



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 846 OF 2014**

**BANKING, INSURANCE AND FINANCE UNION (KENYA).....CLAIMANT**

**VERSUS**

**NATIONAL BANK OF KENYA LIMITED.....RESPONDENT**

**RULING**

Before this Court is the Claimant's Application dated 17<sup>th</sup> January 2019. The Claimant seeks the following Orders:

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2. That the Court do issue interim orders restraining the Respondent by themselves or their recognized agents or principals from selling and/or attempting to sell by public or private auction the property of David Ndungu Maina of P. O. Box 4942 00100 Flat No.A5 on LR No. 8226/201 (Shefa Court, Kahawa Wendani) within Kiambu County.

3. That the Court do issue orders prohibiting the sale of the above-named property until the hearing and determination of the main claim in the Cause herein where Mr. Maina is one of the Claimants.

4. That the Court do award costs of this Application in favour of the Applicants/Claimants.

The motion is supported by the Affidavit sworn by Joseph Ole Tipape and is premised on the grounds, as outlined in the said motion together with the affidavit: the Respondent's auctioneers, Direct "O" Auctioneers issued the 45 Days Redemption Statutory Notices together with Notices of Sale and Schedules stating that the property will be sold on 24<sup>th</sup> January 2019. That the Respondent's attempt to sell the grievant's property by public auction is mischievous as it pre-empts the outcome of the Cause herein. Further, the Respondent is not harassing its former employees to service their loans.

The Applicant avers that the grievant was granted a staff loan on the basis of being an employee of the Respondent and it would be in the interest of justice to await the court's verdict in the cause herein. That if the grievant is reinstated, re-engaged or compensated, he will continue to service his loans until payment in full and if the loans are not cleared, then the Respondent would rightfully recover the outstanding loan balances. Further, the Respondent has possession of the title deed for the said property and stands to suffer no loss in the event the loan is not fully settled.

The Applicant avers that the amount demanded by the auctioneers of Kshs.5,560,398.78 has been arrived at after levying exorbitant interest rates.

The Respondent opposed the Application vide the Grounds of Opposition on the grounds that: the orders sought in the Application are not anchored on the pleadings, the Applicant failed to disclose that he failed to service the outstanding loan and that the Application has been made in bad faith and therefore an abuse of the court process.

The Respondent further filed a Replying Affidavit of Michael M. Mwita wherein the Respondent avers that the Applicant's Amended Memorandum of Claim filed on 1<sup>st</sup> August 2017, deleted prayer (vii) and (viii) and as such the issue of the grievant's property was not pleaded as rightfully held in the Ruling issued on 13<sup>th</sup> April 2018.

The Respondent further avers that the grievant started defaulting in his loan payments which led to the issuance of 30 days demand notice dated 10<sup>th</sup> July 2015, 90 days Statutory Notice issued on 11<sup>th</sup> October 2016, 40 days' Notice of Intention to sell issued on 2<sup>nd</sup> March 2017 and which was extended for 1 month and the issuance of the Redemption notice which is the subject of this Application. As at 6<sup>th</sup> February

2019, the grievants had debt in the sum of Kshs.7,291,855.85 and arrears of Kshs.6,778,537.31. The Respondent has made futile attempts to have the loan repaid. Further, the Applicant has not denied that the grievant is indeed indebted to the Respondent.

The Respondent asserts that the recovery efforts have been made legally and procedurally.

The parties made their submissions orally before this Court.

### **Determination**

The issue before this Court for analysis is whether the Applicant is entitled to the orders sought.

On 23<sup>rd</sup> October 2015, the Applicant filed an Amended Memorandum of Claim where it introduced properties L.R. Number Uasin Gishu/Kaptagat/410 and Nandi/Kamobo/4474 owned by Esther Koskei Rono and Ngong/Ngong/54262 owned by Titus Nderitu into the proceedings. However, the Applicant filed another Amended Memorandum of Claim on 1<sup>st</sup> August 2017 which deleted paragraphs (vii) and (viii) regarding the above noted properties. As such, the orders sought in the Application herein are sought in *vacuo* as the property in question has not been pleaded in the substantive Claim. This was also the position in the Ruling of Radido J. delivered on 13<sup>th</sup> April 2018 and a ruling on the review thereof on 23<sup>rd</sup> November 2018 when he was faced with a similar Application in the cause herein.

Further, the Applicant has not refuted that the grievant is indebted to the Respondent for the sum claimed by the Auctioneers, which remains outstanding to date. An employee should not cease to repay a loan even upon the termination of their employment. Although the issuance of staff loans is a benefit accorded to employees because of the existing employment relationship, it is still an agreement whose terms should be adhered to. In my view, an employee should always foresee an eventuality such as termination of employment thereby putting in place certain mechanisms to ensure that their loan repayment is not affected by their termination. In addition, where an employee is unable to furnish the loan as expected, then they should notify their former employer and possibly renegotiate the loan terms.

In the case of **Francis Kalama Mulewa v Kenya Commercial Bank [2015] eKLR** the Court held as follows:

*“The last issue to consider is whether the Respondent should be restrained from selling the suit premises in exercise of his Statutory Power of Sale to recover the outstanding loan and whether the court should award damages to the claimant in respect of the loss he has allegedly suffered when his loan balance of KShs.706249.81 was converted from staff loan to commercial loan and interest changed from 7% to 20% per annum. ... The Claimant accepted the offer in writing and signing on all pages of the letter. The claimant has admitted that he has defaulted in his loan repayment since the day he was dismissed from employment. According to him the staff loan was only repayable by salary. No legal or factual basis was shown to support the foregoing allegation. The court therefore find and holds that the claimant breached the terms of the loan contract and the court will not come to his aid. The only ground upon which the court can interfere with contracts like the one before the court is when there exists a mistake or misrepresentation of material facts. In this case the claimant neither pleaded nor proved any mistake or misrepresentation.”*

The prayer for injunction to restrain the Respondent from enforcing their rights under the contract is not supported by any valid reason. There is no evidence before the court to show that the Respondent breached the law or the Applicant's rights in a bid to recover its debt, or in any other manner.

The only prayer that perhaps if brought would have been considered by the court is the issue of interest as a staff benefit, which is however not prayed for in the application.

In the circumstances, the application is dismissed.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14<sup>TH</sup> DAY OF JUNE 2019**

**MAUREEN ONYANGO**

**JUDGE**