



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1573 OF 2017

(Before Hon. Justice Hellen S. Wasilwa on 28th May, 2018)

VICTOR K. MUTISYA.....CLAIMANT

VERSUS

FIRST COMMUNITY BANK LIMITED.....RESPONDEDNT

RULING

1. The Application before Court is one dated 10th October 2017 brought under Article 10, 21, 22, 23, 27, 28, 41, 50, 159(a) of the Constitution of Kenya 2010, Sections 12, 40, 45, 49 and 50 of the Employment and Labour Relations Court and Rule 17 and 28 of the Employment and Labour Relation Court (Procedure) Rules, 2016 and all other enabling provisions of the law seeking Orders:-

- a. That this Honourable Court be pleased to certify this application as urgent and dispense with the service at the first instance.
- b. That this Honourable Court be pleased to grant an ex-parte interim injunction restraining the Respondent either by itself, servant and/or agents from headhunting, advertising, carrying out interviews, recruiting and employing Head of ICT pending the hearing and determination of this application and the claim herein.
- c. That this Honourable Court be pleased to stop the Respondent from changing the rate of interest of the Claimant's two loan facilities from 6.3% to 14% or any other interest rate and the monthly repayment of the Asset Finance Murabaha Agreement loan from Kshs.32,275.00 to Kshs.37,509.00 pending the hearing and determination of this application and the claim herein.
- d. That pending the hearing and determination of this application and the claim this Honourable Court be pleased to issue an order restraining the Respondent, its employees, servants and/or agents from listing the Applicant with any credit reference bureau on account of the non-performing financial facilities that the applicant had been extended to by the Respondent as an employee of the Respondent.
- e. That this Honourable Court be pleased to order the Respondent to produce for inspection a written record of all the employees fired by the Respondent with all requisite particulars of their job title, grade, salaries after 1st December, 2016 pending the hearing and determination of this application and claim.
- f. That this Honourable Court be pleased to direct the Respondent to issue the Applicant with a certificate of service in terms of the provisions of Section 51 of the Employment Act,2007.
- g. That this Honourable Court be pleased to order the Respondent to reinstate the Applicant as the Group Head of ICT pending the hearing and determination of the claim.
- h. That this Honourable Court be pleased to stop the Respondent from varying the financing rate and the monthly repayment mount of each of facilities advanced to the applicant pending the hearing and determination of the claim.
- i. That cost of this application be provided for.

2. This application is supported by the affidavit of Victor K. Mutisya the Applicant herein and is premised on grounds:-

1. That the Applicant was working as the Head of ICT of the bank until 1st December, 2016 when the Chief Executive Officer of the Respondent, without any prior notification or consultation, terminated him allegedly on grounds of redundancy as a result of a restructuring exercise.

2. The Applicant was not informed of the criteria that the Respondent used to identify and declare him redundant and that despite there being 11 employees in the ICT department he was the only one who was terminated. Up to date, the Applicant does not know the process that the Respondent employed to arrive at the decision to terminate him.

3. Even if the Respondent wanted to carry out a redundancy process as contemplated, due to his seniority in time, acquired skills, reliability and being the only Head of the department he should not have been targeted.

4. In any case, the Respondent did not discuss with the Applicant the issue of alleged high staff costs to try and explore an amicable way of dealing with the problem if at all since the Applicant was not at fault.

5. The Respondent willfully ignored and disregarded Clause 3.7.4 of its Human Resource Policy on Employee Redundancy/Employee Lay-Offs which is categorical that an employee of the Bank can only be laid off when his/her position is temporarily suspended or permanently eliminated by the bank. An employee may also be declared redundant if, as a result of an official structural realignment within the organization, the position he/she is holding ceases to exist. None of these conditions precedent for redundancy to happen had occurred in the case of the Applicant.

6. In spite of the Respondent terminating the Claimant allegedly to reduce staff costs, the Respondent subsequently hired new employees in the Bank to fill the positions with the Claimant's position being taken over by his assistant. In addition, an IT Consultant's services were sought to undertake some of the duties carried out by the Claimant.

7. The Claimant while employed by the Respondent took out two finance facilities at different intervals. The first facility as stated in the letter of offer dated 9th December 2013 and the Musharaka Ending with Ownership Financing Agreement Executed on 17th December 2013 whose financing rate is 6.3% per annum for the purchase of property LR. No 337/2337 Mavoko. The security of this facility was the direct salary assignment in addition to legal charge of the property.

8. The Claimant also took out another facility as stated in the letter of offer dated 16th June 2015 and the Asset Finance Muharaba Agreement executed on 18th June 2015 with the bank's profit in this facility being Kshs. 231,482 for the purchase of motor vehicle registration number KBN 826N with security of the facility being the continued assignment of salary to staff account held by the bank besides the joint registration of the motor vehicle.

9. The bank unilaterally and without any lawful basis varied the repayment terms of the two facilities with effect from 30th June 2017 without prior written notice and contrary to the provisions of facility agreements of the variation of terms that the financing rate of the first facility, the Musharaka financing agreement would be increased to the commercial rate of 14% while the profit of the second facility would be increased to Kshs 37,509.00 from Kshs. 32,275.00 in monthly repayment.

10. The Respondent unilaterally and without granting the Applicant a period to give an alternative repayment method, converted the finance facility rates from staff loans to the commercial market rates, instead of staff terms and rates a few months after the Applicant had lost his source of income as a result of the unlawful and unfair termination on account of redundancy.

11. The Applicant upon, termination, requested the Respondent to defer the commencement of the new facility terms to eight months and six months for the first and second facility respectively but the Respondent never responded. The Respondent has since implemented the commercial lending rates on the facilities thus prejudicing the Applicant after terminating him unfairly.

12. The Respondent still has the ICT Department which is critical in its operations. The Applicant's office and duties cannot be abolished and the Applicant's termination on alleged redundancy was only meant to deny him his contractual benefits.

13. The Applicant stands to suffer prejudice and loss if the Respondent fails to reinstate him as head of ICT at the Bank.

3. The Respondent filed their replying affidavit where they admit that the Claimant/Applicant was their employee as the Head of ICT and that the Claimant took 2 financing facilities with the bank. They aver that the financial rates that the Claimant was enjoying were by virtue of him being an employee and the same cannot be enjoyed when one ceases to be an employee of the Bank.

4. They aver that the Claimant had not been making repayments on his loan account and on or about April 2016, the Respondent started considering a restructuring exercise which idea was informed by the fact that the bank had been making losses and was not performing at its optimal. That through an internal Memo dated 4th November 2016, the Respondent informed all employees of the intended redundancies and the reasons thereof as well as the criteria that was to be used to select the redundant staff.

5. They further aver that through the restructuring exercise, the Respondent successfully reduced employee numbers by 20% and payroll costs by Kshs.10 million per month. The redundancy was not meant to target any staff but was done as part of the business re-alignment measures carried out as it was a necessity.

6. They further state that the Claimant's allegations that he was targeted for termination so that the Respondent could avoid paying the

maturing gratuity payoffs is not true as the Respondent continues to employ individuals who are entitled to the same benefits. The redundancy was carried out in an objective, fair, professional and considerate manner, and none of the positions declared redundant have been advertised.

7. They further state that, the Claimant has been paid all his dues and no terminal dues are outstanding. His prayer for reinstatement is impractical due to the financial and structural considerations discussed and he will suffer no irreparable loss if this application is denied.

Submissions

8. The Claimant submits that the Respondent in their replying affidavit stated that the bank had been making losses but had not exhibited annual financial statements for the years the alleged losses occurred. Therefore he submits that there was no reason to reduce costs, as the Respondent's Head of Finance indicated that the bank had in the first time in history surpassed its budget in profitability hence the main reason by the Respondent for undertaking redundancy was therefore not genuine.

9. He also submits that the Respondent did not follow the due procedure to declare the position redundant as laid out under Section 40 of the Employment Act as no consultations were held. The Respondent alleges that the internal memo dated 4th December 2016 was the notice given to the employees on the intended redundancy and that the said notice does not meet the threshold of Section 40(1)(d) of the Employment Act.

10. The Claimant also submits that he did take out two loan facilities whose terms were a financing rate of 6.3% per annum and a monthly payment of 32,275.00 respectively and in view of the fact that he was unfairly terminated. The provisions of Clause 4.19(e) of the FCB Financing Policy would not apply to him as alleged in paragraph 8 of the Replying Affidavit.

11. The Respondent submit that redundancy is a legal process provided for under Section 40 of the Employment Act, it the Claimant's case that his termination on account of redundancy was unfair and unprocedural is not true as the reconstructing exercise was informed by the fact that the bank had been making losses and was not performing at its optimal and hence the need to improve efficiency and at the same time reduce costs and in this regard they relied on the case of **Peter Mutisya Musembi & Another versus National Bank of Kenya Limited, ELRC Cause No. 1777 of 2014.**

12. They further submit that the Claimant no longer being an employee of the Respondent was not eligible for the financial rates offered to employees as he was well aware of this as the same is clearly set out in Clause 4.19(e) of the Respondent's Financing Policy. This decision is supported by the case of **Banking Insurance & Finance Union Versus National Bank of Kenya ELRC No.846 of 2014** where the said Court dismissed the case in similar applications.

13. The Respondent state that the prayer for reinstatement is in the nature of a mandatory injunction as it is trite law that an order whose effect is to make a final determination of a case can be granted at an interlocutory stage, and therefore pray that the Court will dismiss the application for injunction with costs to the Defendants.

14. I have considered the averments of both parties. The issue for determination is whether the Applicant has established a prima facie case with a probability of success to warrant issuance of orders sought.

15. The Applicant has indicated that indeed he was an employee of Respondent and was terminated on redundancy. He avers that the redundancy was unfairly and unjustly done hence his contention that the loans facilities be left to apply at staff rates since the Respondent was responsible for his termination.

16. Indeed the Applicant if it is found was unfairly terminated, he would have suffered double damage where he would have been terminated unfairly and also be enforced to repay his loans at commercial rates.

17. On a balance of probabilities, it is my finding that the balance will tilt in favour of the Applicant continuing to the interest rates at staff rates that at commercial rates.

18. On issue of barring the Respondent from recruiting his replacement as to the position of Head of ICT, the Applicant has already indicated that the position was filled up by his Deputy hence it would not be necessary to make such an order which has already been overtaken by events.

19. In the circumstances, I grant the Applicant order in terms of prayer (c), (d), (e) and (f) of this claim.

c. "That Respondent is hereby stopped from changing the rate of interest of the Claimant's two loan facilities from 6.3% to 14% or any other interest rate and the monthly repayment of the Asset Finance Murabaha Agreement loan from Kshs.32,275.00 to Kshs.37,509.00 pending the hearing and determination of this application and the claim herein.

d. That pending the hearing and determination of this application and the claim an order is hereby issued restraining the Respondent, its employees, servants and/or agents from listing the applicant with any credit reference bureau on account of the non-performing financial facilities that the applicant had been extended to by the Respondent as an employee of the Respondent.

e. That the Respondent is compelled to produce for inspection a written record of all the employees fired by the Respondent with all requisite particulars of their job title, grade, salaries after 1st December, 2016 pending the hearing and determination of this application and claim.

f. That the Respondent is directed to issue the Applicant with a certificate of service in terms of the provisions of Section 51 of the Employment Act, 2007.

20. Costs in the cause.

Dated and delivered in open Court this 28th day of May, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kamara holding brief for Njomo for Claimant Applicant – Present

Miss Barasa for Respondent – Present