



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 2364 OF 2017**

*(Before Hon. Lady Justice Maureen Onyango)*

**MICHAEL ALWEMA KILUMBI.....CLAIMANT/APPLICANT**

**VERSUS**

**BARCLAYS BANK OF KENYA LIMITED.....RESPONDENT**

**RULING**

The Claimant, Michael Alwema Kilumbi, filed a Notice of Motion Application dated 29<sup>th</sup> November, 2017, brought under Rule 17(1), (3) and (5) of the Employment and Labour Relations Court (Procedures) Rules 2016 seeking a Temporary Order of Injunction restraining the Respondent from varying the Applicant's interest rates on the loan facility advanced during the pendency of his employment and to bar the Respondent from listing him to the Credit Reference Bureau (CRB).

The Application is premised on the grounds that:-

1. The Respondent has illegally, without justification, unfairly and procedurally dismissed the Claimant from employment.
2. The Claimant got a loan from the Respondent during his period of employment being one of the privileges he enjoyed as an employee of the Respondent.
3. The Respondent made monthly deductions in satisfaction of the loan awarded from the Claimant's salary
4. The Respondent upon unfairly terminating the claimant from employment has unilaterally converted the Loan terms to commercial rates and has continued to harass him to make payments using the new interest rates.
5. The Respondent is going to use all means possible to make the Claimant repay this loan if not stopped by this Honourable Court.

The Application is also supported by the Claimant's Affidavit wherein he states that he was employed by the Respondent in December 1993 as a junior clerk in the banking sector and diligently rose through the ranks to the position of Branch Manager as confirmed on 20<sup>th</sup> April 2010. That he managed to secure a loan from the Respondent with repayment terms that attracted preferential interest rates to the Respondent employees.

He avers that his employment was unfairly terminated by the Respondent on 16<sup>th</sup> June 2016 vide a letter which further injured him that the Respondent would be adjusting the interest rates on his loans to the prevailing customer rates 30 days from his last working day. That as a result of the unfair termination by the Respondent, he has not been able to make timely repayments of his loan.

**Respondent's Case**

In response to the above Application, the Respondent filed a Preliminary Objection dated 13<sup>th</sup> December 2017 opposing the same on the grounds that:-

1. The Respondent's obligations to report non-performing loans to the CRB are mandatory further to section 31 of the Banking Act, Cap 488 as read together with Regulation 50(1) of the CRB Regulations 2013.
2. The Respondent is precluded from any legal proceedings further to section 31(5) of the Banking Act as read together with

Regulation 19 of the CRB Regulations 2013.

3. The contract regarding the commercial loan between the Claimant and the Respondent is not amenable to the Jurisdiction of this Honourable Court.

4. This Honourable Court has no jurisdiction to grant the orders sought.

They also filed a Replying Affidavit sworn on 29<sup>th</sup> January 2018, by the Legal Counsel employed by the Respondent who avers that the Claimant only enjoyed a concessionary interest rate availed to members of staff and did not receive the loan as a staff benefit. That since it is only the concessionary interest rate for the loans which arose from the Claimant's employment with the Respondent and not the loan itself, this court has no jurisdiction over the credit facilities obtained by the Claimant as the Respondent's customer.

She also avers that the Claimant has never engaged the Respondent's active Credit Control department to reschedule his debts with the Respondent to enable him service his debt comfortably.

### **Applicant's Submissions**

The Claimant submits that the court is to determine the following issues arising from the Application:

- a) Whether this Honourable Court has Jurisdiction to adjudicate over this matter.
- b) Whether the Claimant and the Respondent were in an Employer Employee relationship or Banker Customer Relationship.
- c) Whether the Respondent can unilaterally vary the Interest Rates applicable to the Claimant.
- d) Whether the Respondent should be restrained from listing the Claimant before any credit reference bureau on account of non-performing loan.

It is submitted by the Claimant that this court has jurisdiction to adjudicate over an employer employee dispute as in this matter, vested upon it by Article 162(2) of the Constitution which provides that; "Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to — (a) employment and labour relations;..." This is also expounded by Section 12(1)(a) of the Employment and Labour Relations Act that states that; "The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including — (a) disputes relating to or arising out of employment between an employer and an employee;..."

He relies in the cases of **ABRAHAM NYAMBANE ASIAGO -V- BARCLAYS BANK OF KENYA LIMITED [2013] eKLR** and the case of **BONIFACE LUM AMUNGA BIKO -V- NATIONAL BANK OF KENYA LIMITED [2017] eKLR** where the court held that employment relationship is a wide concept and is not restricted to the contract of service and that this Honourable Court therefore has jurisdiction to look into the interest rates applicable to the Claimant.

The Claimant submits that he was in an Employer Employee relationship as opposed to a Banker Customer relationship as portrayed by the Respondent in their Replying Affidavit dated 29<sup>th</sup> January 2018. That he went through the Staff Loan pre-scoring vetting process before being granted the unsecured staff loan at friendly terms by the Respondent. He submits that in a Banker Customer relationship, the customers are usually not subjected to staff loan pre-scoring vetting as this is a process only carried out for the Respondent's employees. That the Respondent also has not denied having employed him.

The Claimant submits that the Respondent should be deterred from unilaterally varying the interest rates applicable to 9.87% plus a margin of 4% because it unfairly terminated him from employment. Further, that prior to his unfair termination of employment, he enjoyed friendly repayment interest rate on the loan advanced by way of monthly deductions made by the Respondent from his monthly salary.

He cites the case of **ELIUD KIMAILE -V- COOPERATIVE BANK OF KENYA LIMITED [2017] eKLR** where the learned Judge stated as follows:

*"Once an employment relationship comes to an end, an employer may vary the preferential loan terms granted to the departing employee. There is however the basic assumption in all such cases, that the employment relationship terminates within the law."*

He further submits that the Respondent acted in a rash and illegal manner in unilaterally varying the interest rates applicable to him considering his termination was unlawful.

The Claimant submits that the Respondent has a duty to report non-performing loans to the Credit Reference Bureau only in the event that the same is disclosed and shared in good faith as provided for under **Section 31(5) of the Banking Act** as follows;

*"No duty to which the Central Bank, Kenya Deposit Insurance Corporation, a credit reference bureau, an institution licensed under this Act, or the Microfinance Act or institutions licensed under the Sacco Societies Act, 2008, institutions registered under the Co-operative Societies Act (Cap. 490), public utility companies and any institution mandated to share credit information under any written law or their respective officers may be subject, shall be breached by reason of the disclosure, in good faith, of any*

information under subsection (2), to or by, as the case may be.”

That allowing the Respondent to list the Claimant to a CRB would be acting in bad faith against Section 31(5) of the Banking Act as the Respondent is to blame for the unfair and unprocedural termination of the claimant from employment thus occasioning default in the repayment of the loans advanced.

He prays that the court grants the prayers set out in the application dated 29<sup>th</sup> November 2017.

### **Respondent’s Submissions**

The Respondent submits that the Claimant applied for, and was given two loans on commercial terms as an employee of the Bank; the first facility being unsecured and the second being secured. In the course of his employment with the Respondent Bank, the Bank in its discretion reduced the interest rate for his loan to a preferential staff rate. That the Claimant's employment came to an end sometime in June 2016 and after this termination, the Claimant did not regularly service his loan which fell into arrears. That the Respondent is required by statute to report nonperforming loans to a CRB and that despite being given an opportunity to do so, the Claimant did not engage the Respondent's credit department to make his proposal on the settlement of his loan.

It is submitted by the Respondent that the loans it advanced to the Claimant arose from a bank-customer relationship and not simply the employer-employee relationship and as such, this Court has no jurisdiction further to section 12 of the Employment and Labour Relations Court Act. That the loans could only be deposited into the Claimant’s current account with the Respondent and for one to hold a current account, one has first to be a customer of the bank as described in Section 2 of the Banking Act.

The Respondent also submits that it is protected from suit in carrying out its statutory duty to report non-performing loans to a CRB by dint of section 31(5) of the Banking Act and further by Regulation 19(1) of the CRB Regulations. That it is required to inform a CRB of the loan status of the Claimant as provided for under **Regulation 50(4) of the CRB Regulations** which states that: “*An institution shall be responsible and under an obligation to submit and update all customer information to the Bureau in accordance with these Regulations.*”

Further, it submits that this Court will perpetuate an illegality should it issue orders that restrain the Respondent from carrying out its statutory duty and cites the case of TIMOTHY JOHN SATI -VS- BARCLAYS BANK KENYA LIMITED where the court stated in paragraph 10 that:

“The bank is lawfully entitled to proceed with the realisation of the charged property to recover the outstanding debt and is also obligated in law to give defaulting party details to CRB.”

It also submits that the Claimant has not averred anywhere alleging bad faith on its compliance with its reporting obligations under the relevant provisions of the Banking Act and a finding that the Claimant was unfairly or unlawfully dismissed from his employment would be premature. That it is the Claimant who lacks good faith because he has failed to make efforts to service his loan or engage with the Respondent’s credit department.

The Respondent prays to the court not to grant the orders sought because the application lacks merit and that it should be dismissed with costs.

### Determination

I have considered the application and the grounds and affidavit in support thereof as well as the notice of preliminary objection and replying affidavit filed on behalf of the respondent.

The first issue I want to comment on is the notice of preliminary objection filed by the respondent. A preliminary objection is defined in **MUKHISA BISCUIT MANUFACTURERS LIMITED -V- WEST END DISTRIBUTORS LIMITED**, as –

*“A preliminary objection is in the nature of what used to be a demurrer. It raises a point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”*

I find the preliminary objection filed by the respondent to be inappropriate as the grounds thereof are not uncontested and are not matters of law. The claimant has contested the matters raised therein.

I will therefore treat the same as grounds of objection to the claimant’s application.

I now set out the issues for determination in the application as follows –

1. Jurisdiction of this court to determine the issues raised in the application being the varying of interest rates.
2. Whether the respondent had capacity to vary interest rates.
3. Whether the claimant is entitled to the orders sought.

## 1. Jurisdiction

The jurisdiction of this court as set out in the constitution and the Employment and Labour Relations Court Act is to hear and determine matters arising from employment and labour relations disputes. The claimant herein argues that the issue of variation of interest rates for staff loan is a matter that arises out of employment and this court has jurisdiction to hear the same while the respondent argues that the issue is one between a bank and its customer and therefore outside this court's jurisdiction.

This issue has come up several times before in this court. In the case of **ABRAHAM NYAMBANE ASIAGO –V- BARCLAYS BANK OF KENYA LIMITED** and **BONIFACE LUM AMUNGA BIKO –V- NATIONAL BANK OF KENYA LIMITED** (both referred to herein above by the claimant). In both cases the court held that employment relationship is a wide concept not restricted to the contract and the court has jurisdiction to look into the interest rates applicable to the claimant. The same was also the decision in the case of **TIMOTHY JOHN SATI –V- BARCLAYS BANK KENYA LIMITED** cited by the respondent and the case of **CHRISTOPHER ONYANGO AND OTHERS –V- HERITAGE INSURANCE COMPANY LIMITED**. A similar decision was also reached in **BIFU –V- CONSOLIDATED BANK OF KENYA LIMITED**.

I think that from the decisions cited above, there is no dispute that a loan advanced to an employee in the course of employment becomes a term of employment and falls within the jurisdiction of this court. This is further affirmed by Section 19(1)(h) of the Employment Act which provides as follows –

### 19. Deduction of wages

**(1) Notwithstanding section 17(1), an employer may deduct from the wages of his employee —**

(a) ....

(b) ....

(c) ....

(d) ....

(e) ....

(f) ....

(g) ....

**(h) an amount due and payable by the employee under and in accordance with the terms of an agreement in writing, by way of repayment or part repayment of a loan of money made to him by the employer, not exceeding fifty percent of the wages payable to that employee after the deduction of all such other amounts as may be due from him under this section; and**

(i) ....

I thus hold that the terms of the loan advanced by the respondent to the claimant falls within the jurisdiction of this court.

## 2. Whether the respondent had capacity to vary the interest rates of the loan advanced to the claimant

The letter of offer of staff loan between the claimant and the respondent incorporated the respondent's staff loan, terms and conditions. Paragraph 2 thereof provides for interest as follows –

### **“2. INTEREST**

***a) The Borrower will pay interest (as well after as before any demand on judgment or the bankruptcy of the Borrower) on the loan in respect of each interest period at the rate per annum specified in the terms.***

***b) The Bank will notify the Borrower of any changes from time to time in the amount of interest payable in respect of each repayment date. The Bank shall be entitled to vary the basis on which interest shall be calculated in respect of the loan and/or to vary the rate of interest and/or vary the margin chargeable to such other rate and/or margin which the bank considers appropriate in all the circumstances and subject to any applicable restrictions concerning the rate of interest chargeable under the law.***

***c) Interest will be calculated by the bank on a day today basis on a year of 365 days and shall be paid on each repayment date.”***

Paragraph 8 provides for recall of loan together with outstanding interest in the event of default and termination of employment is deemed as an event of default. Paragraph 13 provides for assignment and disclosure and specifically provides as follows in respect to disclosure of information –

**“13. ASSIGNMENT AND DISCLOSURE**

a. ....

b. ....

c. ....

d. ....

*e. To protect the bank and its customers the bank has to follow certain internal procedures when opening accounts for making lending decisions. These may include the use of credit sourcing, obtaining information from credit reference agencies and the parting with of information about the Borrower for lending purposes to any company in the same group of companies as the Bank. The Bank may disclose information about the Borrower to credit reference agencies and fraud prevention agencies and other organizations, who may record, use and give out information to other lenders and insurers to help other users make assessments for] credit and all types of insurance (including handling any claims) for debt tracing and to prevent laundering.*

*f. If the Borrower does not make full repayment or agree satisfactory repayment proposals with the Bank within 28 days of the Bank making demand for full payment under this agreement the Bank may also disclose the information to credit reference agencies. This may affect other companies' decisions about lending the Borrower any money.*

*g. Other than as provided above the Bank will not disclose information concerning the loan to third parties unless:*

*i) the Bank is legally compelled or it is in the public interest to do so;*

*ii) the Borrower asks the Bank to do so or gives the Bank permission; or*

*iii) it is in the Bank's interest to do so.”*

The claimant bound himself to these terms at the time of applying for the loans advanced to him.

The claimant admits that he has fallen into arrears since the termination of his employment.

The only reason advanced by the claimant in support of the application is that his employment was terminated unfairly and that the respondent converted the loan terms to commercial rates.

These are not valid grounds as the issue whether or not the termination of the claimant's employment was unfair is the subject for determination in his claim. No finding has been made that the termination of employment was unfair.

Even if a finding is made eventually that the termination is unfair, the claimant would still not be an employee of the respondent as he has not prayed for reinstatement.

The agreement signed between the claimant and the respondent authorises the bank to vary interest rates at any time with its only obligation being to inform the claimant about the same. The agreement further allows the respondent to recall the loan upon default. The claimant is in default by virtue of having fallen into arrears in the repayment of the loan as well as by virtue of having left the employment of the bank.

Again, the claimant agreed to the disclosure of his credit status to a credit reference agency in circumstances where the respondent is legally compelled to do so. In the present case, the respondent is compelled by Section 31(5) of the Banking Act to do so.

From the foregoing I find no default on the part of the respondent in either varying the interest rate of the loan facility advanced to the claimant or in reference of the claimant's credit status to the Credit Reference Bureau.

**3. Whether the claimant is entitled to the prayers sought**

Having found no default on the part of the respondent, the application must fail. I accordingly dismiss the same. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 2<sup>ND</sup> DAY OF NOVEMBER 2018**

**MAUREEN ONYANGO**

**JUDGE**