS LIBESE.....CLAIMANT

VERSUS

BARCLAYS BANK OF KENYA.....RESPONDENT

RULING

1. By a notice of motion filed on 11th October, 2017, the claimant applicant sought orders inter alia that:

a) That pending the hearing and determination of the claim the respondent whether by itself, or its servants or agents, advocates or any other person acting for and or on their behalf be restrained by an order for injunction from harassing and issuing of threats of listing the claimant with the Credit Reference Bureau.

2. The application was supported by the affidavit of the claimant and further based on the grounds among others that:

a) That the constitutional and legal rights of the Applicant have been gravely violated.

b) The Applicant had taken a staff unsupported guarantee Loan of Kshs 3,650,000 and a Credit Card Balance of Kshs 926,670.00 which she had been regularly paying up even after she was prematurely terminated by the Respondent.

c) The Applicant had legitimate expectation that for the duration of servicing the loans she would be working for the Respondent and using her monthly income to repay the loan instalments.

d) Since the claimant's termination, the Respondent has been constantly harassing, intimidating and issuing threats of having her listed with the Credit Reference Bureau as per a collection notice sent on 9th October, 2017.

e) The Applicant is willing to continue making payments towards settling her loans despite her current state of unemployment.

3. The respondent opposed the application and filed a replying affidavit through one Milka Maina who deponed on the main that:-

a. It is not correct as stated at paragraph 2 of the Supporting Affidavit that the Claimant applied for a "staff loan. The Respondent does not offer staff loans to its employees. Like all other customers of the Respondent, the Claimant applied for an unsecured loan and a credit card facility from the Respondent.

b. Whilst she was employed by the Respondent, the Claimant enjoyed a concessionary interests rate availed to members of staff. As it is only the concessionary interest rate for the loans which arose from the Claimant's employment with the Respondent and not the loan itself.

c. It is correct that the Claimant has not been servicing her debts with the Respondent. I am further aware that the Respondent maintains an active Credit Control department. The Claimant could have engaged with this department to reschedule her debts as she avers that she wishes to at paragraph 7 of the Supporting Affidavit. The Claimant has not demonstrated to this Honourable Court that she has engaged that department and been turned away or unassisted. Her application before this Honourable Court is therefore premature and mischievous.

d. I am also aware that the Respondent's obligations to report non-performing loans to the Credit Reference Bureau are mandatory further to section 31 of the Banking Act, Cap 488 Laws of Kenya as read together with Regulation 50 (1) of the Credit Reference Bureau Regulations, 2013. The orders sought by the Claimant cannot therefore be granted as they seek to have the Respondent compelled to violate the law and/ or perpetuate an illegality.

e. I am further aware that section 31 (5) of the Banking Act as read together with Regulation 19 of the Credit Reference Bureau Regulations, 2013 precludes any legal proceedings further to the exercise of reporting obligations in accordance with those provisions.

4. In his submissions in support of the application, Mr Kanyara for the claimant submitted that the applicant had legitimate expectation of being in the respondent's employ rate of 6% generally applicable and enjoying the preferential interest rate of 6% generally applicable to the respondent's employees until payment in full of her loans. However once she was terminated, the respondent directed that the staff loan revert to customer rate. In good faith, the applicant continued to make monthly repayments despite the great financial constraints occasioned by the termination.

5. According to counsel, the strain was prejudicial to the applicant and that she was not running away from her financial obligations but wanted the court to refrain from listing her with the credit reference bureau. Counsel further submitted that indeed the applicant reached out to the respondent informing them of her financial situation, her state of unemployment and her inability to make consistent payments towards repayment of her loans. Consequently her credit card was cancelled in May, 2017 and her payments restructured to 36 monthly repayments.

6. Ms Wanjiru for the respondent on her part submitted that it was clear that the loan preceded the claimant's employment with the respondent hence the loan was not a staff loan neither did the same arise from her employment with the respondent. According to Counsel, the claimant did not offer any particulars or evidence to show the commercial loan was converted to staff loan upon her employment. Ms Wanjiru therefore submitted that the court did have jurisdiction over the commercial loan.

7. Concerning the allegation of legitimate expectation counsel submitted that it was upon the claimant to demonstrate where the clear and unambiguous representation of her entitlement was and how it was reasonable for her to rely on such entitlement. According to counsel the fact of the matter was that the preferential rate was not provided for in the loan terms and conditions and was afforded to the claimant solely on the premise of her being an employee and on a discretionary basis.

8. Regarding report to CRB, Counsel submitted that the respondent was under statutory obligation to report non-performing loans to a CRB and that the respondent was protected from suit in carrying out this duty. The claimant's major complaint is not defaulting in payment of the loans advanced by the respondent but the strain in making such repayments after the separation from respondent has stated that despite the strain employment. The claimant has stated that despite the strain she has been making some effort to service the loan. It was her feeling that reporting her to a CRB could hurt her chances of either getting another job or accessing alternative credit to repay the respondent. This to her amounted to harassment over which she sought the court's intervention.

9. Whereas the respondent has contended that the loans to the claimant were taken prior to her engagement by the respondent, it concedes that these loans out of the fact that the claimant subsequently became its employee were serviced at staff rates and this was discretionary. Counsel for the respondent has contended that in the absence of any documentation, the claimant could not rely on this discretionary arrangement to plead the principle of legitimate expectation. Representations which have financial implications could create legitimate expectations if relied on by a party being so represented to. The claimant's commercial loans were out of what the respondent's counsel calls discretionary arrangement converted to staff rates upon her employment by the respondent.

10. This change cannot be gainsaid created an expectation on the part of the claimant that as long as her employment continued she would enjoy the preferential rates. This relationship unfortunately terminated before she could clear her loans. She has disputed the circumstances leading to her termination. She could be mistaken or not but that is a matter to be decided at the main trial. All she is asking of the court in the interim is for the respondent not to report her default or non-payment on regular basis of the expected instalments, to CRB as this would be prejudicial to her credit rating. The intention of creating a database of credit information on clients of institutions licensed under the Banking Act was not to harass or punish to be listed but to make such information available to potential lenders while exercising due diligence for lending.

11. It is of course prudent not to lend to perennial defaulters but in the court's view the claimant is yet to and does not at the moment fall in this category. Her inability to regularly repay her loans and at the rate demanded by the respondent is explicable and does not warrant her being reported to CRB as a perennial defaulter. Besides she has contested the legitimacy of her separation from respondent's employment. Her circumstances are therefore plausible and warrant the courts interference by way of injunction.

12. In the circumstances, the injunction order issued by Lady Justice Wasilwa on 11th October, 2017 is hereby confirmed pending the hearing and determination of the main claim.

13. It is so ordered.

Dated at Nairobi this 18th day of January, 2019

Abuodha Jorum Nelson

Judge

Delivered this 18th day of January, 2019

Abuodha Jorum Nelson

Judge

In the presence

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge