



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

(Before Hon. Lady Justice Maureen Onyango)

CAUSE NO. 657 OF 2013

ABDALLAH ABDI ALI.....CLAIMANT

VERSUS

FIRST COMMUNITY BANK LIMITED.....RESPONDENT

AND

CAUSE NO. 656 OF 2013

JAMAL ABDALLAH AWADH.....CLAIMANT

VERSUS

FIRST COMMUNITY BANK LIMITED.....RESPONDENT

RULING

The Application before the Court is dated 4th May 2018, and is expressed to be brought under Articles 10, 21, 22, 23, 27, 28, 40, 41, 48, 50, 159(2)(a) of the Constitution of Kenya, 2010, Sections 12, 40, 45, 49 and 50 of the Employment and Labour Relations Court Act and Rule 17 and 28 of the Employment and Labour Relation Court (Procedure) Rules, 2016, Section 103 of the Land Act and all other enabling provisions of the law. The Applicant prays for orders that:

1. That this Court be pleased to certify this application as urgent and dispense with the service at the first instance.
2. That this Court be pleased to grant an order of injunction restraining the Respondents, their servants, officers, employees, assigns and/or agents or any other person acting for and/or on their behalf, from doing the following acts or any of them, that is to say from advertising for sale, disposing off, alienating, dealing with, selling by public auction or otherwise howsoever at any other time from or by completing by conveyance or transfer of any sale concluded by auction and/ or private treaty or leasing, letting or otherwise howsoever interfering with the ownership of title to and/or interest in all that property known as title No. Kwale/Diani Settlement Scheme/1633 Ukunda Area, Msambweni District and property known as Title No. Kwale/Diani 509 Diani Beach 3 – Ukunda pending the hearing and determination of this Application.
3. That this Court be pleased to grant an order of injunction restraining the Respondents, their servants, officers, employees, assigns and/or agents or any other person acting for and/or on their behalf, from doing the following acts or any of them, that is to say from advertising for sale, disposing off, alienating, dealing with, selling by public auction or otherwise howsoever at any other time from or by completing by conveyance or transfer of any sale concluded by auction and/ or private treaty or leasing, letting or otherwise howsoever interfering with the ownership of title to and/or interest in all that property known as Title Kwale/Diani S.S/ 1633 and Kwale/Diani 509 pending the hearing and determination of the main Claim.
4. That this Court be pleased to grant an ex-parte interim injunction restraining the Respondent either by itself, servant and/or agents from, reviewing and effecting the financing rate payable in respect of the first facility at the staff rate of 5% to the commercial financing rate of 14% which the monthly repayment ought to be Kshs.19,759.24 as opposed Kshs.44,000.00, pending the determination of both this Application and the main Claim.

5. That pending the hearing and determination of this application this Honourable Court be pleased to issue an order restraining the Respondent, its employees, servants and or agents from listing the Applicant by any credit reference bureaus on account of the non-performing financial facility that the Applicant had been extended to by the Respondent on account of being employees of the Respondent.
6. That with respect to the Applicant's termination on account of redundancy this Honourable Court be pleased to order the Respondent to produce for inspection a written record of all the employees hired by the Respondent with all requisite particulars of their job title, grade, salaries after 1st December 2016 pending the hearing and determination of both this application and the main Claim.
7. That this Court be pleased to direct the Respondent to issue the Applicant with a Certificate of Service in terms of the provisions of Section 51 of the Employment Act, 2007.
8. That this Court be pleased to order the Respondent to reinstate the Applicant as the General Manager pending the hearing and determination of the claim.
9. That costs of this application be provided for.

The Application is premised on the grounds that:

1. The Applicant was working as the General Manager of the Bank until 30th November 2016 when the Chief Executive officer of the Respondent, without any prior notification or consultation terminated him allegedly on grounds of redundancy as a result of a restructuring exercise.
2. The Applicant was not informed of the criteria that the Respondent used to identify and declare him redundant and that despite him being assured in writing that his position and career growth in the bank would not be affected by the appointment of the Chief Executive Officer. Up to date, the Applicant does not know how the process that the Respondent employed to arrive at the decision to terminate him.
3. Even if the Respondent wanted to carry out a redundancy process as contemplated under the law, the Applicant could not have been rendered redundant due to his seniority in time, acquired skills, reliability and being the General Manager at the Bank.
4. In any case, the Respondent did not discuss with the Applicant being the General Manager the alleged issue of alleged high staff costs to try and explore an amicable way of dealing with the problem if at all since the Applicant was not at fault.
5. The Bank wilfully ignored and disregarded clause 3.7.4 of its Human Resource Policy on *EMPLOYEE REDUNDANCY/EMPLOYEE LAY-OFFS* which is categorical that an employee of the bank can only be laid off when his/her position is temporarily suspended or permanently eliminated by the bank. An Employee may also be declared redundant if as a result of an official structural realignment within the organization the position he/she is holding ceases to exist. None of these conditions precedent for redundancy to happen had occurred in the case of the Applicant.
6. The Applicant while employed by the Respondent took out three finance facilities. The first being an initial loan, known as deal No 2725, taken over by the Respondent that was between the Applicant and his previous employer Fina Bank whose financing rate was 5% with was for the purchase of the property known as Title No. Kwale/Diani Settlement Scheme/1633. The second being the facility, known as deal 2964 provided for in the letter of offer dated 27th December 2013 and the Musharaka Ending With Ownership Financing Agreement executed on 30th December 2013 whose financing rate was 15% per annum (reducing) for the construction of three cottages on property Title No. Kwale/Diani Settlement Scheme/1633 Ukunda Area, Msambweni District. The security of this facility was the direct salary assignment in addition to the further legal charge of Kshs.6,810,000 of the property. The third facility being the facility known as deal 3773 of which the financing rate was 13.5% reducing which was the then staff commercial rate and with the security being the charge over the property Title No. Kwale/Diani/509 Diani Beach 3- Ukunda.
7. The Respondent unilaterally and without any lawful basis varied the repayment terms of the first facility without prior written notice to the Applicant of the change in the financing rate of the facility. This is despite the fact the Respondent was alive to the fact that the Applicant had lost his source of income which had been directly assigned to the Bank for the repayment of the advanced facility.
8. The Applicant in his letter dated 13th November 2017 requested the Respondent to review the payment terms of the first facility being deal 2725 by reverting to the initial facility repayment terms in accordance with the Letter of Offer of which the monthly repayment amount was Kshs.19,754.24 as opposed to the monthly reviewed amount of Kshs.44,000.
9. The Applicant in his letter further informed the Respondent that the arrears had been occasioned by both the varied financing rate and the then ongoing political climate in the country.
10. The Respondent issued the Applicant with a Statutory Notice of Sale dated 11th January, 2018 in respect of the property known as Title No. Kwale/Diani/509/Diani Beach 3-Ukunda as a result of the Applicant's default in payment of the sum of Kshs.21,012,128.15. Surprisingly in the said Statutory Notice the Respondent acknowledges that default in payment has been occasioned by factors beyond the Applicant's control besides the Respondent giving the Applicant a viable option of selling the property to a suitable buyer in order to offset the Outstanding Facility amount.

11. Should the Respondent continue applying the unilaterally varied repayment terms of the facility and further proceed with the sale of the property in exercise of its statutory power of sale the Applicant will suffer damage which cannot be compensated by way of damages.

12. The Applicant further stands to suffer prejudice and loss as the weaker party if the Respondent is allowed to fill his position at the bank since the Applicant is aware that the Respondent has since hired persons to fill various vacancies at higher salaries.

13. The Application is brought without undue delay and in good faith.

The Application is supported by the Affidavit of Abdalla Abdi Ali the Claimant wherein he states that he was employed by the Respondent as the Head of Risk & Compliance. That in November, 2015, he was appointed as the Acting Assistant General Manager until December, 2015, when he was appointed to the position substantively.

That on Friday, 3rd November 2016, the Chief Executive Officer of the Respondent sent out a memo to all staff informing them *inter alia* that the bank had hired an external firm to review and identify those areas where staff reductions can be made without negatively affecting the bank operations. According to the memo the selection process was to take into account the number of staff per function, employees' skill levels and overall attitude.

That on 1st December 2016 at around 11.30 am the Claimant attempted to log into the system and realised that he could not log in. He left the office and went for prayers and upon return at around 2.30 he was handed a termination letter and his door biometric system was disabled.

That prior to termination he had taken out three facilities from the bank on preferential rates which in June 2017, were varied Claimant/Applicant increasing the rates to commercial rates in turn increasing his repayment rates without informing him. As a result he was unable to keep up with the repayments.

That the repayment interest rates were converted despite the fact that he was unlawfully and unfairly terminated. That on 30th January 2018, the Respondent issued the Claimant/Applicant with a Statutory Notice dated 11th January, 2018 on the intended sale of the charged property known as Kwale/Diani/509 Beach3-Ukunda.

That his employment with the Respondent was unfairly terminated and he urges the Court to allow the prayers sought.

The Respondent opposes the application and filed a Replying Affidavit sworn by one Philip Lidambiza Sabwa, the Head of Human Resource of the Respondent. He avers that in May 2016, the bank was facing a non-performing loan portfolio of 18% above, the industry average of 4.6%. That anything above 8% is considered high risk.

That the bank's cost-to-income ratio was extremely high and therefore it could not generate additional revenue to redress this imbalance because cash was tied up in the non-performing loans. This resulted in the Respondent's operations being unprofitable.

To address this, the respondent embarked on implementing new policies to streamline the organisation. One of the measures taken was to reduce staff. The Bank engaged a professional Human Resource Consultancy Firm to assist in the restructuring process. Meetings were held with all the staff as part of an assessment process and the information gathered used to determine the employees to be declared redundant.

The Claimant was one of the employees rendered redundant effective 4th December, 2016 after an extensive and thorough redundancy procedure.

That during the course of employment Claimant entered into various financing agreements with the Respondent and enjoyed staff rates which reverted to commercial rate in line with the staffing financing policies. He avers that the Claimant was well aware of the variation as the same is set out in clause 4.19(c) of the Respondent's Financing policy. He prayed that the application be dismissed with costs.

Applicants' Submissions

It is submitted on behalf of the Applicant that he has established a prima facie case of unfair termination of employment on account of redundancy. That the reasons for redundancy were not valid, fair and was not instigated by a genuine need to cut costs. That the reason given for redundancy was that the Bank was facing non-performing loan portfolio of 18% and that its cost to income ratio was extremely high. That this was not a genuine reason as non-performing loans had been in existence since 2012. That the bank has also not displayed financial records or financial statement to show that the bank had performed dismally especially in the year 2016/2017.

It is also submitted that the Claimant/Applicant was also terminated unprocedurally as none of the requirements under section 40 of the Employment Act were complied with.

On whether the Applicant is entitled to continue repaying his facilities at the staff rate in view of the unlawfulness in the termination of employment and his legitimate expectation it is submitted that in view of his unfair termination the provisions of Clause 4.19(e) do not apply. They cite the case of *Crispus Magonchi Gisemba vs Tausi Assurance Company Limited (2017)eKLR* where it was held:

"The claim for loss in selling property acquired while in employment and sold due to termination of employment follows the cause. The rationale is that there is a close nexus between employment and the employment benefits that go with it. As such, where an employee is able to get a benefit due to his employment and the employment is unfairly terminated, the benefit cannot be

lost as had the employment not terminated unfairly such benefit would remain alive.”

The Applicant submits that he has established a prima facie case with probability of success. He cites the case of **Banking Insurance & Finance Union (Kenya) Vs National Bank of Kenya (2016) eKLR** where it was held:

“In the present case, the Claimant has an arguable case that the grievants ought to continue repaying the loans on preferential terms until the hearing and determination of the suit. However this does not shield the employees who have defaulted in repaying of the outstanding loan... Had the grievants left employment voluntarily, they would have continued to repay the loan on commercial rates. The obligation remains if the termination is contested subject to the retention of special rates until the lawfulness or otherwise of the termination is determined.”

On reinstatement it is submitted that the Court is empowered under Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016, subject to the conditions stipulated under section 49(4) of the Employment Act. That the Claimant was a long serving employee at the Respondent as a General Manager and the circumstances of his termination are unjustified.

On the issue of production of documents it is submitted that under section 74 of the Employment Act the Employer is required to keep written records of all employees employed by the Employer which records may be inspected by an authorised officer. That the Court has authority under section 20(4) to order the production of any relevant documents. He cites the case of **Leland I Salano Vs Intercontinental Hotel (2013) eKLR** where it was held:

“The commonly used criteria in determining whether the documents at the employment are confidential is where their release would damage the employer’s business, breach undertakings to respect confidentiality; breach statutory restrictions on disclosure of information; cause financial loss or avail the employee improper gain or advantage or impede the proper management of the enterprise... It has not been suggested that use of the contested documents, would disrupt the Respondent’s operations, beyond the inconveniences associated with orders of reinstatement and compensation. The Claimant has a right under the constitution of Kenya, to access of information that assists in prosecution of the Claim. He has a right to be free of unfair labour practices. The Respondent has not shown in what way, its right to privacy and fair trial, would be compromised but the admission in evidence, of the contested information.”

He urges the Court to allow the Application as drawn.

Respondent’s Submissions

It is submitted on behalf of the Respondent that the Claimant/Applicant has not established a prima facie case with chances of success for the reason that redundancy is a legal process provided for under section 40 of the Employment Act.

That about April 2016, the Respondent started to consider restructuring informed by the fact the Respondent had been making losses and was not performing at its optimal. Vide an internal memo dated 4th November, 2016, the Respondent informed all its employees including the Applicant of inter alia the intended redundancies. A meeting was also held with all the staff who were advised of the bank’s situation and the actions the Bank intended to take in that regard.

That the Ministry of Labour, Social Security and Services was informed of the intended redundancy vide a letter dated 4th November 2016. That the Applicant was interviewed by the consultants engaged by the Respondent to handle the restructuring process as a result of which the Claimant/Applicant was declared redundant effective 4th December, 2016. That in view of this the Claimant has failed to establish a prima facie case with chances of success.

It is further submitted that the Claimant/Applicant did take out two financing facilities with the bank. That the financial rates he was enjoying was by virtue of him being an employee. That there were two separate and distinct contracts and the contract of employment should not have a bearing on the financing facilities. The respondent cites the case of **Peter Mutiya Musembi & Another Vs National Bank of Kenya ELRC No. 1777 of 2014** where it was held:

“The 1st Claimant is contractually bound to service his loan facility whether he is in employment or not and the Respondent has the right to realise the securities if the 1st Claimant is in default in respect of the loan.... the 1st Claimant/Applicant does not meet the requirement of granting a temporary injunction in that he has not shown he would suffer loss in capable of adequate redress by way of damages.... The balance convenience therefore does not favour the grant of the relief sought.”

On the issue of reinstatement it is submitted that the prayer sought is in the nature of a mandatory injunction whose effect is to make a final determination of a case which should not be the case at an interlocutory stage. That a mandatory injunction can be granted at an interlocutory stage as well as the hearing but in the absence of a special circumstance it will not normally be granted. This position was stated in the case of **Kenya Breweries Ltd Vs Okeyo (2002) EA 109**.

That the issue of whether the claimant was unfairly and unprocedurally terminated is for determination before the Court and to grant an order for reinstatement at this stage would amount to a final order at an interlocutory stage.

On the issue of production of all records of employees hired by the Respondent with all requisite particulars of their job title, grade, salaries it is submitted that the same is not tenable as these are third parties to the claim herein. The respondent cites the case of **Vincent Muema Mututku vs Rift Valley Railways (Kenya) Limited (2015) eKLR** to buttress this position.

The respondent urges the Court to dismiss the Application with costs.

Determination

The principles of injunctive orders are set out in the case of **Giella Vs Cassman Brown & Company Ltd (1973) EA 358**. The applicant must show that he has a prima facie case with a probability of success and that he stands to suffer irreparable damage. If the court is however in doubt on the foregoing, it will decide the matter on the balance of convenience.

Prima facie case

The Claimant/Applicant premises the application on the ground that the

Respondent has issued a notice of sale for his properties arising out of facilities which he had taken while in employment and was enjoying preferential interest rates. The Claimant has been unable to keep up with the payments after the interest rate for the facilities reverted to commercial rates following the purported unfair termination.

In the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] eKLR** the Court of Appeal endeavoured to define a Prima facie case as follows:

“So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter...”

... prima facie case is more than an arguable case. It is not sufficient to raise issues. 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.”

The Claimant avers that he was rendered redundant on 4th December, 2016 and that the process for the redundancy was unfair and did not comply with the law. The Respondent has not attached any documentation to the Replying affidavit to counter this assertion and as such the Court does not have the benefit of perusal of the procedure followed in termination of the Claimant’s services.

There is therefore a prima facie case established by the Claimant which would require further inquiry by this Court.

Irreparable damage

The Claimant/Applicant pleads that he had legitimate expectation that he would continue in employment and continue to service the facilities advanced to him at preferential rates. After termination the interest rates converted to commercial rates which led to the bank issuing him with a statutory notice of sale of the charged properties.

Denying the Claimant the orders sought will cause him irreparable harm which cannot be compensated by way of damages. The Claimant wishes to continue paying for the facilities at preferential rates as the matter is pending final determination. This being the case the orders are warranted as to hold otherwise would not be in the interest of justice. The court notes that should the case fail the bank will still be covered by the securities and will therefore not be prejudiced.

I am guided by the case of **Abraham Nyambane Asiago Vs Barclays Bank of Kenya Limited (2013) eKLR** where it was held:

“I have no doubt in my mind that an employer who grants an employee a loan facility on special terms is entitled to vary the terms of the facility or even recall it altogether once the employment relationship ceases to exist. However, there is a basic assumption in all such cases, that the employment relationship terminates within the law. If there is a whiff of unlawfulness in the termination of employment, then the employer’s right to withdraw the special loan facility advanced to the employee is withheld.”

Balance of Convenience

In the case of **Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR** it was held:

“The court should issue an injunction where the balance of convenience is in favour of the plaintiff and not where the balance is in favour of the opposite party. The meaning of balance of convenience in favour of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favour of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.”

The loss of the property changed would be a greater loss to the applicant while the respondent would still be covered by the said securities which it can realise should the claim herein not be successful.

The application therefore succeeds in part to the extent that the respondent is restrained from either by itself, servant and/or agents, reviewing and effecting the financing rate of interest payable in respect of the first facility at the staff rate of 5% to the commercial financing rate of 14% for which the monthly repayment ought to be Kshs.19,759.24 as opposed to Kshs.44,000.00, pending the determination of the main Claim.

For the avoidance of doubt, the respondent is directed to readjust and credit the applicant's account with the difference between the staff rate and the commercial rate.

The applicant is however under obligation to service the loans failing which the respondent will be at liberty to realise the securities and to list the applicant with the Credit Reference Bureau (CRB) as mandated by law.

In view of the nature of the orders granted, parties are directed to comply with all pre-trial requirements and fix the case for hearing within the next 60 days so that the main claim can be concluded expeditiously.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 4TH DAY OF FEBRUARY 2019

MAUREEN ONYANGO

JUDGE