



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 754 OF 2017

(Before Hon. Justice Hellen S. Wasilwa on 21st March, 2018)

FLORENCE ACHIENG ASETTO.....CLAIMANT

-VERSUS-

FAULU MICROFINANCE

BANK KENYA LIMITED.....RESPONDENT

RULING

1. Before this Court is an application dated 17th August 2017 brought under rule 14 (6) and Rule 17 (1), (3), (5) and (6) of the Employment and Labour Relations Court Rules, 2016, Practice note of 31st May 1984 seeking orders:-

- a) *That this application be certified urgent and service is dispensed within the first instance.*
- b) *That this application be heard during the pendency of the annual vacation by the Honourable Vacation Duty Judge.*
- c) *That pending the hearing interpartes and determination of this application the Respondent, its officers and/or agents be and is hereby restrained from converting, from staff rate to commercial rate, the interest rate concerning the loan the applicant took with the Respondent under the terms of the letter of offer dated 16th December 2014.*
- d) *That pending the hearing interpartes and determination, the Respondent, its officer and/or agents be and is hereby restrained from converting, from staff rate to commercial rate, the interest rate concerning the facility the Applicant took with the Respondent under the terms in the letter of offer dated 16th December 2014.*
- e) *That this court be pleased to grant leave to the Applicant to amend their Memorandum of Claim dated 20th April 2017.*
- f) *That upon grant of prayer (d) above the amended Memorandum of Claim annexed hereto be deemed as duly filed and served.*
- g) *That costs for this Application be in cause.*

2. The Application is supported by the affidavit of **Florence Achieng Aseto** and is premised on the grounds that:-

1. *The Applicant/Claimant took a staff loan of Kshs. 5,400,000/= with the Respondent at a reducing staff interest rate of 9% per annum.*
2. *The Respondent has increased the said staff interest rate to commercial rate following the termination of the Applicant's employment contract.*
3. *The Applicant/Claimant has filed a suit challenging the termination of her employment contract by the Respondent.*
4. *The Applicant's former Advocate inadvertently left virtual issues, pieces of evidence and important prayers that should guide the court in doing justice.*
5. *The applicant is not to blame for the manner in which the memorandum of Claim was drafted.*

6. *That the Respondent stands to suffer no prejudice if application is allowed as they can be granted corresponding leave to amend their statement of Response.*

7. *That in the circumstances it would only be just and fair that the applicant be granted leave to amend the Memorandum of Claim so as to add more relevant information and prayers and enable the court to adjudicate on the real issues in dispute between the parties.*

8. *The application has been brought promptly and in good faith.*

9. *There is imminent danger that the Respondent will permanently increase the interest rate to commercial rate and defeat the prayer of reinstatement.*

10. *No prejudice will be occasioned on the Respondent.*

11. *It is the interest of justice to allow this Application.*

3. In their replying affidavit, the Respondent avers that from the Court order dated 18/08/2017, the Applicant had obtained an order to restrain the Respondent from converting the interest rate of the facility from staff to commercial rate until 21/09/2017 pending the hearing and determination of the Application which neither the Applicant nor her advocate attended Court on the above mentioned dates and she has not made a prima facie case as she has not indicated what injury she is likely to suffer if the prayers sought are not granted and whether the Applicant's injury if any, can be adequately compensated in damages. In view of the foregoing, the Respondent believe that the Application is unmerited.

4. In their submissions, the Applicant stated the replying affidavit of the Respondent where they opposed the application stating that it generally lacked merit and averring specifically that the Applicant is no longer a member of its staff and as such, the staff interest rates do not apply to her, in the interpretation to the loan agreement entered into by the applicant and the Respondent on 16th December 2014 (the loan agreement) is the type of facility described in the loan agreement as staff mortgage loan which is a credit given to borrowers by virtue of their position as employees of the Respondent which under the terms on interest rate, the loan agreement talks about the reducing rate of 9% which is a staff rate that states: **the borrower shall pay interest at a reducing balance rate of 9% p.a. the charged interest rate will, however, be converted to commercial rate immediately upon staff exit from Faulu....** Thus, relying on the wording **'the charged interest rate will, however, be converted to commercial rate immediately upon staff exit from Faulu'** speaks volumes of the intention of the parties. The parties agreed to make the staff interest rate applicable until when the Applicant ceases to work for the Respondent. It was not when the applicant went on a long leave, was on suspension, hospitalized, or challenging termination and seeking reinstatement but when the parties were to separate with no possibility- Judicial or extrajudicial- of coming back together. This principle was espoused in the case of Heritage Consultants Ltd Vs Permanent Secretary, Ministry of Regional Development [2013] eKLR in which Justice Havelock (retired) held:-

"In interpreting the words of the agreement, the Court has to interpret them in their normal, literal meaning in the first instance... in this regard therefore, an arbitration clause must be construed according to its language, in the context of the agreement as a whole and in the light of the circumstances in which it was made".

5. The Respondent terminated the employment contract of the applicant on 28th February 2017 for alleged negligence on performance of duties whereas the Applicant had filed a case, questioning the fairness of the termination and had sought reinstatement to work. In analyzing this concept, the Respondent used the case of Aggrey Lukorito Wasike Vs Kenya Power and Lighting Company Limited [2016] eKLR. In this case the court defined reinstatement as follows:-

"An order of reinstatement means that the employee is restored to the position held, or a position substantially similar to the one held, prior to the removal, or dismissal, or otherwise separation with the employer with full prevailing pay and other benefits".

6. One notorious principle of granting an interlocutory injunction is whether the Applicant will suffer unjustly if the injunction is not granted, in this case, the Applicant has been making monthly loan payments which go directly to the loan account. The court should be in a position to comprehend the strain the Claimant will go through to pay the loan together with the interest at commercial rates and yet it was the fault of the Respondent in pushing the Claimant out of the work place.

7. In seeking leave to amend the memorandum of Claim, other than the general averment that the application lacks merit, the Respondent has not specifically opposed the application and prayer for amendment of the Memorandum of Claim dated 20th April 2017, thus submit that this second limb of the application is unopposed and should be allowed, this is supported in Coffee Board of Kenya Vs Thika Coffee Mills Limited & 2 others [2014] e KLR.

8. The Applicant therefore urges the Court to restrain the Respondent from converting the interest rate to commercial pending the determination of the main suit.

9. In their replying submissions, the Respondent relied on Rule 17 (4) of the Employment and Labour Relations Court (Procedure) Rules of 2016 in submitting that the orders issued by the Honourable Court on 18th August 2017 have lapsed and cannot be extended stating that the Applicant was fully aware of the matter scheduled for directions and failed to attend court to seek extension of the ex parte order and as such the order lapsed, the Respondent used the case of National Social Security Fund Vs John Ochieng Opiyo [2006] eKLR.

10. The injunctive relief must be predicated upon the reliefs sought in a main claim, it is a principle of law that pleadings must as far as possible be concise, precise, clear and definite. The relief sought by the Applicant should have been set out with sufficient precision to enable

the Respondent respond and prepare its case as it may be. Through the amendments, neither the general body nor the prayers of the Memorandum of Claim or the proposed amendments seek an injunction to restrain the Respondent from converting the interest rate from the staff rate to commercial rate concerning the loan the Applicant took. In support of this position, the Respondent placed reliance on the case of **Marta Wangeci Kimani Vs Samuel Kimani Karoki & 5 others [2016] eKLR.**

11. The Applicant failed to demonstrate that she is entitled to injunctive relief, whereby, without prejudice to the forgoing, using the case of **Geilla Vs Cassman Brown** which states that an applicant seeking interlocutory relief must satisfy the court that: a prima facie case exists with a probability of success; irreparable injury shall be suffered that cannot be compensated by costs and that the balance of convenience tilts in his/her favour, the Applicant has not demonstrated a prima facie case with the probability of success.

12. An order restraining the Respondent from varying the rates would be tantamount to the court rewriting the contract between the parties. In the case of **National Bank of Kenya Ltd Vs Pipeplastic Samkolit (k) Ltd & another (2001) eKLR** at Authority 4 of the Respondent's List and Bundle of Authorities at page 21 the Court of Appeal found that parties must be bound by their agreements in so far as interest rate are concerned.

13. I have considered the averments of the parties. The Applicant seeks 2 pronged prayers being:-

1. That the Respondent be restrained from converting the interest rates payable on his loan from staff to commercial rates.

2. That the Applicant be allowed to amend the Memorandum of Claim.

14. The Applicant seeks the first orders stating that she is tactfully paying the loan at the moment without a job and will suffer a greater injustice given that she was dismissed unfairly by the Respondent. I note that for this Court to consider granting the Applicant the order sought, the Court must be satisfied that the Applicant stands to suffer irreparable harm or damage if the orders sought are not granted.

15. The Applicant is currently unemployed having been dismissed by the Respondent on 28.2.2017. She has dutifully been paying the loan at staff rates. She has filed this case alleging unfair and unjustified termination. This claim is still pending before this Court.

16. The Respondents do not stand to suffer great prejudice if the Applicant keeps paying this loan at staff rates.

17. The Applicant however stands to suffer greater prejudice if the application to keep paying at staff rates is denied which may lead to greater default with higher interest rates. This will be a greater injustice if at the end of it the Court finds the dismissal may have been unjustified.

18. In my view, the balance of convenience tilts in favour of allowing the application for the Applicant to keep paying the loan at staff rates, which I allow.

19. The application to amend the claim is not opposed by the Respondent. I will therefore also allow the said applicant and order that the amendments be effected within 30 days.

20. Costs in the cause.

Read in open Court this 21st day of March, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Odhiambo for Claimant – Present

Mulindi holding brief Mss. Omwenga for Respondents – Present