



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 237 OF 2018**

**EVANS OLIVER OLWALI.....CLAIMANT**

**- VERSUS -**

**STANDARD CHARTERED BANK LIMITED..... RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 22<sup>nd</sup> June, 2018)

**RULING**

The claimant filed the statement of claim on 28.02.2013 through Muma & Kanjama Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the termination of the claimant from employment by the respondent was unlawful and therefore null.
- b) Twelve months compensation for unfair termination at Kshs.650, 000.00 per month.
- c) General damages for discrimination.
- d) Staff mortgage home loan to continue at staff rate of 6% until full payment.
- e) Staff personal loan to continue at staff rate of 6.46% until full payment.
- f) General and aggravated damages, including exemplary damages for discrimination, distress and mental anguish.
- g) General and aggravated damages, including exemplary damages for loss of future earnings, loss of career and emotional distress.
- h) The claimant's certificate of service indicating the claimant's correct job title as contracted.
- i) Costs of the suit and interest thereon at court rates.

Together with the statement of claim, the claimant filed an application by way of a notice of motion under Articles 22, 23(3), 258 of the Constitution of Kenya 2010, the Employment and Labour Relations Act, Rule 16, Industrial Court (Procedure) Rules, the inherent jurisdiction of the Court and all enabling provisions of law. The substantive prayer in the application was that pending the hearing and determination of the claim the respondent whether by itself, or its servants or agents, advocates or any other person acting for and on their behalf be restrained by an order for injunction from charging interest rate on the mortgage loan facility, the unsecured platinum visa credit card and the unsecured personal loan at 10% plus margin of 4% or any other rate of interest save the allowed charges for staff accounts and the interest staff rate of 6% and further be restrained from issuing threats of listing the petitioner with the Credit Reference Bureau and further repossessing, offering for sale, selling, transferring, disposing of or in any other way alienating or encumbering his family home which is on LR No. 209/14990/7 in Nairobi County. The claimant further prayed for costs of the application.

The application was supported with the claimant's affidavit attached on the application and the following grounds:

- a) That the claimant's constitutional rights have been gravely violated.
- b) On 24.06.2016 the respondent took over the claimant's mortgage loan facility of Kshs.9, 400,000.00 from Co-operative Bank Limited. In March 2017, the respondent approved an unsecured platinum visa credit card limit of Kshs.1, 000, 000.00 with an expiry date of May 2018 and further approved an unsecured personal loan of Kshs.3, 200, 000.00 which he had been regularly paying up at staff rate of 6% per month at monthly instalments of Kshs. 136, 163.21.

- c) The claimant had legitimate expectation that for the duration of servicing the staff loans he would be working for the respondent and he would also continue to service the loan at staff preferential rate as the parties had contractually agreed.
- d) The respondent has greatly endangered the claimant's economic and social rights and his right to redeem his home on LR. No. 209/14990/7 by converting the claimant's staff loan from staff rate of 6% to customer rate of 14% and further violated the applicant's legitimate expectation of repaying the loan at staff rate until payment in full.
- e) The claimant is willing to repay the loans at staff rate as previously agreed upon by the parties despite his current state of unemployment. The claimant's case is that he had a legitimate expectation that for the duration of servicing of the staff loans he would still be working for the respondent and continues servicing the loans at staff preferential rate as stated in the letter of offer.
- f) If the order sought is not granted the claimant risks loss of his matrimonial home.
- g) It is meet and just, for the purposes of justice and equity and the overarching purpose of constitutional integrity, to make the orders sought.

The respondent opposed the application by filing on 29.05.2018 the replying affidavit of Harrison Okeche, the respondent's Head of Employee Relations in charge of East Africa. It was filed through Obura Mbeche & Company Advocates. The respondent's case is that the claimant was employed by the respondent effective 02.05.2016 and terminated on account of redundancy effective 23.08.2017. It was true that the claimant enjoyed preferential staff interest rates on the loans throughout the employment period. Upon termination and as regards the outstanding loans as per the letter of termination the claimant received the following entitlements:

- a) A 25% net discount on outstanding loans.
- b) Staff bank accounts to remain on staff rates for 6 months from separation date.

At termination the mortgage balance was Kshs. 9, 156, 334.97 and Kshs. 3, 034, 467.00 for personal loan. After the 25% discount, the mortgage balance came down to Kshs. 6, 646, 416.42 and the personal loan at Kshs. 2, 024, 198.47. It is the respondent's case that the parties having made an agreement in that regard and the respondent having acted upon the agreement, the claimant had no legitimate expectation to continue enjoying the staff preferential interest rates and as now alleged by the claimant. Under the agreement, it is the respondent's case that at the end of the 6 months, the respondent had a legitimate expectation that the claimant's loans with the respondent would revert to commercial rates. Further, the respondent's case is that the matter will be heard at full hearing of the suit and if the claimant will be successful, he will be awarded as per the prayers in the statement of claim. The respondent further urged that any difference in the interest rates will readily be compensated or offset from the loan balance and the claimant will not suffer any irreparable damage. Finally, the respondent's case is that the claimant has ceased to be an employee and an order that the staff interest rates continue to apply will amount to a reinstatement.

**First**, the Court is bound by the holding of the Court of Appeal in Erick V J Makokha & 4 Others –Versus- Lawrence Sagini & 2 Others (1994)e KLR and as applied in Fadhil Juma Kisua & Another –Versus- Kenya Ports Authority [2015]eKLR (Onesmus Makau J) thus, **“The contract of employment having gone, the fringe benefits of subsidized housing went with it.”** In the present case there was no dispute that the preferential staff interest rates subsisted on account of the employment relationship. There was no dispute that the contract of employment between the parties had been terminated. The Court considers that the fringe benefit of preferential staff interest rates would resurrect only upon reinstatement or such other lawful justification after the full hearing of the suit.

**Second**, the claimant does not deny that he was accorded the 25% discount on the loans and a 6 months moratorium on the commercial interest rates as per the terms of the termination letter. The claimant does not deny having enjoyed those terms of the letter of termination. Accordingly, the Court returns that it would be inequitable for the claimant to enjoy those terms and at the same time the equitable order of injunction as prayed for. In any event, the claimant would be guilty of material non-disclosure because in the grounds and affidavit supporting the application, he failed to disclose his having enjoyed those terms as per the termination letter.

**Third**, the Court has considered the prayers in the statement of claim and returns that as submitted for the respondent, if the temporary injunction is not granted, the claimant would not thereby suffer irreparable harm beyond compensation by damages because the difference in the interest rates could be compensated by way of a monetary award.

**Fourth**, for the temporary injunction to issue, as per Nguruman Limited –Versus- Jan Nielson & 2 Others Civil Appeal No.77 of 2012, the applicant must establish his case only at a prima facie level; demonstrate irreparable injury if a temporary injunction is not granted; and ally any doubts as to (b) by showing that the balance of convenience is in his favour. The Court considers that in view of the terms in the termination letter on the pending loans and the parties having acted accordingly, the claimant cannot be said to have established a prima facie case. Further, the Court has found that an irreparable injury has not been established. The Court follows Elijah Kipng'eno Arap Bii – Versus- Kenya Commercial Bank Limited [2001]eKLR, (Ringera J) thus, **“Is the applicant's probable injury capable of being adequately compensated in damages? I have no doubt that it is. The applicant has known all along that the securities he offered for his charge debt would be realized if default was made in the repayment. As I have said severally, once property is offered as security it by that very fact becomes a commodity for sale. And there is no commodity for sale whose loss cannot be compensated adequately in damages. So although Mr. Wandabwa's eloquence nearly induced in me tears of sympathy for the applicant, I am on a rational consideration of the matter impelled to conclude that the applicant's loss is perfectly compensable by an award of damages and that the bank is capable of meeting any such award. The application fails on this ground too.”**

**Fifth**, the Court has considered the holding in Boniface Lum Amunga Biko –Versus- National Bank of Kenya Limited [2017]eKLR, (Mbaru J) thus, **“24. Before the court can determine the suit before it, the same relating to a case of unfair termination of employment of the claimant, to allow the Respondent to apply high or higher interest rates on the loan facilities advanced to the claimant while in employment would be to stripe him the dignity of man and subject him to adverse circumstances. However, where the court makes a**

**finding that indeed the Respondent was justified in terminating the employment of the claimant, the due loan facilities can be recalled with all applicable and appropriate interest rates based on the date of termination. As such, the orders sought are merited at this point to enable the court address the main suit and give appropriate final orders to the parties. Such I find will help in meeting the ends of justice and the application by the claimant is therefore found to have merit.”** The Court finds that the present case is distinguishable because in the present case, unlike in that decided case, there was a clear agreement on the fate of the pending loans as per the terms of the termination letter. The termination was on 23.08.2017 and the suit together with the application were filed on 28.02.2018 which was just after the lapsing of the 6 months moratorium on commercial interest rates as per the terms of the termination letter. In the opinion of the Court, the claimant waited for parties to shift their respective positions as per the termination letter then he moved to Court. In such circumstances, the Court returns that the claimant would not deserve a favourable discretion for an injunction as prayed for.

**Sixth**, the Court has revisited 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.

**Finally**, the Court has considered Rule 17(5) of the Employment and Labour Relations Court (Procedure) Rules, 2016 which provides. **“(5) In a suit where an injunction is sought, a claimant or applicant may at anytime in the suit, apply to the Court for an interim or temporary injunction to restrain the respondent from committing breach of contract or an injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property.”** In the Court’s opinion, the use of the word **“where”** creates a possible situation for an applicant to make an application for an interim order. The Court considers that the situation is only one of the many other situations that a temporary injunction may be applied for. That provision is permissive rather than exclusive or prohibitory. Thus unless it is shown that a case squarely falls within the provision, lack of a prayer for injunction in the main suit does not thereby become an automatic bar to an application for a temporary injunction. Thus, for example, if the claimant is to apply for a temporary injunction to restrain reduction in salary by an employer in alleged breach of contractual term fixing the salary, under the rule, it would be necessary for such an applicant to have prayed for an injunction in that regard in the main suit – for otherwise the temporary injunction would not serve a purpose upon hearing and determination of the main suit in view of the contractual breach complained of. Thus, as to whether the rule will apply to bar a temporary injunction, it is the opinion of the Court that each case will have to be assessed on its own merits. In any event, the Court returns that the rule is advisory or instructive as it is a guide and is not mandatory.

In conclusion the application filed for the claimant on 28.02.2018 is hereby dismissed with costs in the cause and the parties to take further steps towards expeditious hearing and determination of the suit.

**Signed, dated and delivered in court at Nairobi this Friday 22<sup>nd</sup> June, 2018.**

**BYRAM ONGAYA**

**JUDGE**