



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 895 OF 2016

(Before Hon. Justice Hellen S. Wasilwa on 21st February, 2017)

JOSEPH ODUOR OTIENO.....CLAIMANT

VERSUS

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT

RULING

1. The Application before Court is one dated 6/5/2016. This Application was filed on 18/5/2016 under Certificate of Urgency brought by the Applicant herein through a Notice of Motion filed under Section 3(1) and (2) of the Industrial Court Act, and Rule 16(1), (3), (4), (5) and (8) of the Industrial Court (Procedure Rules), Rule 3(2) of the High Court (Practice and Procedure Rules) and all other enabling provisions of the law.

2. The Applicant sought orders that:

1. This application be certified as urgent and be heard ex-parte in the first instance due to the urgent nature of the reliefs sought and service of this application be dispensed with in first instance.

2. The Respondent be and is hereby restrained by itself or its servants, agents, officers, or any other person whomsoever from reviewing, revising, converting, changing from the preferential rates previously enjoyed by the Claimant to market rates or in any other way interfering with the interest rates chargeable on the loan facility held by the Claimant with the Respondent pending the hearing and determination of this application inter-parties.

3. The Respondent be and is hereby restrained by itself or its servants, agents, officers, or any other person whomsoever from reviewing, revising, converting, changing from the preferential rates previously enjoyed by the Claimant to market rates or in any other way interfering with the interest rates chargeable on the loan facilities held by the Claimant with the Respondent pending the hearing and final determination of the suit.

4. The Respondent be and is hereby ordered whether by itself or its servants, agents, officers, or any other person whomsoever to issue a favourable recommendation letter to the Applicant.

5. Such other or further orders as the Court may deem fit to grant.

6. The costs of this application be in the cause.

3. The Application is based on the following grounds:

1. The Claimant was employed by the Respondent to work in various capacities and in various branches of the Respondent.

2. The Respondent, sometimes in November 2015, unlawfully terminated the Claimant's employment without any genuine, just, valid or fair reason and in an unfair procedure on grounds of loss of confidence attributed to fraudulent activities that the Claimant was allegedly involved in.

3. The Respondent's actions are a violation of the Claimant's right to fair administrative action, are discriminatory and also amount to an unfair labour practice under the Employment Act, 2007 and the Constitution of Kenya.

4. The Claimant had obtained a loan facility from the Respondent at preferential rates during his employment and is unable to continue servicing the same owing to his loss of employment which is purely attributed to the Respondent.

6. The Respondent is also in the process of converting/reviewing the interest rates chargeable on the loan facility taken by the Claimant at preferential rates to market rates notwithstanding that it is the Respondent who has caused the Claimant's unemployment and therefore it is detrimental to require the Claimant to service the loan at market rates which is much higher.

6. The Respondent has also refused to issue the Claimant with a favourable recommendation letter which may negatively affect his future career as he has worked with the Respondent for a considerable period of time.

7. The Claimant has a good case with high chances of success and there has not been any delay in bringing this application.

8. The grant of the orders sought will not occasion the Respondent any prejudices incapable of remedying by way of damages.

9. It is only fair and in the interest of justice that the Claimant is granted the orders sought herein.

4. This application is further supported by the annexed supporting affidavit of Joseph Oduor Otieno the Applicant herein who has averred as follows:

1. That he was employed by the Respondent on 12/3/2008.

2. That by virtue of his employment he was entitled to loan facilities which included personal loans, mortgages, study loans and other facilities which included personal loans, mortgages, study loans and other facilities at Preferential interest rates as opposed to market rates.

5. That sometime in year 2014, the Respondent came up with a Voluntary Retirement Plan (VRP) whereby they invited employees to take up a Voluntary Retirement Package. That the plan was voluntary and the Applicant opted not to take it.

6. On 24th August 2015, the Respondent purported to suspend him from duty on some alleged fraudulent activities in Respondent office. On 13.11.2015, the services of the Claimant were also terminated by the Respondent. He appealed this decision but the Appeal was not allowed.

7. The Applicant avers that in his letter of termination, it was stated that the Respondent would convert

interest rates charged on his facilities to market rates if they remain outstanding for 90 days from the time of termination.

8. The Applicant contends that allowing the Respondent to benefit from their own wrong doing is unfair as they terminated him unfairly without following due process.

9. It is for this reason that the Applicant seeks orders as prayed pending the hearing and determination of this claim.

10. The Respondents opposed this application. They filed their grounds of opposition on 4.7.2016 and they aver that the application is incompetent and fatally defective and is indeed an abuse of the Court process. They state that the Applicant has not demonstrated any or any prima facie case for orders sought.

11. They also aver that the orders sought are only applicable to an employee and they also offend the common law principle as recognised under Section 49 (4) (d) of Employment Act that there should be no order for specific performance in contracts except in very exceptional circumstances.

12. The Respondents have also submitted that there are no exceptional circumstances that arise in this case that would warrant the grant of orders sought and that any alleged breach in.

13. I have considered the submissions of both parties and the issues to determine is whether the application meets the criteria for grant of an Injunction. The criteria has been set out in the celebrated case of **Giella vs. Cassman Brown Company Limited (19723) E.A** which held that an Application for grant of an Injunction must show a prima facie case with probability of success, demonstrate that unless it is granted, the Applicant might suffer irreparable injury which cannot be compensated in damages and in the case of doubt, the Court will decide the matter on a balance of convenience.

14. In determining whether there is a prima facie case with a probability of success, the Applicant ought to demonstrate that he has a case capable of being determined judiciously by the Court.

15. The Applicant before me has demonstrated that he has triable issues being whether his termination was unfair and unlawful, and this is in line with the finding **on Mnao vs. First American Bank of Kenya Limited & 2 others (2003) eKLR** that:

“a prima facie case in a civil application includes but is not confined to a “genuine and arguable case”. It is a case which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or a rebuttal from the later”

16. On the issue of irreparable damage and injury, the Applicant has shown that the interest rates applicable to him under the “employee” contract are very varied and having lost his job, he cannot service his loan at the market rates. He avers that the Respondents are responsible for his loss of job and should therefore not benefit from their own wrong-doing.

17. This fact alone is not a fact that cannot be compensated by way of damages because at the end of the day, if the Court finds that the termination of employment was unlawful, a raft of orders can be made including damages to fully compensate the Applicant.

18. On the issue of a balance of convenience, it would however be more convenient having found there is a prima facie case to allow the application than not to and escalate the problem.

19. I therefore find the application has merit and I allow it and order that the Respondent be and is hereby restrained by itself or the servants, agents, officers or any other person whomsoever from reviewing, revising, converting, changing from the preferential rates previously enjoyed by the Claimant to market rates or in any other way interfering with the interest rates chargeable on the loan facilities held by the

Claimant with the Respondent pending the hearing and final determination of the suit.

20. The Respondent is also ordered to issue the Applicant with a Certificate of Service.

21. Costs in the cause.

Read in open Court this 21st day of February, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Muumbi for Claimant - Present

Mokaya for Respondent – Present