REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 2515 OF 2017

JOSEPH SUDI NDINYO.....1ST CLAIMANT

KAZUNGU MWANGO.....2ND CLAIMANT

- VERSUS -

THE KENYA UTALII COLLEGE.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 29th June, 2018)

RULING

The 1st claimant filed an application on 17.04.2018 through Mang'era & Company Advocates. The application was by the notice of motion dated 16.04.2018 and under Article 22, 23 and 47 of the Constitution, section 37 and 87 of the Labour Institutions Act, Rule 17, 27 of the Employment and Labour and Employment relations Rules and all other enabling provisions of the law. The 1st claimant prayed for orders that upon hearing the application, the Honourable Court be pleased to issue an order restraining the respondents from recovering from the applicant and his loan guarantors any liabilities including outstanding loans owed by the applicant to the respondent until the suit is heard and determined; that the Honourable Court does grant other order that it does deem fit in the circumstances; and the costs of the application be awarded to the applicant.

The application was based on the attached supporting affidavit of the 1st claimant and the 1st claimant's further supporting affidavit filed on 24.04.2018.

The respondent opposed the application by filing on 11.06.2018 the replying affidavit of Hashim Mohamed, the respondent's Principal and through Kiragu Wathuta & Company Advocates.

The 1st claimant's grounds in support of the application are as follows:

a. The respondent has written a demand letter to the 1st claimant and his loan guarantors, who are the respondent's employees, stating that deduction from the guarantor's salary the loan they guaranteed the applicant. The letter demanding payment from the guarantors is dated 10.04.2018 and deductions from the guarantors' salaries towards repayment of the respondent's loan and liabilities were scheduled to start 01.05.2018 (but for the temporary orders stopping commencement of such deduction and repayment by guarantors pending hearing of the application).

b. The 1st claimant has filed the present suit challenging his dismissal on account that it was unfair, malicious and devoid of merit and which suit has not been heard and determined on merits.

c. Leave was granted on 09.03.2018 for the respondent to file a counterclaim in view of the loans in issue but no such counterclaim had been filed.

d. In view of the pending suit, the respondent should not be allowed to recover the loans administratively until the claim is heard and determined on merit as doing so would undermine the due process and authority of the Court.

e. The respondent's claim against the applicant, if any, should be subject of determination in the pending suit.

f. The application should be allowed in the interest of justice and fairness.

g. The respondent operates a housing scheme under which it assists the employees to purchase or complete the construction of

residential houses. In that case the respondent advanced to the applicant a loan for such housing purpose. Under clause 6 of the housing construction loan agreement, in event the applicant left the respondent's employment before the total loan sum has been paid in full the outstanding amount would forthwith become payable by the borrower, the applicant. Further it is provided that if forthwith not paid it shall be lawful for the respondent, without prejudice to any other means of recovery, to deduct outstanding loan from the applicant's service benefits such as salary, pension or gratuity; or to take possession and to sell the property to recover outstanding loan plus interest.

h. Within such arrangement the guarantors under the "**guarantors for housing loan**" signed undertaking to pay the housing loan to the college if the applicant failed to pay the loan for any reason whatsoever. The guarantors included Peter Gitaa, Florence Njau, Wycliffe Kiganda, and Antony Kimutai.

i. The applicant's case was that his failure to repay the loan was caused by the alleged unfair termination of the applicant's employment by the respondent. He had otherwise repaid the loan from his monthly pay and consistently so.

The respondent opposes the application upon the following grounds:

a. The applicant is bound to pay the loans as they fall due as per the loan agreement.

b. Peter Gitaa, Florence Njau, Wycliffe Kiganda, and Antony Kimutai voluntarily agreed to be the applicant's guarantors in event of the default by the applicant to repay the loan.

c. The applicant has not requested for indulgence from the respondent on the loan repayment. Since the applicant made no rearrangement to settle the loans it is just to pursue the guarantors.

d. The guarantors have never requested to be relieved as the applicant's guarantors as they are ready to fully meet their obligations as guarantors, the applicant having failed to repay the loans.

e. The pending suit did not preclude the respondent from recovering the outstanding loan from the guarantors – the Court process is not being undermined in any manner.

f. The application lacking in merits be dismissed with costs.

The Court has considered the material on record including the submissions filed for the parties and makes the following findings.

First, the Court returns that it is not in dispute that the applicant has failed to repay the outstanding housing loan consequential to the dismissal whose effect was that the applicant lost the monthly salaries out of which the monthly loan repayments were recovered.

Second, it is not in dispute that the housing loan agreement provided for recovery of the loan from the applicant's benefits revolving around the contract of service or sale of the property. It is also clear that such recovery was without prejudice to other available modes of recovering the loan. The Court returns that in view of the without prejudice provision, the respondent would be entitled to pursue the guarantors – it cannot be said that the recovery mechanisms in the housing loan agreement had to be exhausted prior to invoking the guarantee agreement. As submitted for the respondent, as per **Mwaniki Wa Ndegwa –Versus- National Bank & Another [2016]EKLR**, the obligation of the guarantor is clear – the guarantor is liable upon default by the principal debtor and it is not guarantor to see to it that the borrower complies with his contractual obligation but to pay on demand the guaranteed sum (citing **Ebony Development Company Ltd –Versus- Standard Chartered Bank Ltd [2008]eKLR**). Further per **Halsbury's Laws of England 4th Edition Vol. 20 para 194 at page 124** thus, "**On the default of the principal debtor causing loss to the creditor, the guarantor is, apart from special stipulation, immediately liable to the full extent of his obligation, without being entitled to require either notice of the default or previous recourse against the principal**...."

Third, the Court returns that the guarantee agreement is not in dispute. The Court finds that the guarantee agreement is a tripartite stand alone agreement separate from the loan agreement as well as the contract of service between the parties. The disputes, if any, arising out of the guarantee agreement, in absence of established nexus to the contract of service, would constitute an independent cause of action. In the present case, the Court finds that there was no established dispute flowing from the implementation of the guarantee agreement and the applicant has not established a nexus between the guarantee agreement and the contract of service in dispute in the present case. Indeed, the Court has perused the statement of claim and nowhere is the housing loan agreement or the guarantee agreement referred to. The Court returns that the disputes about the loan recovery or the guarantee agreement being not in issue in the present suit, it was misconceived for submissions to be made for the applicant in declining to grant the application, the applicant would thereby be denied the constitutional right to be heard to fair determination of the dispute or to adduce evidence per Article 50 of the Constitution.

Fourth, as per **Giella –Versus- Cassman Brown & Company Ltd [1973]E.A 358**, an applicant for a temporary injunction must show a prima facie case with a probability of success; an injunction will normally be granted unless the applicant might otherwise suffer irreparable injury; and when the court is in doubt, it will decide the application on the balance of convenience. In the present case, the applicant has failed to establish a prima facie case with a probability of success or the irreparable injury that he will suffer if the temporary injunction is not granted – the Court having found that the respondent is entitled to implement the guarantee agreements and the agreements not being in dispute in the pending suit. The Court considers that in such circumstances, the weighing of the balance of convenience does not therefore begin to emerge in the present case – the application being clearly below the threshold for grant of a temporary injunction.

Fifth, the Court cites **Elijah Kipng'eno Arap Bii –Versus- Kenya Commercial Bank Limited [2001]eKLR**, (Ringera J) and follows the holding in that case that there is no jurisprudence to the effect that a dismissed employee who has challenged his dismissal is entitled as a matter of justice and equity to the preservation of the status quo as regards his properties if the same had been charged to his employer. In the present case, the applicant is not entitled to status quo on repayment of the loans simply because he has challenged the dismissal in the

pending suit.

In conclusion, the application dated 16.04.2018 is hereby dismissed with costs in favour of the respondent and parties to take steps towards expeditious hearing and determination of the pending suit.

Signed, dated and **delivered** in court at **Nairobi** this **Friday 29th June, 2018.**

BYRAM ONGAYA

JUDGE