



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 119 OF 2019**

**JOSEPH NJAGI MWITA & 4 OTHERS.....CLAIMANTS/APPLICANTS**

**VERSUS**

**BARCLAYS BANK LIMITED.....RESPONDENT**

**RULING**

**Introduction**

1. The application before the court is the Claimants' Notice of Motion dated 26th February 2019 which seeks the following orders:

- a. THAT pending the hearing and determination of the main claim the court does suspend the migration of interest rates for the claimants'/applicants' facilities from the respondent's staff preferential rates to commercial rates.
- b. THAT the Honorable court does issue such orders and give such directions as it may deem fit and just to meet the ends of justice.
- c. THAT cost of this application be provided for.

2. The application is founded on the grounds on the face of the motion and supported by the annexed affidavit of Joseph Njagi Mwita sworn on 26th February 2019. In brief, the applicants content that they are former employees of the respondent until they were terminated in February 2018 under a Voluntary Exit Scheme (VES) scheme. That during their employment they obtained secured and unsecured loans under staff preferential interest rates but upon the abrupt separation, the bank has unilaterally decided to reschedule the interest rate from the staff preferential rate of 6% per annum to commercial rate of 13% per annum. The Claimants are apprehensive that unless the injunction sought is granted by this court, the Respondent will effect the said commercial rates on their loans and cause them to default on their loan obligations and ultimately lead to auctioning of their homes.

3. The respondent has opposed the application by the Replying Affidavit of one Vaslas Odhiambo sworn on 8th March 2019 whose main contention is that the claimants voluntarily applied for the VES and exited the Respondent's employment upon mutually agreed terms. That one of the terms agreed was that the claimants would enjoy the staff preferential interest for a grace period of one year after which their outstanding loans would attract interest at commercial rates. He further contends that the said loans were advanced under commercial agreements that is binding on the claimants. That the loan agreements expressly provided that the staff preferential interest rate was only applicable during the claimants' term of office and the employer had the right to upgrade it to commercial rate after the termination of the employment. Finally, he contends that the suit herein is abuse of the court process because the loan agreements contained arbitration clause. He therefore prayed for the application to be dismissed with costs.

4. The application was disposed of by written submissions. The claimants filed theirs on 19.3.2019 and the respondent filed hers on 1.4.2019. When the application was placed before the duty Judge under certificate of urgency on 26.2.2019, interim injunction was granted pending the hearing and determination of the application and order is still in force.

**Applicants' submissions**

5. The applicants submitted that in granting the interim reliefs sought, the court is supposed to consider whether there a prima facie case with probability of success; whether the applicants stand to suffer irreparable harm if relief is denied; and to which side the balance of convenience tilts. That in responding to prayers for interlocutory relief, the court should always opt for the lower rather than the higher risk of injustice. They urged the court to balance between recovery of the suspended interest rates from the claimants in the unlikely event the claim is unsuccessful; and Selling of the applicants' homes for failure to service the facilities on the new enhanced rates and later finding that

the variation and separation were all irregular in the circumstances.

6. They submitted that the Respondent embarked on a massive closure of its branches to ensure that it remained relevant in the market industry and as a result of which she put pressure on the poor performing staff to exit through the VES as a softer landing. However, the applicants denied that they were consulted before the VES as alleged by the respondent in her replying affidavit and contended that the terms and conditions of the VES contained in the email **exhibit JNM1** had fundamental non-disclosure of the following material facts:

- a. They were not told that their credit cards would be tampered with;
- b. There was no disclosure that they would be burdened with costs such as stamp duty, legal fees etcetera and this had material effect to the claimants' right to property;
- c. The emails as sent do not talk of any representations by the claimants or their representatives to be held;
- d. The labour office was entirely not involved in the process;

and

- e. There is no known policy in place to guide this process called VES.

7. The applicants submitted that the suit is properly before the court and the court has jurisdiction because the dispute involves Loans granted to the claimants as employees and at staff rates and repayment period/terms were unilaterally altered by the Respondent. They further submitted that **Section 87(1) and (2) of the Employment Act** and **section 12(1)(a) of the Employment and Labour Relations Court Act Cap 234B** vests jurisdiction on this court to determine all the disputes between employees and employers.

8. They further submitted that the court has a duty under article 40 of the constitution to protect the right to property and if the orders sought are not granted the Respondent will dispose the charged properties and no amount of compensation would be adequate. They contended that the court has not been told what prejudice the Respondent stands to suffer in the event the application is granted and submitted that the Respondent will lose nothing if the implementation of the new rates is put on hold pending the hearing and determination of the suit.

9. The applicants further submitted that their suit has high chances of success in the following four issues to be interrogated in the main claim:

- i. Voluntariness or otherwise of the VES process.
- ii. The unilateral conversion of loan rates from staff preferential rate 6% rate to commercial rate of 13%
- iii. Equality of bargain in the VES process and the ordinary meaning of the word voluntary.
- iv. Withholding of gratuity pay to some applicants.

10. Finally, they admitted that an employer who grants an employee a loan on preferential terms can vary the terms once the employment ceases to exist but contended that, there is a basic assumption in all such cases that the employment relationship terminates within the law. That, if there exists a whiff of unlawfulness in the termination of employment, then the employer's right to withdraw the preferential loan facility as advanced to the employee is withheld.

11. They relied on **section 4(3) of the Fair Administrative Action Act 2015** there is a threshold of the requirements to be availed to any person who stands to be affected by a decision as follows. Thus:

**4(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-**

- a. prior and adequate notice of the nature and reasons for the proposed administrative action.**
- b. an opportunity to be heard and to make representations in that regard;**
- c. notice of a right to a review or internal appeal against an administrative decision, where applicable;**
- d. a statement of reasons pursuant to section 6;**
- e. notice of the right to legal representation, where applicable;**
- f. notice of the right to cross-examine or where applicable; or**
- g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.**

12. They prayed for the application to be allowed urging the court to take into account the principle of proportionality.

### **Respondent's submissions**

13. The respondent submitted that flowing from **Giella v Cassman Brown** the applicants have not proved a prima facie case with probability of success and that irreparable harm will be occasioned to them if the order sought is withheld. She therefore urged that the interim order of injunction should not be confirmed.

14. The documents on record show that the claimants voluntarily applied for the VES 2018 and specifically referred to the application letters at pages 30 to 34 of the Replying affidavit. She submitted that the claimants have not adduced any evidence to prove that they were intimidated to apply for the VES.

15. The claimants were well aware of the terms of the VES before they applied for the same and later accepting the offers. She submitted that the terms of the VES with respect to interest rates and securitization of the unsecured loans (the crux of the application herein) were clearly captured in at least five documents, namely, VES 2018 Circular; Letters of Offer from her to the claimants; Each claimant's Acceptance forms accepting the VES offer and settlement of loans; Frequently asked questions accompanying the VES 2018 Circular; and Minutes of the consultation exercise done through Joint Working council.

16. The claimants are by their own choice no longer employees of the respondent and cannot benefit from preferential interest rates, which are employment benefits. She submitted that preferential interest rates are fringe benefits and they fall away with the termination of the employment contract. In addition, she submitted that clause 2 of all her staff loans and conditions provided that the staff preferential interest rates shall cease immediately the borrower exits employment for whatever reason unless the bank otherwise agrees in writing. She relied on **Fadhil Juma Kisua & another v Kenya Ports Authority [2015] eKLR**, **Evans Oliver Olwali v Standard Chartered Bank Limited [2018] eKLR** and **Erick VJ Makhokha & 4 others v Lawrence Sagini & 2 others [1994] eKLR** to support the foregoing submission.

17. The application for the interlocutory injunction has been made after unreasonable delay and it is an abuse of process of the court calculated to evade a binding agreement freely entered into.

18. Finally, the respondent submitted that the balance of convenience tilts in her favour because the impugned interest rates was freely accepted, and if the order sought is granted and later the suit is dismissed she will face more difficulties in recovering the lost interest from the claimants.

### **Analysis and determination**

19. After careful consideration of the rival affidavits and submissions presented to me, the issue for determination herein is whether the applicant has met the threshold for granting interlocutory injunction as enunciated by the Court of Appeal in **Giella -vs- Cassman Brown & Co. Ltd. [1973] E.A. 360** that:

**“The conditions for the grant of an interlocutory injunction are now settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”**

### **Prima Facie Case**

20. The Court of Appeal defined Prima facie case in **Mrao Ltd. -vs- First American Bank of Kenya Ltd. & 2 Others [2003] KLR 155** as follows: -

**“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.”**

21. In this case, the applicants have alleged that their employment was unfairly terminated by the respondent who also unilaterally decided to upgrade the interest rate on their loan facilities from the staff preferential interest rate to commercial rate. The respondent has however contended that the claimants voluntarily applied for the VES 2018 and accepted the terms offered by her regarding interest rates on their outstanding secured and unsecured loans. She further contended that clause 2 of all her staff loans terms and conditions provided that the staff preferential interest rates shall cease immediately the borrower exits employment for whatever reason unless the bank otherwise agrees in writing.

22. I have carefully considered the rival affidavits and submissions filed by both sides. There is no doubt that the claimants applied for the VES 2018 vide exhibit VO-5 and the respondent accepted by exhibit VO-6 stating the terms for the for the VES including the mode of loan settlement and the migration of interest chargeable from staff preferential rate to commercial rate after a grace period of 12 months. It is further without doubt that the claimants accepted the said terms of the VES unconditionally by signing the Acceptance Form annexed to the VO-6 and thereby voluntarily created a binding contract.

23. I would agree with the respondent's contention that the decision to apply commercial interest rates on the claimants' loans was within her discretion and in line with the agreed terms of the loan agreements between her and the respective claimant. Clause 2 (c) of the Staff loan

terms and conditions provided as follows:

**“The Bank may charge 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 otherwise agrees in writing.”**

24. Having all facts in consideration, I am of the considered view that preferential interest rates on staff loans are at the discretion of the employer and they fall away with the termination of the employment relationship. The foregoing view is fortified by **Evans Oliver Olwali v Standard Chartered Bank Limited [2018] eKLR** where Ongaya J expressed himself as follows:

**“In the present case there was no dispute that the preferential staff interest rates subsisted on account of the employment relationship. There was no dispute that the contract of employment between the parties had been terminated. The court considers that the fringe benefit of preferential staff interest rates would resurrect only upon reinstatement or such other lawful justification after the hearing of the suit.”**

25. In this case, the claimants have not prayed for reinstatement and as such, there are zero chances for them becoming employees of the respondent even if their suit for unfair termination was successful. It follows therefore that granting the interlocutory injunction sought, in order for the claimants to continue paying the preferential staff interest on their loan would not serve the interest of justice because the claimants are not even desirous of going back to the respondent’s employment.

26. Having found that preferential interest rates on staff loans are for the serving employees and at the discretion of the employer, and having found that the claimants voluntarily accepted the terms of their respective loans and the VES terms on their outstanding loans, and further having found that the claimants’ employment with the respondent has since been terminated and they are not seeking reinstatement to their employment, I return that the decision by the respondent to apply commercial interest rates on their outstanding loans is lawful and does not infringe on their rights under their loan agreements. Flowing from the foregoing holding, I further return that the applicant has not proved a prima facie case with probability of success to warrant granting of the injunction sought.

#### **Irreparable harm**

27. Having found that the applicant has not established a prima facie case with probability of success, I see no point of considering the issue of irreparable harm because the principles of granting interlocutory injunction are by their nature cumulative.

#### **Conclusion and disposition**

28. I have found that the applicants have not proved a prima facie case with probability of success because first, they voluntarily accepted the terms of their respective loans which allowed the bank to apply interest at commercial rates once the employee exited the bank for whatever reason; second they voluntarily accepted the terms of the VES 2018 on the application of interest at commercial rates on their outstanding loans after a grace period of 12 months; and finally, they have ceased being employees of the respondent and they are not suing for reinstatement and as such the order sought is not in the interest of justice. Consequently, I dismiss the application. Costs in the cause.

**Dated, Signed and Delivered in Open Court at Nairobi this 24th day of May 2019.**

**ONESMUS N. MAKAU**

**JUDGE**