



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1411 OF 2018

(Before Hon. Justice Hellen S. Wasilwa on 11th March 2019)

JOHN NGURI KINYANJUI.....CLAIMANT/APPLICANT

-VERSUS-

EQUITY BANK (K) LIMITED.....RESPONDENT

RULING

1. The Application before Court was filed on 1st October 2018 under Section 12 (3) of the Employment and Labour Relations Court Act and under Rule 17 of the Employment and Labour Relations Court [Procedure] Rules 2016 and any other enabling provisions of the law seeking following Orders:-

1. ***THAT*** this application be and is hereby certified urgent and the same be placed down for hearing on an urgent basis.
2. ***THAT*** pending the hearing and determination of this application interpartes and the suit herein, the Respondent's action of varying the Applicant's interest rates for all his facilities from 8% for the motor vehicle loan and the Personal development loan to 13% be stayed and/or suspended;
3. ***THAT*** pending the hearing and determination of this application interpartes this honourable court do issue an injunction against the Respondent prohibiting the Respondent from repossessing and/or selling or in any other way dealing with LR. No. Ndumberi/Nduberi/3272 and Motor vehicle registration no. KCM 277B being property of the Applicant bought, purchased or otherwise acquired by way of loans from the Respondent during the employment of the applicant to market rates and/or listing the applicant with the credit and Reference Bureau (CRB).
4. ***THAT*** pending the hearing and determination if the suit this honourable court do issue an injunction against the Respondent prohibiting the Respondent from repossessing and/or selling in any other way dealing with LR No. Ndumberi/Nduberi/3232 and Motor Vehicle registration No. KCM 277 B being property of the applicant bought, purchased or otherwise acquired by way of loans from the Respondent during the employment of the Applicant to market rates and/or listing the Applicant with the Credit and Reference Bureau (CRB).
5. ***THAT*** costs of this application be in the cause.

2. The Application is supported by the Applicant's Affidavit sworn on 1st October 2018 and is premised on the following grounds:-

1. ***THAT*** the Applicant was employed by the Respondent on 8th October 2012 as a Project Manager. He also served as a FINSERVE Product Manager for some time in 2016 and a Business Analyst from 2016 to 2018.
2. ***THAT*** on 1st August 2014 the Applicant was offered a development loan facility for the purchase of L.R. No. Ndumberi/Nduberi.3272 and on 25th August 2017 he was offered a preferential car loan facility.
3. ***THAT*** the Applicant has never defaulted in servicing his loans owed to the Respondent since 25th August 2017.
4. ***THAT*** on 2nd May 2018 the Respondent issued the Applicant with a termination Notice on account of lack of a genuine account of or justification of listed loan and on account of failure to provide a realistic plan action for the settlement of listed accruing loans.

5. **THAT the alleged accrued loans were never owed to the Respondent and were accrued before the Applicant was employed by the Respondent.**

6. **THAT since 2nd May 2018 the Respondent has neglected refused or otherwise ignored to pay the Applicant his terminal dues and that since then Applicant has been without a source of income.**

7. **THAT on 21st September 2018 the Applicant received a demand letter dated 17th August 2018 by registered post from the Respondent demanding payment of the outstanding arrears. In addition, the Applicant's terminal dues have been unilaterally converted and used by the Respondent to offset the applicant's loan arrears.**

8. **THAT the reason for the applicant's termination was not justifiable per the Respondent's own standards as it constitutes a minor offence as per clause 14.4.1 of the Human Resource Policy Manual and that the reasons for termination were not in tandem with Clause 18.11 of the Respondent's Code of Conduct.**

9. **THAT the Applicant's motor vehicle Registration No. KCM 277B and the parcel of land known as L.R. No. Ndumberi/Nbuberi/3272 are on the process of being repossessed by the Respondent to be sold, alienated, transferred and/or to be dealt with in a manner contrary to the Applicant's interest and contrary to Clause 6.8 of the Respondent's Human Resource Policy.**

10. **THAT the unprocedural termination of the Applicant's services and the refusal to pay the Applicant his terminal dues has caused economic and financial hardship to the Applicant thus making it difficult to service the aforementioned loan facilities as his known source of livelihood has been severed by the Respondent.**

11. **THAT the Applicant's property right are about to be infringed by the Respondent without following the due process.**

3. The Respondent in response to the Application filed a Replying Affidavit deponed by Kariuki Kingori the Respondent's Legal Manager. He states the Applicant's Account has not fallen into arrears and that the Respondent has not issued any statutory demands in respect of the loan facility for personal development, being the first loan advanced to the Applicant. In addition, that the Respondent has not commenced any process of realising its security as relates to the first loan.

4. He further states that the Applicant has failed and ignored to repay the loan facility for the purchase of Motor Vehicle Registration No. KCM 277B, the second loan, prompting the Respondent to issue a Notice dated 17th August 2018 demanding the Applicant to regularise his account which was in arrears to the tune of KShs. 79,602.50.

5. He states that Clause 4 (a) letter of offer dated 25th August 2017 provides that the interest would be charged at 8% p.a but should the Applicant leave employment of the Respondent interest would be charged at the prevailing rate. In addition, under Clause 7.7 of the letter of appointment dated 8th October 2012 the preferential rate offered on staff loans would cease to be applicable immediately the Applicant leaves employment and commercial rates would apply.

6. He states that Clause 6.8 of the Human Resource Policy Manual provides that the Applicant shall be given 6 months grace period before full commercial rates apply and that the Claimant is still enjoying the 6 months grace period and the interest rates are still capped at 8% and 13%.

7. He states that under Clause 12 (b) of the letter of offer the Applicant consented and allowed the Respondent to forward the personal data to Licenced Credit Reference Bureaus in accordance with the Banking (Credit Reference Bureaus) Regulations 2013.

8. He states that the Respondent has at all times complied with the law and that the Applicant's terminal dues were paid to him and were never converted to offset his loan arrears. He furthers states that the Applicant has not met the threshold for the grant of an injunction.

Applicant's submissions

9. The Applicant submitted that he has met the prerequisite conditions for the grant of an injunction and relied on the case of **Boniface Lum Amunga Biko v National Bank of Kenya [2017] eKLR** where the Court relied on the Court of Appeal in **Nguruman Limited v Jan Bonde Neilson & 2 Others Appeal No. 77 of 2012.**

10. The Applicant submitted that from the demand letter dated 17th August 2018 the Applicant was indebted to the Respondent on 2 accounts of the car loan KShs. 1,596,376.50 and land loan for KShs. 3,782,009.70 and was granted 14 days to clear the loans.

11. The Applicant submitted that the application cannot be termed as being unmerited or premature as he stands to lose both the car and land which he has substantially paid for until his termination. The Applicant further submitted that the variation of the loan terms from 8% to 13% was punitive and malicious as the Respondent initiated the termination on flimsy grounds contrary to its Human Resource Policy Manual and Employment Act. The Applicant relied on the case of **Boniface Lum Amunga Biko** [Supra] where the Court held:-

“Before the Court can determine the suit before it, the same relating to a case of unfair termination of employment of the Claimant, to allow the Respondent to apply high or higher interest rates on the loan facilities advanced to the Claimant while in employment would be to strip him the dignity of man and subject him to adverse circumstances. However, where the court makes a finding that indeed the Respondent was justified in terminating the employment of the claimant, the due loan facilities can be recalled with all applicable and appropriate interest rates based on the date of termination. As such, the orders sought are

merited at this point to enable the court address the main suit and give appropriate final orders to the parties. Such I find will help in meeting the ends of justice and the application by the Claimant is therefore found to have merit.”

Respondent’s submissions

12. The Respondent submitted that the Applicant has not met the threshold laid down in the case of **Giella v Cassman Brown (1973) EA 358**. It further submitted that in order for the Honourable Court to determine whether or not the Applicant has successfully established a prima facie case against the Respondent it must satisfy that the Applicant has established and satisfied the principles enunciated in the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] eKLR**. The Respondent also relied on the case of **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014]eKLR**.

13. The Respondent submitted that it is questionable that the Applicant seeks interim orders so as to deny the Respondent its right to exercise its power of sale with respect to the second loan which he has refused to pay. The Respondent relied on the decision in **Curacid Kenya Limited v East African Development Bank [2008] eKLR** where Court held:-

“In my humble view, a party who has a right cannot and will not be prevented from that right being exercised except on the basis that the right was being exercised oppressively”.

14. The Respondent submitted that it is yet to commence the process of realising its security with respect to the first loan therefore no rights are capable of infringement as alleged by the Applicant.

15. The Respondent further submitted that the Applicant is asking the Court to issue an anticipatory injunction, which is not possible. It relied on the Court of Appeal decision in **Stephen Mbugua Mwangi & Another v Tatu City Limited & Another [2012] eKLR** and submitted that there are no circumstance from which the Applicant be said to have a prima facie case and that in bringing the application the Applicant is only seeking to frustrate the Respondent’s right of sale.

16. The Respondent further submitted that the Claimant has not demonstrated that he will suffer actual, substantial and demonstrable injury incapable of being compensated by way of damages. The Respondent relied on the case of **Andrew M. Wanjohi v Equity Building Society & 2 Others [2006]eKLR**.

17. The Respondent submitted that the balance of convenience tilts in its favour as Clause 12 (c) of the letter of offer dated 25th August 2017, the Applicant did acknowledge that in the event he ceased being an employee of the Respondent, the entire facility together with any sum payable thereunder would immediately become due and owing to the Respondent irrespective of the circumstances leading to the cessation of employment. The Respondent relied on the cases of **Francis J.K. Ichatha v Housing Finance Company of Kenya, Civil Application No. 108 of 2005** and **Kenya Products and Investments Ltd v Kenya Post Office Savings Bank HCCC No. 2811 of 1995 (unreported)**.

18. The Respondent submitted that despite the issuance of interim orders the Claimant has not disclosed any intention to make any payment to redeem the debt. In respect of the interest rate the Respondent submitted that Clause 4 (a) of the letter of offer dated 25th August 2017, Clause 7.7 of the letter of appointment dated 8th October 2012 and Clause 6.8 of the Respondent’s Human Resource Policy Manual commercial rates would apply upon the Applicant leaving employment and would be given 6 months before the commercial rates apply.

19. The Respondent submitted that even though there exists disputes with respect of variation of interest rates, that would not justify the grant of an interlocutory injunction. The Respondent relied on the case of **New Age Developers & Construction Co. Ltd v Jamii Bora Bank Ltd [2017] eKLR**.

20. The Respondent submitted that under Clause 12 (b) of the letter of offer the Claimant consented to information being forwarded to Licenced Credit Reference Bureaus in accordance with the Banking (Credit Reference Bureaus) Regulations 2013.

21. I have examined all the averments and submissions of both parties. From the letter of offer to the Applicant advancing him the loan facility, Clause 12(c) indeed indicated that the entire loan would fall due in the event of the Applicant leaving the bank irrespective of the circumstances.

22. However, it is also important to note that the Claimant has filed suit claiming unfair termination. This suit is still pending before Court. The fact that the fairness of the termination is disputed, there is a prima facie evidence that the Applicant seeks an establishment of the truth while in the meantime servicing his loans for which he has not defaulted before.

23. If indeed this claim is determined in the Applicant’s favour whereas he has already been condemned concerning the loans owing, he would have suffered double jeopardy.

24. The Respondent on the other hand would lose nothing, as the Applicant will keep servicing the loans as he has done previously.

25. In the circumstances, it is my finding that the balance of convenience tilts in favour of the Applicant being granted prayers sought in the application than being denied the prayers sought.

26. I therefore allow the application before me in terms of prayer 2 and 4 pending the hearing and determination of this claim;

1. THAT pending the hearing and determination of this claim, the Respondent’s action of varying the Applicant’s interest rates for all his facilities from 8% for the motor vehicle loan and the Personal development loan to 13% be and is hereby stayed and/or

suspended;

2. ***THAT*** pending the hearing and determination of the suit an injunction against the Respondent be and is hereby issued prohibiting the Respondent from repossessing and/or selling in any other way dealing with LR No. Ndumberi/Nduberi/3232 and Motor Vehicle registration No. KCM 277 B being property of the applicant bought, purchased or otherwise acquired by way of loans from the Respondent during the employment of the Applicant to market rates and/or listing the Applicant with the Credit and Reference Bureau (CRB).

27. Costs in the cause.

Dated and delivered in open Court this 11th day of March, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Amutallah for Applicant – Present

Mbogo holding brief Ratemo for Respondent – Present