



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 1201 OF 2018**

*(Before Hon. Lady Justice Maureen Onyango)*

**MOSES KINGORI NDUNYU.....CLAIMANT**

**VERSUS**

**CHOICE MICROFINANCE BANK LIMITED....1<sup>ST</sup> RESPONDENT**

**SIMON GACHUNIA.....2<sup>ND</sup> RESPONDENT**

**RULING**

The Applicant's employment was terminated on account of poor performance. Aggrieved, the Applicant has filed the instant Notice of Motion Application seeking the following orders:

- a. Spent.
- b. That an order do issue by way of temporary injunction against the Respondent's herein, their agents, servants and/or persons claiming under their title from in any way legally interfering with the Applicant's employment and position as Chief Executive Officer of the 1<sup>st</sup> Respondent, not to fetter his access to the offices pending the hearing and determination of the Application.
- c. That an order do issue by way of temporary injunction against the Respondents herein their agents servants and/or persons claiming under their title from in any way illegally interfering with the Applicant's employment and position as Chief Executive Officer of the 1<sup>st</sup> Respondent, not to fetter his access to the offices pending the hearing and/or determination of the suit.
- d. That the costs of the Application be provided for.

The Application is supported by the Affidavit of Moses Kingori Ndunyu, the applicant. The Respondents opposed this Application vide the 2<sup>nd</sup> Respondent's Replying Affidavit.

Further, pursuant to the orders issued on 20<sup>th</sup> July 2018 restraining the Respondents from illegally interfering with the Applicant's employment as CEO of the 1<sup>st</sup> Respondent pending *inter partes* hearing of the same, the Respondent filed a Notice of Motion Application dated 25<sup>th</sup> July 2018 seeking the following orders:

- a. Spent
- b. That the Court be pleased to forthwith stay execution of the *ex parte* orders issued by this Honourable Court on 18<sup>th</sup> July 2018 restraining the Respondent from interfering with the Claimant's employment pending the hearing and determination of this application.
- c. That the Court be pleased to vacate/ discharge and/or set aside the *ex parte* orders issued on 18<sup>th</sup> July 2018.
- d. That costs of Application be provided for.

The Applicant's case is that on 10<sup>th</sup> July 2018, unknown to him and while he was out of the office on official duty, the 2<sup>nd</sup> Respondent

convened a management meeting and informed those present that the Board had resolved to terminate the Applicant's contract and appoint Joseph Njeru as the acting CEO. He was notified of the same via a telephone call.

It is the Applicant's position that the 2<sup>nd</sup> Respondent's actions were driven by malice. That he has real apprehension that unless the 2<sup>nd</sup> Respondent is restrained, he will illegally terminate the Applicant's employment occasioning serious harm to his reputation as a banker.

The Respondent's case on the other hand is that the Orders issued on 18<sup>th</sup> July 2018, are incapable of enforcement since the Applicant is no longer an employee as his services were terminated on 17<sup>th</sup> July 2018, a fact not in dispute. As a result, the Respondents risk institution of contempt proceedings against them.

Parties filed their written submissions and thereafter highlighted the same in Court. The Applicant submitted that there was no board meeting held at which the termination of his employment was recommended and that he was never summoned to attend disciplinary proceedings. He further submits that the termination letter dated 17<sup>th</sup> July 2018 is a forgery which was written after the expiry of his demand letter and after the respondents learnt that they had been taken to Court.

The Applicant submits that he has met the threshold set out in *Giella vs. Cassman Brown [1973] EA 358* as he has established a *prima facie* case, has demonstrated that he will suffer irreparable damage if the injunction is not granted and that the balance of convenience favour the granting of the orders sought. He further submits that there is no hindrance to enforcement of the orders sought as his office is still vacant.

The Respondent submitted that the Applicant had not established a *prima facie* case to justify the grant of an injunction and further that the orders sought were not capable of enforcement since by the time the matter was placed before Court on 18<sup>th</sup> July 2018, the Claimant's employment had already been terminated.

### **Determination**

The criteria for granting temporary injunction was set out in *Giella v Cassman Brown [SUPRA]* as:

*"... 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 for damages. Thirdly, if the Court is in doubt, it will decide an application on a balance of convenience."*

The Applicant has argued that the termination letter was forged and only written by the 1<sup>st</sup> Respondent when it learnt that a cause had been instituted. On the other hand, the Respondents submit that the letter was first sent on email and thereafter sent on post, and the Applicant filed this Application as a means of evading the eventuality of termination. At page 24 of the annexures to Simon Gachunia's Replying Affidavit, there is an email from Faith Kosilbet to the Applicant clearly indicating that the Claimant's termination letter was sent to him via email. There is also a pdf attachment in the email which can only be presumed to be the termination letter.

In my view, this is clear evidence that the Applicant had knowledge of his termination as he was filing this Application. It is this Court's procedure that when a Certificate of Urgency is filed after midday, it is heard on the next day. The Application though filed on 17<sup>th</sup> July 2018, was before Court on 18<sup>th</sup> July 2018. As such, I believe that by the time this court's orders were granted on 18<sup>th</sup> JULY 2018 the claimant's employment had already been terminated.

The court in *Anita Cheleagat O'donovan & 2 others vs. Fredrick Kwame Kumah & 2 Others [2015] eKLR* held that –

*"In this matter to issue orders for injunction would be after the matter has been overtaken by events. Orders may not be made which cannot be enforced or which may be ineffective for practical purposes. This was the position reiterated in KalyaSoi Farmers Cooperative Society v Paul Kirui & Another (supra), it was held inter alia;*

*"As is said, "Equity, like nature, will do nothing in vain." On the basis of this maxim, Courts have held again and again that it cannot stultify itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes. If it will be impossible to comply with the injunction sought, the Court will decline to grant it."*

I have also noted that the Affidavit of service sworn by Francis Maina Mithamo indicates that he served the Court Order upon the Respondents on 20<sup>th</sup> July 2019.

For the Court to conclusively interrogate these competing assertions, it will be necessary to examine the evidence such as witness testimonies which cannot be done at the Application stage and which have not been conclusively addressed in the submissions. Further, the prayers sought by the Applicant in the instant Application are similar to those in his claim. He will suffer no irreparable loss if the Application is not granted as he can be compensated by way of damage, in the event his claim succeeds. The prayers sought are:

- a. A declaration that the Claimant's alleged termination and/or reorganization of staff structure was unlawful.
- b. That the verbal notification by the 2<sup>nd</sup> Respondent of the Claimant's (sic) be and are hereby rescinded.
- c. A permanent injunction be as (sic) hereby issued against the 2<sup>nd</sup> Respondent or persons acting under his title from in any way illegally interfering with the Claimant's employment.

d. Damages for wrongful loss of employment.

e. General damages.

f. Cost of the claim.

**For the foregoing reasons the Applicant's application is dismissed and the Orders issued on 18<sup>th</sup> July 2018 vacated.**

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

**MAUREEN ONYANGO**

**JUDGE**