



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1473 OF 2015**

**(Consolidated with ELRC Cause No. 1476 of 2015)**

**PETER MUSEMBI MUTHAMA.....CLAIMANT/APPLICANT**

**VERSUS**

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

**RULING**

**Introduction**

1. The application before the Court is Claimant's Notice of Motion dated 10.1.2018. It is brought under Article 40 of the Constitution and Rule 17(3), (4) (5) and (6) of the Employment and Labour Relations Court Rules (ELRCR) and it basically seeks temporary Injunction to restrain the respondent and/or her agents and servants from selling, dealing, interfering, alienating or disposing of all that land known as **LR. No. MN/11/1513 (C.R. 20377) Mtopanga Estate Mombasa (suit premises)** pending the hearing and determination of this suit. The application is supported by the applicant's own affidavits sworn on 9.1.2018 and 9.2.2018. The gist of the application is that all the secured loan was fully settled and there is no basis for auctioning the suit premises.

2. The Respondent has opposed the application by the replying affidavit Sworn by her Remedial Manager Mr. **Michael Marwa Mwita** on 1.2.2018. The gist of the objection is that there is still outstanding sum from the loans secured by the suit premises and as such the order sought should be withheld.

3. The application was disposed of by filing written submissions. In the first instance, when the application was filed under Certificate of Urgency, Wasilwa, J. granted interim order of injunction which is still in force after it was extended by consent of the parties pending final determination of the application.

**Applicant's case**

4. The applicant submitted that his application has met the conditions required for the grant of an interlocutory injunction as set out by **Giella – vs- Cassman Brown & Co. Ltd. [1973] E.A. 360**, namely prima facie case with probability of success, irreparable injury and balance of convenience.

On the issue of prima facie case, the applicant contended: that by the suit herein he has challenged the process of termination of his employment which has led to the mess of the loan obligation alleged by the respondent for being unfair; that he has repaid all his secured loan by his terminal dues and as such the

suit premises is no longer a security for the secured loan as per annexure MMM – 5b to the Replying Affidavit by Mr. Marwa; that the only outstanding loans are unsecured loans as per Annexure MMM 6 and 7 to Marwa’s Replying affidavit; and that the variation of the interest on the loans from 5% granted to him as an employee was in breach of section 84 of the Land Act 2012.

5. He relied on *Abraham Nyambane Asiago –vs- Barclays Bank of Kenya Ltd. (2013 eKLR* and *Esther Mbinyo Musau –vs- National Bank of Kenya Ltd. [2015] eKLR* to urge that employer has no right to withhold special loan facility advanced to his employee if the employer terminates the employment contract unlawfully. He further relied on *Kisimani Holdings Ltd. & Another –vs- Fidelity Bank Ltd. [2013] eKLR* to urge that the increase of the interest rate and the sale of property through an illegal process would deprive a person his right to own property and lead to irreparable loss or damage.

6. In conclusion it was submitted for the applicant that the balance of convenience favours him because he has fully paid the loan and as such the Order of Injunction sought should be granted.

### **Respondent’s Case**

7. The respondent has submitted: that the applicant has not established a Prima facie case with probability of success because the early retirement was lawful and in line with the Human Resource Policy; that the applicant has outstanding loans which he is bound by a contract to repay whether in employment or not; that the applicant committed himself to clear the outstanding loan but he has not honoured the said commitments and the loans have fallen into arrears; that the allegation that the outstanding loan is unsecured is not true; and that the increase of interest rate from staff rates was based on the law, Human Resource Policy and normal practice, which the applicant was aware of, that upon leaving employment, he was to lose the preferential interest rate offered to the staff to the market rates. In addition the respondent contended that the 10% rebate on the loan balance was given on *ex-gratia* basis and the applicant accepted by his pledge to repay the loan annexed as MMM 5 (a) and (b) to the Replying Affidavit.

8. The respondent relied on *Francis Kalama Mulewa –vs- Kenya Commercial Bank [2015] eKLR* and *Alfred Muthomi Mutiria & 2 Others –vs- National Bank of Kenya Ltd. [2016] eKLR* to urge that a *chargee* is bound to pay the consequences of breaching his loan contract and the Court cannot freeze servicing of a loan because that is against the interest of the lender, the banking industry and the economy of the country in general.

9. As regards the issue of irreparable injury, the respondent submitted that the applicant has failed to demonstrate such injury. The respondent contended; that the applicant has not proved that the suit property is his only source of income; that the applicant was given chance to secure his own buyer for the suit premises but failed to do so; and that by praying for damages in his suit, the applicant has shown that he will not suffer irreparable injury if injunction is withheld. He relied on Peter *Mutisya Musembi & Another -vs- National Bank of Kenya Ltd. [2016] eKLR* to urge that having prayed for monetary award in the suit, the applicant does not meet the requirement of irreparable injury.

10. Finally it was submitted for the respondent that the balance of convenience is in her favour because she has demonstrated that there is a substantial loan balance and if the charged property is not sold at this time the loan will escalate to figures which the applicant will be unable to service, and the value of the suit premises will not be sufficient to clear the arrears. In addition the respondent urged that the applicant has come to equity with unclean hands and he is undeserving the equitable remedy sought.

### **Analysis and Determination**

11. After careful consideration of the rival affidavits and submissions presented to me, the issue for determination herein is whether the applicant has met the threshold for granting interlocutory injunction as it was established by *Giella –vs- Cassman Brown & Co. Ltd. [1973] E.A. 360* where it was held that:

***“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**

12. The Court of Appeal defined Prima facie case 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.”***

13. There is no dispute that the Claimant brought the suit herein challenging the termination of his employment by the respondent on account of early retirement and the terms thereof. The suit alleges that the early retirement was discriminatory, unfair and unlawful and it violated the Kenya Constitution, Employment Act and International Labour Practices. The suit seeks declaration that the applicant was treated differently from his colleagues who were terminated around the same time under a Voluntary Early Retirement (VER) programme that was initiated by the respondent. The treatment in issue included the amount of rebate on staff loans granted to applicant upon his early retirement compared to the employees on Voluntary Early Retirement Program which were both initiated by the employer. The suit also challenges the increase of the interest rate on the loan balance because the termination was not only unfair but also at the initiative of the respondent. In summary, the suit challenges the legality and fairness of the applicant’s early retirement and also the quantum of outstanding loan due from the applicant following the early retirement initiated by the respondent.

14. The applicant’s suit was consolidated with ELRCC 1476 of 2015 on 18.1.2017 when the hearing commenced. The hearing was however interrupted by the application under review when the respondent instructed an Auctioneer to sell the suit premises after the applicant fell into loan arrears. The applicant is of the view that the sale of the suit premises would violate his right to fair hearing of this suit.

15. After careful consideration of material presented to the Court, I am satisfied that the applicant has made out a Prima facie case that warrants the exercise of this court’s discretion in his favour. The foregoing view is fortified by the respondent admission in paragraph 7 of the replying affidavit that as at the time of his retirement on 2.6.2015, the applicant’s secured loan balance was only **Kshs.324,581.63** and that he paid the same from his bank account as per paragraph 7 and 10 of the Replying affidavit and Annexure MMM 5 (b) thereto. Surprisingly Annexures MMM 6 and 7 to the replying affidavit reflect Kshs.19,060.60 as the outstanding balance on the secured loan but the applicant has denied the said new balance and dismissed it as an illegal entry. He maintained that he cleared the whole balance of the secured loan and the suit premises ceased being security for the secured loan.

16. The respondent has not demonstrated by evidence or submissions why the suit premises should be sold to settle the unsecured loans. Consequently, I find and hold that the applicant has proved on a balance of probability, his secured loan was fully paid after retirement and without any justification, the respondent cannot auction the suit premises to recover the unsecured loans before the determination of this suit. This holding should, however, not be mistaken for a freeze on the repayment of the outstanding loans. The applicant is still bound to continue repaying his loans under the respective contracts pending determination of the suit herein and in default, the respondent will have every right to use the appropriate methods to recover her loans.

17. The facts of this case are distinguishable from the facts in ***Francis Kalama Mulewa -vs- Kenya Commercial Bank Limited [2015] eKLR*** because in the said case the claimant caused his dismissal through misconduct while in this case the claimant is an innocent victim of an early retirement initiated by the employer. The said action by the employer was contrary to the reasonable expectation by the applicant to continue in employment and repayment of his loans as per the signed contracts and that is

explained by his failure to sign for VER.

### **Irreparable Injury**

18. The applicant has alleged that he is now solely depended on the rent income from the suit property for his livelihood and the sale of the same to recover the unsecured loans will not only render him financially embarrassed but it will also violate his right to own property under Article 40 of the Constitution. In view of the finding herein above that the suit premises is no longer a security for the secured loan, I agree with the applicant that selling it to recover unsecured loans will amount to violation of his right to own property under Article 40 of the Constitution.

### **Balance of Convenience**

19. After considering the evidence and submissions I am satisfied that the balance of convenience tilts in favour of the applicant because he has shown by evidence that he paid all the loan secured by the suit premises even before the respondent appointed an Auctioneer to sell the same.

### **Disposition**

20. In view of the finding herein above that the application has met the threshold for the grant of interlocutory injunction, I allow the application as prayed. However this is not a freeze on the repayment of the unsecured loan balance by the applicant. He is therefore bound to continue servicing the loans under the respective contracts pending the hearing and determination of the suit herein. Costs of the application shall be in the Cause.

**Dated, Signed and Delivered in Open Court at Nairobi this 10th day of May 2018.**

**ONESMUS N. MAKAU**

**JUDGE**