



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1296 OF 2018

BONIFACE MUSYOKI KIMONICLAIMANT/APPLICANT

VERSUS

STANDARD CHARTERED BANK OF KENYA LIMITED.....RESPONDENT

RULING

Introduction

1. The Application before the court is dated 1st October, 2018, It is brought under Rule 17(1) – (7) of the Employment and Labour Relations Court (Procedure) Rules and all other enabling provisions of the law seeking for Orders that:

- a. Service of this Application be dispensed with in the first instance and that this Application be certified as urgent.
- b. Pending the hearing and determination of the Application this Court do issue an injunction against the Respondent prohibiting the Respondent from repossessing and/or selling or in any other way dealing with any property of the Claimant bought, purchased or otherwise acquired by way of banking facilities from the Respondent during the employment of the claimant particularly Apartment Number 09, Block 3 Zone B6 erected on L.R. Number 17/14 (Jacaranda Gardens)
- c. Pending the hearing and determination of the Suit this Court do issue an injunction against the Respondent prohibiting the Respondent from repossessing and/or selling or in any other way dealing with any property of the Claimant bought, purchased or otherwise acquired by way of banking facilities from the Respondent during the employment of the claimant particularly Apartment Number 09, Block 3 Zone B6 erected on L.R. Number 17/14 (Jacaranda Gardens)
- d. That costs of the Application be provided for.

2. The Application is premised on the grounds on the face of the Application and the Claimant's affidavit sworn on 1.10. 2018. The gist of the of the application is that the Respondent wrongfully and unfairly terminated his employment on 19.1.2017 without justifiable reason and after conducting a sham hearing. That while still in employment he took advantage of the Respondent's benefits offered to its employees and obtained a house loan and a personal loan with legitimate expectation that due to his good performance at work he would remain in such employment until the same were fully repaid.

3. He avers that he is still in occupation of the house but the respondent has, through its agents Messrs' Leakey's Auctioneers, purported to exercise its Statutory Power of Sale over the house, Apartment Number 09, Block 3 Zone B6 erected on L.R. Number 17/14 (Jacaranda Gardens), and further threatened to realise the said property by way of public auction on 16th October, 2018 on account of outstanding balance owed to the Respondent for the various loan facilities. That despite financial hardship he has consistently paid the mortgage instalments of Kshs.61,000 monthly and as such he is of the view that the intended auction of his house is informed by malice, bad faith and ill intent. That unless the orders sought are granted he stands to suffer irreparable loss.

4. The Respondent has opposed the application vide two Affidavits sworn by one Boniface Machuki, the Respondent's Manager at their Collections and Recoveries unit on 9.10.2018 and 30.10.2018 and prayed for the motion to be dismissed with costs. To begin, the affidavit raises objection to the application on ground that the prayers sought cannot be granted by this Court as they would be in violation of the Provisions of Rule 17(5) of the Employment and Labour Relations Court (Procedure) Rules.

5. As regards the merits of the application, Mr. Machuki deposed that the Respondent granted a loan of Kshs. 8.8 Million to the Claimant at staff rates by virtue of being its employee which loan was secured by a Charge over Apartment No. Apartment Number 09, Block 3 Zone B6

erected on L.R. Number 17/14 (Jacaranda Gardens) and a personal loan of Kshs. 3.8 Million. That the claimant defaulted and as at 8th October, 2018, the arrears on the mortgage were to the tune of Ksh. 710,421.35 and full outstanding balance of Kshs.9,092,218.56 while the Personal Loan arrears stood at Kshs.3,330,309.74.

6. He further deposed that the termination of the Claimant's employment on 19th January, 2017, was lawful and fair because it was grounded on breach of his contract through misconduct. That although the loans were supposed to revert to commercial rates as per the bank policy within the month, it was agreed between him and the bank that the loan interest would be maintained at 6% and 6.4% for his personal and mortgage loans respectively. That despite the foregoing compromise, the Claimant has since July, 2017 not serviced his personal loan at all and has been underpaying his mortgage instalments leading to arrears of Kshs. 710,421.35 as a result of which the Respondent opted to exercise its statutory power of sale over the charged property.

7. As regards the legitimate expectation to continue working until full repayment of the loans, the Respondent contends that by dint of the contract of employment having a termination clause, the employment relationship could be terminated at any time by either party by following the laid down contractual procedures and the law. He further contended that default on repayment of the loans is a failure to honour a personal obligation and has nothing to do with separation of the parties.

8. In conclusion, he exhibited a Final warning letter and other correspondences to fortify his contention that the Claimant never provided stellar services to the Respondent as claimed and that the instant application is an attempt by the Claimant to avoid his personal obligation to the bank.

Claimant's Submissions

9. The claimant found no merits in the objection raised by the respondent and submitted that the Court has jurisdiction to grant the Orders as sought under Rule 17(5) of the **Employment and Labour Relations Court (Procedure) Rules, 2016**. That although the rule refers to a suit for injunction the said provision was not exclusive or prohibitive but rather permissive. He relied on **Boniface Lum Amunga Biko vs National Bank of Kenya [2017]eKLR** to fortify his submission that the court has jurisdiction to grant injunction in the circumstances of this case.

10. The Claimant further submitted that he has met the threshold for granting of interlocutory injunction as enunciated by **Giella vs Cassman Brown & Company Limited [1973] EA358**. That he has sufficiently established a prima facie case with probability of success by exhibiting documents to prove that he has been meeting his mortgage loan obligations by paying kshs 61000 per month, as opposed to the required kshs 56674.26 and contended that the alleged perennial default on the secured loan was founded on wrongful consolidation of the secured loan with the unsecured personal loan. He therefore maintained that by virtue of him having been servicing the secured loan, he has a right over the suit premises and if the orders sought are not granted he will suffer irreparable loss that cannot be compensated by way of damages.

Respondent's submissions

11. The respondent submitted that the claimant has not denied the debt owing to the Respondent and from the pleading, it is clear that he has not been servicing the loans. Based on this the Respondent submits that the claimant has not come to Court with clean hands as he always had notice of the default and only came to Court one year after he was issued with the 1st formal notice. It cited **Kyangavo V Kenya Commercial Bank Limited & Another(2004) 1KLR 126** where it was held:

“Secondly, the injunction sought is an equitable remedy. He that comes to equity must come with clean hands and must also do equity. The conduct of the Plaintiff in this case betrays him. It does not endear him to equitable remedies. He admitted in this Court, quite frankly, that since leaving employment of the bank over four years ago, he is in default, and yet he is also in possession. He can't have it both ways. Either he pays the loan, or allows the bank to realise its security. He who comes to equity must fulfil all or substantially outstanding obligations before insisting on his rights. The Plaintiff has not done that. Consequently, he has not done equity. In the hands of the Plaintiff, a permanent injunction would wreak havoc to the 1st Defendant and that would be inequitable. While chargers are enjoined by law to follow the laid down procedures for the realisation of their security, the Courts must not at the time be converted into a haven or refuge by defaulters. Even lenders and chargers have their own rights.”

12. It further submitted that it has rights in relation to the charge executed between the Applicant and itself, and it should not be stopped from exercising its contractual rights simply because they had an employer-employee relationship at some point in the past. She contended that the Employment contract had an exit clause providing for termination at any time for a cause or notice and as such the alleged legitimate expectation by the claimant to work for the Respondent till he cleared the loans, is not valid.

13. It further urged that, the Claimant has failed to satisfy the test for the grant of interlocutory injunction as set out by **Giella vs Cassman Brown**. The Respondent submits that there is no prima facie case since the claimant executed an agreement allowing the 2 loans to be secured by the same property. That any harm which the Claimant may suffer after the order is withheld is not irreparable since he can be compensated by way of damages. It contended that, contrary to the applicant's contention, it stands to suffer irreparably if the order is granted because the more the debt accrues the harder it will be to realise the said amounts from the sole security provided by the claimant.

14. In conclusion, the respondent submitted that the balance of convenience tilts in favour of dismissing the application and thus urge the Court to so order.

Analysis and determination

15. Having carefully considered the pleadings, application, affidavits and the rival submissions, the issues for determination are:

- a. Whether the application is incompetent.
- b. Whether the application has met the threshold for granting interlocutory injunction.

Whether application is incompetent

16. The respondent has objected to the application on ground that it offends the provisions of **Rule 17(5) of the ELRC procedure rules**. The rule provides as follows:

“17(5) In a suit where an injunction is sought, a claimant or applicant may at any time in the suit, apply to the court for an interim or temporary injunction to restrain the respondent from committing a breach of contract or an injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.”

17. The claimant has interpreted the foregoing provision as permissive rather than exclusive or prohibitive. I agree with the claimant that the rule is permissive but differ with him in as far as he suggests that the reliefs sought in the suit are immaterial when seeking interlocutory injunction. In my view, the very reason for granting interlocutory injunction is to preserve the substratum of the dispute before the court pending hearing and determination. It follows therefore that if the injunction order sought has no relationship or consonance with the main dispute before the court, the applicant is better placed filing another suit since the mischief for which the injunction is intended to restrain, constitutes a separate cause of action.

18. In the present case the dispute contained in the pleadings is one of unfair termination of claimant’s employment contract by the respondent and the reliefs sought are compensatory damages quantified as kshs.14,563,400. There is no mention of secured or unsecured loans in the entire Statement of Claim filed by the claimant on 9.8.2018 and the Memorandum of Response filed by the respondent on 9.10.2018. It is therefore clear that the dispute before the court does not in any way concern loans taken by the claimant while in the respondent’s employment.

19. Assuming that the claimant was right in alleging that the intended auction of his mortgaged house was unlawful, what would be the effect of granting the interlocutory order sought to the preservation of the substance of the pending suit? I see no bearing of the order to the dispute in the suit at all. The order will neither preserve the substratum of the suit nor affect the outcome thereof because the application presents a separate cause of action with distinct facts from those of the main suit.

20. The respondent cited my decision in **Fadhil Juma Kisua & Another vs Kenya Ports Authority [2017] e KLR** where I upheld a similar objection and I see no reason to depart from that opinion. Having considered all the materials presented to the court, I return that the application for injunction herein is alien to the dispute before the court and it cannot be granted. I will therefore not go to the merits of motion. If the claimant is desirous of pursuing the dispute pressed by the rejected motion he may as well commence another suit.

Dated, Signed and Delivered at Nairobi this 22th day of March, 2019

ONESMUS MAKAU

JUDGE