



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL PETITION NO. 62 OF 2018**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF THE RIGHTS  
IN ARTICLES 19,20,21,27,41,43 & 47 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF  
ARTICLES 2,3 & 10 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: THE EMPLOYMENT ACT (2007)**

**AND**

**IN THE MATTER OF: SECTION 4,7,10(1), 11 & 12 OF THE  
FAIR ADMINISTRATIVE ACTIONS ACT NO.4 OF 2015.**

**BETWEEN**

**DANIEL MWANYASI MWALWALA.....APPLICANT**

**VERSUS**

**BARCLAYS BANK OF KENYA LIMITED.....RESPONDENT**

**RULING**

**Introduction**

1. The Application before the Court is the petitioner's Notice of Motion dated **26th March, 2019**. It is brought under Articles 22, 23 (3) and 258 of the Constitution of Kenya, 2010, the Employment and Labour Relations Court (Procedure) Rules, 2016, the inherent Jurisdiction of the Court and all the enabling provisions of the Law and it seeks for the following Orders **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 charging interest rate on the House Loan facility, at any other rate of interest save for the allowed charges for staff accounts and the interest staff rate of 6% and further repossessing, offering for sale, selling, transferring, disposing of or in any other way alienating or encumbering his family home which is **LR. No. 209/17129 in Nairobi County**.
- b. That the Applicant be at liberty to apply for such further or other orders and/or directions as this Honourable Court would deem fit and just to grant.
- c. That Costs occasioned by this Application be borne by the Respondent.

2. The Motion is supported by the affidavit sworn by Daniel Mwanyasi Mwalwala deponed on 26th March, 2019 and is premised on the following grounds:

- a. That the Constitution and legal rights of the Applicant will be greatly violated.
- b. That vide communication dated 18th January, 2018 the Respondent initiated voluntary Exit Package that affected the applicant economically leaving him without dignity.
- c. That the Respondent's Line Manager pressured or put under duress the Applicant to take the Voluntary Exit Package or he will be at risk of losing his employment benefit in the event he appealed against the performance rafting of 2017.
- d. That fear of the losing of his employment benefits and limited amount of time the applicant was supposed to submit the Application made him to apply for Voluntary Exit Package against his wish.
- e. That on 6th February, 2018 the Applicant's Line Manager informed the Applicant that his Application for Voluntary Exit Package had been successful since he lobbied for the approval.
- f. That the Voluntary Exit Package was completely rolled out in February, 2018, which allowed the applicant to continue to repay his loan at staff rate until march 2019 when the Applicant loan interest rates will change from staff rate of 6% to customer rate of 14%.
- g. That the Respondent will greatly endanger the Applicant's economic and social rights and his right to redeem his home on LR No. 209/17129 in Nairobi County by converting the Applicant's staff loan from staff rate of 6% to customer rate of 10.00 plus a margin of 4.00% and further violates the Applicant's legitimate expectation of repaying the loan at staff rate until payment in full.
- h. The Applicant is willing to continue repaying the loans at staff rate until payment in full as previously agreed upon by the parties despite his current state of unemployment.
- i. If the Orders sought are not granted, the Applicant risks loss of his matrimonial home.
- j. It is meet and just for the purposes of justice and equity and the overarching purpose of constitutional integrity, to make the orders sought.

3. The Respondent opposed the Application vide the Replying Affidavit sworn by **VASLAS ODHIAMBO**, her Head of Employee Relations, on **3rd April, 2019**. In brief he deposed that the instant application raises the same issues as those raised in the main Petition and as such he reiterated the averments made in the Response to the Petition and cross petition dated 23rd July, 2018 as well as the Further Affidavit dated 4th March, 2018.

4. He further contended that the Petitioner's employment was terminated on 28th February, 2018 by his own voluntary action and after voluntarily agreeing to the terms of VES. That the application is overtaken by events since 12 months' grace period has lapsed since the separation and the interest rates has already changed from staff preferential rates to commercial rates. That the Petitioner/Applicant having left the Respondent's employment is not entitled to the staff interest rate on his outstanding loan. That the application is an after-thought, devoid of merits, filed in bad faith and ought to be dismissed with costs.

5. The application was disposed of by written submissions.

#### **Applicant's Submissions**

6. The Applicant submitted that this Honourable Court has jurisdiction to entertain the instant Application by virtue of Article 162 (2) of the Constitution of Kenya and relied on **Boniface Lum Amunga Biko Vs National Bank of Kenya Limited (2017) eKLR** and for emphasis. He further submitted that the concept of employer/employee relations as set out under Section 12 (1) of the ELRC Act is just but one element of the Court's jurisdiction and contended that Section 12 of the ELRC Act ought to be read widely to include other incidental relations that arise between the parties to a contract of service such as loans. He further relied on **Banking Insurance & Finance Union (Kenya) Vs National Bank of Kenya (2016) eKLR** where the court held that reverting from staff interest rates to commercial rate after the termination of employment relationship is done on the basic assumption that the separation was done within the law.

7. The Applicant further contended that he has fulfilled all the requirements for granting of the Orders as sought in the instant Application as highlighted in the case of **Giella Vs Cassman Brown & Co. Ltd (1973) EA 358**. He urged the Court to find that all the principles of granting of injunction have been satisfied herein and grant the reliefs as sought. He relied on **Benedict Abonyo Omollo Vs Judicial Service Commission (2015) eKLR** for emphasis.

8. He further submitted that, at the time of applying for the staff loan, he had legitimate expectation that for the duration of servicing his staff loans he would still be working for the Respondent and would continue to service the loan at the staff rates. He urged the Court to find that he ought to continue paying the facility at the staff rates and relied on **Oindi Zaippeline & 39 Others Vs Karatina University & Another (2014) eKLR**, **Nazarene Nyaga & 78 Others Vs Barclays Bank of Kenya (2018) eKLR**, **Fredrick O. Kombija Vs National Bank of Kenya (2018) eKLR** and **Boniface Lum Amunga Biko Vs National Bank of Kenya Limited (20147) eKLR** for emphasis.

#### **Respondent's Submissions**

9. The Respondent submitted that the instant Application is made in bad faith and is overtaken by events as the commercial rates on the Petitioner's facility took effect on 28th February, 2019 upon the lapse of a twelve months' period provided for in the Applicant's Exit letter.

That the application is also brought with unclean hands as the applicant has withheld from the court the information about the taking effect of the commercial rates on his outstanding loan.

10. The Respondent further submitted that the application lacks merit and ought to be dismissed since it has failed to meet the conditions for the granting interlocutory orders as set out in **Giella Vs Cassman Brown**. That the Petitioner applied for Voluntary Exit Scheme which was duly accepted; that he was fully aware of the terms of the VES at all times; that he is no longer an employee of the Respondent Bank by his own choice, and does not seek reinstatement in his suit, and therefore he cannot benefit from preferential interest rates which are benefits for employees only. It relied on the Court of Appeal decision in **Erick VJ Makokha & 4 Others Vs Lawrence Sagini & 2 Others (1994) eKLR**, and this court's decision in **Evans Oliver Olwali Vs Standard Chartered Bank Limited (2018) e KLR** and **Michael Alwema Kilumbi v Barclays Bank of Kenya limited [2018] e KLR** to emphasize that preferential treatment to staff ceases with the termination of the employee-employer relationship.

11. In addition to the foregoing, the respondent submitted that the applicant will not suffer irreparable damage if the order sought is denied; that the Applicant is guilty of laches as he has approached this Honourable Court more than a year after the separation to seek the discretionary protection of the Court having left the Respondent's employment on 28th February, 2018; and that granting the Orders sought in the instant Application would be prejudicial to the Respondent and would only aid the Applicant to frustrate the Agreements between him and the bank.

### **Analysis and determination**

12. After considering the application, affidavits and the submissions filed by the parties, the issue for determination is whether the application meets that threshold for granting interlocutory injunction as enunciated by the Court of Appeal in **Giella –vs-Cassman Brown & Co. Ltd. [1973] E.A. 360** thus:

**“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**

13. A prima facie case was described by the Court of Appeal 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.”**

14. In the instant case, the applicant has alleged that he was pressured into applying for Voluntary Exit Scheme (VES) which was duly accepted by the Respondent herein bringing his employment to an end on 28th February, 2018. However, the Respondent denied the alleged pressure and contended that the applicant voluntarily applied for the VES 2018 and accepted the terms offered by her regarding interest rates on his outstanding loans.

15. I have carefully considered the rival affidavits and submissions filed by both sides. There is no doubt the respondent's Managing Director published a Circular dated 18.1.2018 inviting employees to apply for VES 2008; that the Applicant applied for the VES 2018 on 31.1.2018; that the application was duly accepted by the respondent vide the offer letter dated 6.2.2018 which set out the exit terms; and that the applicant accepted the said exit terms in the offer letter by signing the Acceptance Form annexed to the offer letter. There is further no doubt that one of the exit terms accepted by the applicant was that his outstanding loan would continue attracting interest at staff preferential rate for a period of 12 months from his exit date and then revert to commercial rates.

16. In view of the foregoing circumstances, it obvious that the VES agreement between the parties herein constituted a valid and binding contract at common law. Although the applicant alleged that the contract was vitiated by undue influence from his Line Manager, such allegation has not been substantiated by evidence. In any event, the VES was not an event but a process which took almost a month to end and it involved exchange of several correspondences which were not shown to have been done in the presence of the said Line Manager. Consequently, I return that the applicant has not proved on a balance of probability that his legal rights was breached by the respondent through the VES agreement so as to constitute a prima facie case as described by the Court of Appeal in the **Mrao Limited case**.

17. Having found that the applicant has failed to prove a prima facie case with probability of success, there is no point considering whether or not irreparable harm will be occasioned on the applicant if injunction is declined. The principles of granting interlocutory injunction are cumulative in nature and once a prima facie case with probability of success is not proved, the application must fail. Consequently, I return that the application herein lacks merits and is declined.

18. 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.”**

19. In this case, the Applicant has not prayed for reinstatement and as such, there are zero chances for him becoming an employee of the respondent again even if his suit for unfair termination was successful. It follows therefore that granting the interlocutory injunction sought, in order for the Applicant to continue paying the preferential staff interest on their loan would not serve the interest of justice because the applicant is not even desirous of going back to the respondent’s employment. Likewise the exercise of the Power of Sale by the respondent cannot be restrained because it has not been proved that the respondent has infringed the applicant’s rights under the loan contract.

#### **Conclusion and disposition**

20. I have found that the applicant has not proved a prima facie case with probability of success because he voluntarily accepted the terms of the VES 2018 on the application of interest at commercial rates on his outstanding loans after a grace period of 12 months.

Consequently, I dismiss the application with costs.

**Dated, Signed and Delivered in Open Court at Nairobi this 21st day of June 2019.**

**ONESMUS N. MAKAU**

**JUDGE**