



**REPUBLIC OF KENYA**

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

**CAUSE NO.1072 OF 2016**

**BONIFACE LUM AMUNGA BIKO.....CLAIMANT**

**VERSUS**

**NATIONAL BANK OF KENYA LIMITED.....RESPONDENT**

**RULING**

1. The Claimant by application and Notice of Motion dated 15<sup>th</sup> November, 201 is seeking for orders that;

*1. Spent;*

*2. Pending the hearing and determination of this application and the suit herein, the respondent's action in varying the applicant's interest rates for all his facilities from 3% for the personal loan and the Agricultural Purchase Loan and 4.5% for the car loan and the house loan, to fourteen percent (14%) be stayed and/or suspended;*

*3. ...*

*4. Pending the hearing and determination of the suit this court do issue an injunction against the Respondent prohibiting the Respondent from varying the loan interest rates and/or repossessing and/or selling or in any other way dealing with any property of the applicant bought, purchases or otherwise acquired by way of loans from the Respondent during the employment of the applicant and/or listing the applicant with the Credit and Reference Bureau (CRB).*

*5. ...*

2. The application is supported by the affidavit of the Claimant and on the grounds that on 2<sup>nd</sup> May, 2013 the Claimant was employed by the Respondent as the General Manager, Business Banking and due to excellent performance he was promoted to the position of Executive Director Corporate Institutional and Business Banking and was reporting directly to the Managing Director and Chief Executive Officer. The Claimant had a contract of 5 years.

3. The Respondent wrongfully and unfairly terminated the Claimant without any reason on 13<sup>th</sup> April, 2016 after conducting a sham hearing. The claimant, being aggrieved filed the suit herein on 2<sup>nd</sup> June, 2016 and seeking damages for unfair termination of employment and injunctions stopping the Respondent from varying the terms of his loan facilities to commercial rates.

4. While in employment, the Claimant took advantage of the various benefits offered by the Respondent to its employees and secured a house loan, a car loan, a personal loan and an agricultural land purchase

loan. The policy was that no term of the loan was to be varied until full payment. The termination of the Claimant therefore arose out of ill motive and therefore unfair. The termination had no substantive or justifiable reasons.

5. Further grounds in support of the application are that upon the termination of the claimant, he made demand and notice to sue to the Respondent and upon receipt of the same proceeded to unilaterally and without notice to convert the claimant's loan facilities from agreed rates to commercial rates and making it impossible for the Claimant to meet the monthly payments and taking into account the wrongful and unfair termination of his employment. The unilateral change of the loan facilities without prior notice of the Claimant is in breach of express provisions of the letter of offer and the charge documents. The Claimant had taken the loan facilities with a legitimate expectation that due to his good performance at work with the Respondent he would remain in such employment until the same were fully repaid. He is now in arrears and with the increased interests rates it will be impossible to repay and risks losing his home, vehicle and other assets he had purchased with the loans or be forced to sell the same unless the court issue the orders sought.

6. That the Respondent is seeking to benefit from its wrongful act of unfair termination of the Claimant and such actions are in bad faith. The Claimant had a good case with high chances of success and will be adversely affected where the orders sought are not granted.

7. In submissions, the Claimant relied on the following cases – **Abraham Nyabane Asiego versus Barclays Bank of Kenya [2013] eKLR; Abraham Nyabane Asiego versus Barclays Bank of Kenya [2015] eKLR; Syner Med Pharmaceutical Ltd versus Glaxo Group Limited [2010] eKLR; and Amir Suleiman versus Amboseli Resort Limited [2004] eKLR.**

8. In response the Respondent filed the Replying Affidavit of Linnet Anyika, the Head of Employee Services with the Respondent and avers that upon the employment of the Claimant on 2<sup>nd</sup> May, 2016 [2016] the Claimant applied for various loans which are governed by the Staff Loans Policy (policy), 2013. The claimant's employment with the Respondent was terminated in April, 2016 following a just cause and fair procedure.

9. Ms Anyika also avers that it is a term of the Policy at clause 12.4 that upon termination or dismissal all privileges accorded to an employee cease to apply as the person is an ex-member of staff. The loans due are to be demanded immediately on default. The former employee is to be issued with a 30 days' notice on the change of interest rates to normal commercial rates.

10. The Claimant on 19<sup>th</sup> April, 2016 requested to have all his outstanding loans amalgamated and consolidated for the remaining period of his mortgage as a reasonable interest rate. By letter dated 30<sup>th</sup> June, 2016 the Respondent gave notice to the Claimant that all his outstanding loans which remain unpaid within 90 days from the date of termination would be converted to prevailing market rates without further notice to him.

11. Upon the claimant's request for an amalgamation of his loans, the security held was not adequate for he restricted facility into mortgage loan of Kshs.34,819,398.05. Under clause 12.1 of the policy, only employees who exit through voluntary early retirement may enjoy staff interest rates. The policy does not allow an employee to amalgamate a house loan with car loan. The Claimant has not provided the source of repayment for the proposed debt restructure.

12. The Claimant was provided with the status of his account and having been terminated from employment, there is no employer-employee relationship between the parties and he cannot continue to enjoy the staff interest rates as this is contrary to the policy. What exists between the parties is a banker-customer relationship and this court has no jurisdiction to determine commercial issues arising from the loans advanced to the Claimant upon cessation of employment.

13. There is no prima facie case that has been demonstrated by the Claimant to warrant the orders sought. An order of mandatory injunction can only issue in clear and exceptional cases and this is not such a case.

The termination of employment was for valid reasons and following fair procedures and hence he claim has no chances of success. The Claimant is indebted to the Respondent in the sum of Kshs.35,230,730.24 and since his termination the Claimant has only paid Kshs.2,117,450.00 instead of Kshs.4,381,094.99 as due.

14. The application before court is an abuse of the court process and should not be allowed. The Respondent should be allowed to run its business in accordance to existing guidelines and policies applied uniformly to the entire employee.

15. The Respondent relied on the following cases – **Giella versus Cassman Brown [1973] EA; Mrao Ltd versus First American Bank & 2 Others [2003] eKLR; Lucy Wangui Gachara versus Minudi Okemba Lore [2015] eKLR; Shepherd Holmes Ltd versus Sandham [1971] 1 CH; and Joseph Kithokoi Mutia versus Kenya Power & Lighting Company Ltd [2016] eKLR.**

## **Determination**

### **Whether the court has jurisdiction;**

### **Whether the orders sought should issue**

16. The Respondent has challenged the jurisdiction of this court on the grounds that the claimant's employment with the Respondent has since ceased and what exists is a banker-customer relationship that should be addressed as a commercial dispute. Both parties agree to the extent that the Claimant was in the employment of the Respondent until his termination and during the pendency of the employment, the Claimant enjoyed loan facilities and order work benefits. The loan facilities were based on terms applicable to employees in service but the Claimant has since ceased to be an employee.

17. Article 162(2) of the Constitution sets out the foundational framework for the court. This is the court given the mandate overall employment and labour relations disputes. The mandate is further expounded under the Employment and Labour Relations Court Act where the court presides over all disputes of employment and labour relations. This mandate for the court is well set out in the case of **Okiya Omtatah Okoiti & Joshua Kiptoo versus Cabinet Secretary Education, Science & Technology & Others, Petition No.23 of 2016 consolidated with Petition No.11 of 2016;** the court held that;

*The concept of employer/employee relations as set out under section 12(1) of the ELRC Act [Employment and Labour Relations Court Act] is just but one element of the Court jurisdiction. The concept of labour relations is not restricted to employment only or to an employer/employee relationship only. section 12 of the ELRC Act should be read as a whole as it sets out different kinds, forms and status and situations of labour relations and further as section 12(2) of the ELRC Act provides that;*

*(2) An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.*

17. In arriving at the findings above, the court took into account the case of **Wilbert Kipsang Choge & 6 others v Communications Authority of Kenya & another [2016] eKLR** and the findings that;

*... Whereas the Employment Act defines what employment is, neither itself nor Labour Relations Act define labour relations. However, labour relations can be described as the interaction between employers and employees aimed at creating a fair working environment. It concerns laws, conventions, practices and institutions that regulate the working environment. To a worker or his representative, good labour relations mean conducive working environment, fair remuneration, staff welfare and freedom of association. To the employer good labour relations entails uninterrupted supply of contracted labour in order to achieve the organization's targets and objectives. To the employer staff must show dedication to work and commitment towards*

*organizations goals and strategies.*

18. In this regard therefore, the concept of employment and *labour relations* is wide and not restricted to the contract of service. With employment, there comes other relations at play such as the work benefits that require formation of relations such as the one leading to facilities such as loans, mortgage, and car and buying of agricultural land. Such relations cannot be divorced from the core employment relationship of the employer and employee. To do so would be lose the context within which *labour relations* find meaning.

19. In this case, the Claimant was employed by the Respondent and during such employment he enjoyed work benefits and had loan facilities advanced to him. The employment is now terminated. The Claimant has lodged a complaint with the court in exercise of his rights under section 47 and 87 of the Employment Act, the issue in dispute is listed as the wrongful and unfair termination of employment. The Claimant has set out that during his employment he was advanced with various loan facilities and they have now been recalled upon his termination at a higher interest rate. Indeed, on the basis that the matters set out arose during the employment of the claimant, and the loan facilities advanced to the Claimant as the employee of the Respondent and not as a banker-customer, the court has jurisdiction to hear and determine the matter. With the court addressing the question of whether there was wrongful or unfair termination, the question of the payment of the loan facilities advanced to the Claimant and the applicable interest rates will be dealt.

20. The orders sought by the Claimant are in the main that pending the hearing of his claim his loan facilities with the Respondent should be maintained at the same rate as when the employment was subsisting. That during to the wrongful and unfair termination, the Respondent has moved without notice and increased the Interest rates to the advanced facilities to commercial rates and the Claimant in unable to pay due to the fact that his employment allowed him to relay the loans but such employment has since been terminated at the insistence of the respondent.

21. The Respondent on their part argue that the Claimant was advanced the loan facilities based on the policy applicable to all employees of the respondent. That the Claimant was ware at all material times that upon termination of his employment he became and ex-employee of the Respondent and cannot enjoy terms and benefits due to employees as such relationship has since ceased to exist.

22. The grant of prohibitory orders to stop the Respondent from varying the loan interest rates, the principles governing the same can be traced from various cited cases. The Court of Appeal in ***Nguruman Limited versus Jan Bonde Nielson & 2 Others, Court of Appeal No.77 of 2012***; held that;

*In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;*

*(a) establish his case only at a prima facie level,*

*(b) demonstrate irreparable injury if a temporary injunction is not granted, and*

*(c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.*

*These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the Respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the Respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the*

*applicant to injunction directly without crossing the other hurdles in between.*

23. The claimant, before filing the current application and seeking of orders herein, filed his Memorandum of Claim on 2<sup>nd</sup> June, 2016. The suit is premised on alleged wrongful and unfair termination of employment. Before the court can hear this claim, the need for the current application has arisen based on the grounds that the Claimant stands to lose his home, car and land due to the increased interest rates to his loan facilities advanced by the Respondent while in employment which employment is alleged to have been wrongfully and unfairly terminated.

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 strip 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.

25. With the above noted, the Claimant is not given an open free will. The loan facilities advanced are repayable based on the rates applicable while the Claimant remained in the service of the respondent. The Respondent shall compute all owing dues and notify the Claimant of such due and based on the applicable rates as while he was in their employment. The Claimant shall pay such loans with diligence and without delay. Any default cannot be faulted or visited upon the respondent.

**Application dated 15<sup>th</sup> November, 2016 is hereby allowed;**

**(a) The Respondent is hereby restrained from varying the claimant's interest rates for all his loan facilities advanced during his employment and the revised rates are hereby stayed pending hearing and determination of the main suit;**

**(b) The Respondent shall not alienate in any manner the secured properties acquired by way of loans advanced to the claimants pending the hearing and determination of the suit herein;**

**(c) The Claimant shall continue to pay the loan facilities advanced to him as agreed on terms and conditions subsisting while in employment until further directions;**

**(d) Costs shall in in the cause.**

Delivered, dated and signed in open court at Nairobi this 3<sup>rd</sup> day of March, 2017.

**M. MBARU**

**JUDGE**

In the presence of:

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