



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 218 OF 2018

SAMIRA MBARAK AHMED.....CLAIMANT

VS

FIRST COMMUNITY BANK LIMITED.....RESPONDENT

RULING

1. This ruling flows from the Claimant's application brought by Notice of Motion under certificate or urgency dated 10th April 2018 and filed in court on even date.

2. The application is supported by the Claimant's affidavit and seeks the following orders:

a) That the Respondent, her employees, agents, servants, assigns and/or other person acting under her authority be restrained from debiting Kshs. 44,406 as installments, charging levies, arrears, claiming default or in any way dealing with the Claimant's Account No. 00080189 pending hearing and determination of this suit;

b) That the Court declares the unilateral decision to vary the Claimant's loan terms illegal, unlawful, unjust and the Respondent, her employees, agents, servants, assigns and/or any other person acting under her authority be ordered to review their altered loan terms demanding payment of Kshs. 44,406 as monthly installments back to the original terms of Kshs. 27,929 being the original monthly installments calculated on reducing balance.

3. The application is based on the following grounds:

a) That the Claimant is a former employee of the Respondent;

b) That the Respondent unfairly terminated the Claimant's employment on account of redundancy on 30th November 2016;

c) That the Claimant had a loan facility of Kshs. 4,000,000 with the Respondent which she was servicing prior to her termination;

d) That the Claimant bought a residential house on Plot No. 8489 C.R 62308 Section II Mainland North which is charged against the said loan;

e) That the Claimant was paying monthly installments of Kshs. 27,929 prior to her unfair redundancy;

f) That the Respondent undertook to give her a grace period up to June 2017 to restart payment of her installments;

g) That on 30th June 2017, the Respondent varied the terms of the facility to the Claimant by demanding monthly installments of Kshs. 44,406 up from the usual Kshs. 27,929;

h) That the said Kshs. 44,406 is way too much for the Claimant who is currently out of gainful employment;

i) That the installments demanded commenced in June 2017 failing which the Claimant shall be in arrears and/or in default;

j) That the Claimant has tried to prevail upon the Respondent to review her unilateral amendment but in vain;

k) That the Claimant risks:

- i) Having her security, a residential house on Plot No 8489 C.R 62308 Section II Mainland North sold;
- ii) Falling in arrears;
- iii) Being reported to the Credit Reference Bureau;
- iv) Losing all her repayments made so far;
- v) Being kicked out of her residential house on Plot No 8489 C.R 62308 Section II Mainland North together with her family.

l) That it was a term of the said facility that no variation shall be made to the terms of the loan on termination of the Claimant's employment which was not as a result of the Claimant's fault;

m) That the Claimant was terminated on account of redundancy which was not her fault and which she terms as having been unfairly done;

n) That the Claimant reads malice and vendetta on the part of the Respondent in the amendment of her loan terms after the filing of this cause in court;

o) That the application is made with utmost good faith;

p) That it is only fair and just that the orders sought be granted.

4. The prayers sought in this application are a mixture of prohibitive and mandatory injunctions. The conditions under which injunctive orders generally may be granted are spelt out in the celebrated case of **Giella v Cassman Brown [1973] EA 358** and they are the following:

a) That the applicant has demonstrated a *prima facie* case with a

probability of success;

b) That the applicant has shown that they will suffer irreparable injury not adequately compensable by an award of damages;

c) If the court is in doubt it will decide the application based on the balance of convenience.

5. As a rule, mandatory injunctions will only issue in exceptional circumstances (see **Nation Media Group & 2 others v John Harun Mwau[2014] eKLR**).

6. Looking at the Claimant's pleadings in their totality, it is evident that the prayers sought in the main claim are materially similar to those sought in the current application. The question then is whether there are exceptional circumstances to move the Court to determine the Claimant's claim at the interlocutory stage. I think not.

7. First, although the Claimant makes general statements about the illegality of the termination of her employment, which triggered the revision of her loan terms, she did not bother to build a case for unlawful termination. In fact, she makes no prayer for compensation on this score. Second, the Claimant did not come to Court until at least ten (10) months after the revision of the loan terms.

8. For close to a year, the Claimant appears to have acquiesced to the revision of terms, only for her to come to court under certificate of urgency. In the absence of any credible explanation for the delay in bringing the application, the Court could only reach one conclusion; that it is an afterthought.

9. In light of the foregoing, the Claimant failed to convince the Court that she has a *prima facie* case, with a probability of success.

10. On the question whether the Claimant would suffer irreparable harm incapable of being remedied by an award of damages I say this; the Claimant did not demonstrate any real danger of losing her property on account of the revised loan terms. In fact, at the time the application was being prosecuted by her Counsel, the Claimant was up to date with her loan repayments.

11. If the Court does in the end determine that the Respondent was wrong in revising the loan terms, all the money paid by the Claimant would easily be applied towards increasing her shares/units in the *Musharaka* arrangement. That would in my view, address the second condition in **Giella v Cassman Brown** (supra).

12. Having ruled on the first two conditions in favour of the Respondent Bank, the balance of convenience must tilt towards the Bank.

13. The effect is that the Claimant's application dated 10th April 2018 fails and is dismissed with no order for costs.

14. It is so ordered.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 10TH DAY OF MAY 2018

LINNET NDOLO

JUDGE

Appearance:

Miss Mwaka for the Claimant

No appearance for the Respondent