



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

CAUSE. NO. 2230 OF 2014

ELIZABETH OSICHE APWORA.....CLAIMANT

VERSUS

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT

RULING

Introduction

1. This court entered judgment on 25.8.2017 in favour of the claimant in the sum of Kshs.2,053,284 being terminal benefits plus compensation for unfair termination of his contract of service by the respondent. Thereafter the parties assessed party and party costs at Kshs.380,000.

The decreed sum was to attract interest at court's rate from the date of the judgment until payment in full. The respondent paid Ksh.670,011 made up of the costs of Kshs.380,000 plus Kshs.290,011 described as the net of the decreed sum less outstanding loan balances totaling Kshs.1,735,292.50.

2. On 16.2.2018 the respondent (Applicant) brought the Notice of Motion now before me dated 4.3.2018 which basically seeks for an order that payment of the Kshs.290,011.08 by her to the claimant amounts to satisfaction of the claimant's decree against the respondent and that the matter should be marked as fully settled. The application is supported by the affidavit of the respondent's counsel M/s Sandra Kavagi sworn on 16.3.2018 and further affidavit by the respondent's Credit Manager Mr. Michael Mwita sworn on 17.4.2018.

3. The claimant has opposed the motion by her replying affidavit sworn on 23.3.2018. She denies that she had a loan balance of Ksh.1,735,292.50 as at the time of her judgment. She further contended that the alleged loan was not part of the proceedings leading to the judgment debit and as such the applicant is not entitled to any set off against her but she can recover the loan from the security held.

Analysis and Determination

4. After careful consideration of the motion, affidavits and submissions filed, the only issues for determination is whether in the absence of a pleaded counterclaim or set off the judgment debtor can withhold part of the decree as a set off against a judgment debt. The application is brought under order 22 rule 49 of the Civil Procedure Rules 2010 which states as follows:

“Where:-

(a) the amount decreed with costs and all charges and expenses resulting from the attachment of any property are paid into court, or satisfaction of the decree is otherwise made through the court or is certified by the court; or;

(b) the decree is set aside or revised, the attachment shall be decreed to be with draw.....”.
(Emphasis added)

5. The applicant is asking the court to certify that the total amount decreed plus costs have been fully settled upon the payment of the said Kshs.670,011. She exhibited letter of offer to prove the claimant's

indebtedness and contended that under the letter of offer she had various ways of recovering the loan out of which she chose to use set off against the decreed sum herein. She maintained that the claimant was at all material times aware of the loan debt and as such, the right to set off has rightly been exercised to settle the outstanding loans.

6. She relied in *Francis Kalama Mutewa Vs Kenya Commercial Bank [2015]eKLR and Alfred Muthoni Mutiria & 2 others Vs National Bank of Kenya Limited[2016]eKLR* to urge that the court cannot interfere with a contract unless there exists a vitiating factor; and that non performing loans portfolio impacts negatively on the lending bank and the economy of the country.

7. The claimant opposed the mention and contended that the alleged loan of Kshs.1,763,273 was not of the subject matter in the suit before the judgment was passed since there was no counterclaim on set off pleaded by the applicant. She contended that the applicant is estopped from introducing a new claim at the execution stage because it was not pleaded and heard before the judgment. She further contended that the facts of this case came distinguishable from those in the two precedents cited by the applicant and urged to uphold the decision in *Dakianga Distributors (K) Limited Vs Kenya Seeds Co. Ltd [2015]eKLR* where the court of Appeal held that parties are bound by their pleadings and cannot deviate from the same and introduce new issues after the matter is concluded.

8. Having carefully gone through all the material presented to me, I wish to state that no law or judicial precedent has been cited that supports the applicant's case. In paragraph 10 of the Further Affidavit by Mr. Michael Mwita, it was deponed that the respondent had various rights to pursue recovery of the loan due from the claimant as per the letter of offer and it chose to exercise its right of set off. I have carefully read through the one page letter of offer dated 19.2.2013 exhibited by Mr. Mwita as MM2 and I did not see the alleged right of set off against a decree of the court made in favour of the claimant. The only right contained in the said letter is the right to be paid, right to debit the claimant's account and the right to hold a named parcel of land as security under a legal charge. Consequently, I find that the alleged set off against the decreed sum to be without any legal or contractual basis. I, agree with the claimant that the applicant is bound by her pleadings and cannot introduce new claim during execution however logical it sounds. If she desired to recover the loan through a suit, she should have amended her defence to plead a set off or counterclaim against the claimant, pay court the requisite court fees and prosecute the same.

9. In *Francis Kalama Malewa* case, I declined to grant the request by the Bank to withhold the decreed sum due to outstanding loan because the Bank never pleaded any counterclaim. After entering judgment in favour of the dismissed employee, I held that:

“In the absence of any counterclaim the proceeds of this suit shall be paid to the claimant unless otherwise decided.”

10. Nothing has been shown why I should return a different verdict in this case. I therefore decline the application entirely. Allowing it is to entertain an after thought on behalf of a litigant who fought heard for the claimant's suit to be dismissed only to change his mind after seeing that the court has given a money decree to her.

Conclusion and Disposition

11. For the reason that the applicant's alleged set off is not founded on the law or contract, and that it did not form part of the proceedings which yielded the decree herein, the Notice of Motion dated 16.3.2018 is dismissed with costs and the stay order granted on 19.3.2018 set aside forthwith.

Dated, Signed and Delivered in Open Court at Nairobi this 31st day of July, 2018

ONESMUS N. MAKAU

JUDGE

