



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1906 OF 2016

FAROUK SULTAN HIRANI.....CLAIMANT

VERSUS

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT

RULING

The claimant, by Notice of Motion and application filed under Rule 16(3) of the Industrial Court (Procedure) Rules, 2010 [new Rules published, August 2016 – Employment and Labour Relations Court (Procedure) Rules, 2016] and substantively seeking for orders;

The Respondent be restrained from acting on the basis of the letter dated 22 June 2016 in converting the loan facility taken by the Claimant from 4.5% p.a. to commercial rates pending the hearing and determination of this case.

The application is supported by the affidavit of the Claimant and on the grounds that he took a car loan of Kshs.2, 500,000.00 in November, 2015 for a term of 5 years and a persona loan of Kshs.1, 300,000.00 in July, 2013 for a term of 5 years at 4.5% per annum to be repaid in monthly and combined instalments of Kshs.72, 178.00. To change such payments to commercial rates will require the Claimant to pay Kshs.105, 000.00 per month. The claimant's employment with the Respondent was summarily and unfairly terminated on 22nd June 2016 and he was not paid his terminal dues and he remains without an income. The Claimant has filed a claim challenging his termination reasons and procedures and if the orders sought are not issued, the Claimant will be made to pay high rates and will be adversely affected.

In his affidavit, the Claimant avers that he was employed by the Respondent from 1st July, 2013 and on 22nd June, 2016 became the Director, Business Banking. On 28th May, 2016 the Claimant was issued by the acting Director of Corporate Banking a letter of disciplinary proceedings and was terminated from his employment on 22nd June, 2016 and was directed to pay the due loans in 90 days. At the time the Claimant had a car and personal loan and with termination of employment and without any income, the conversion of the loans into commercial rates will adversely affect him as following his summary dismissal without payment of any terminal dues, he has been unable to repay the due loans. For 3 month the Claimant has been unable to service the due loan instalments. Despite appealing the termination of employment, the appeal lodged was rejected on 22nd June, 2016.

In reply, the Respondent filed Replying Affidavit of Reuben Koech, acting Director Corporate, Institutional and Business Banking – CIBB Division with the Respondent and avers that the Claimant was dismissed upon due process and following a disciplinary process composed in accordance with the respondent's guidelines to endure objectivity and impartiality and based on interrogation and evaluation of all facts and evidence and the Claimant being given a hearing. The Claimant appealed but such was

rejected as there was nothing new raised.

At the time of termination the Claimant had facilities advanced and outstanding unpaid for a car loan and personal loan both totalling to the sum of Kshs.2,944.079 and attract an interest of 14.5%. The Claimant has not demonstrated a *prima facie* case with any chance of success to warrant the grant of orders sought. The loan facilities were advanced based on the respondent's Staff Loan policy and there is a right to amend the interest rates to commercial rates as at end of September, 2016. The Claimant is no longer an employee of the Respondent and the staff rate cannot apply on him.

Both parties filed written submissions.

The Claimant has reiterated his application in submissions and on the principles laid out in the case on **Giella versus Cassman Brown [2973 EA 358]** that there is a good case with high chances of success and that the Claimant was dismissed without due process and justifiable reason and thus the orders sought should be issued.

The Respondent on their part submit that there is no case set out by the Claimant to warrant the orders sought and that interlocutory injunction will not issue unless the Claimant can show that he will suffer irreparable injury that cannot be compensated by way of damages and that the balance of convenience favours such an applicant.

The Respondent also submits that the Claimant was given a hearing and allowed to appeal against his dismissal and therefore does not have a *prima facie* case to justify the grant of orders sought. The Claimant had loan facilities that were based on a staff rate interest and there was notice of the same converting to commercial rates from September, 2016. Whatever injury the Claimant is likely to suffer can be compensated by way of damage and there is no case demonstrated to warrant the grant of the injunction orders sought and therefore the balance of convenience must shift to the benefit of the Respondent so that they can recover monies owing from the claimant.

The Respondent has relied on the following cases **Elijah Kipng'eno Arap Bii versus KCB Ltd [2001] eKLR; Peter Mutisya Musembi & another versus NBK Ltd [2016] eKLR; Francis Kalama Mulewa versus KCB [2014] eKLR.**

Determination

The question as to whether the orders sought should issue with regard to the Respondent being restrained from reviewing the loan interest rate must first address as to whether the Claimant has a *prima facie* case that justifies the grant of the same. The Court of Appeal in **Mrao Ltd versus First American Bank of Kenya Ltd & 2 others [2003] eKLR** held that;

So what is a prima facie case? I would say that in civil cases it is a case in 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 rebuttal from the latter.

The above findings put into account, in employment and labour relations, the Employment Act requires this court to go a step further in addressing the question as to whether there has been procedural and substantive fairness in the termination of an employee. These are matters of evidence but where on the application presented that there exists a good case that requires the employer to give a response as to the circumstances leading to the termination of employment, the procedural steps taken and the reasons given for the termination, and where such are not apparent to the court, in the interim the court and based on the presented material evidence has power to issue appropriate orders pursuant to section 12 of the Employment and Labour Relations Court Act.

The Claimant in his affidavit admits that he was dismissed from his employment with the Respondent vide letter dated 22nd June, 2016 and at the time he had the knowledge that he had loan facilities which

were to convert to commercial interest rates within 90 days of such termination and effectively September, 2016. The Claimant also avers that he has not been able to repay his loan facilities with the Respondent for 3 months.

The claim is that the Claimant was issued with a show cause letter and then called to a disciplinary hearing but at such hearing, the Claimant was asked general question and was to be given further material and documents but instead of the issuance of the same there was termination. The Claimant has attached annexure "FH10" *Disciplinary Hearing Minutes* for 31st May, 2016 and which notes;

He [claimant] requested that the committee avail the requisite documentation and reschedule the disciplinary hearing to enable him respond to the show cause letter and prepare for the hearing.

The documents in question were as below:

- *Email correspondence between 17th December 2015 and 7th January 2016*
- *Approval memos for the various loan accounts*
- *List of loan accounts*

The committee acceded to Farouk's request and Linet was tasked with forwarding the documents to Farouk.

The meeting was brought to a close.

In the Repaying Affidavit of Reuben Koech, he avers at paragraph 4 that;

Disciplinary committee which was composed according to the Bank's guidelines to ensure objectivity and impartiality dismissed the Claimant after interrogation and evaluation of all the facts and evidence available including clarification done by the Claimant on transactions related to a group of companies.

In the replying affidavit there is nothing attached to confirm the disciplinary committee minutes and deliberations made and arriving at a decision to dismiss the Claimant for failing to satisfy matters upon his interrogation and evaluation and I take it that the minutes attached by the Claimant in his affidavit and claim are the subject referenced minutes. In this case, in my view, the disciplinary committee did not conclusively arrive at a decision advance to the Claimant; rather, the Claimant was to be issued with further documents regarding allegations against him to enable him respond effectively. Was this done? Was there a follow up disciplinary hearing and how did the Respondent arrive as the summary dismissal of the claimant?

Such are questions that parties must address at a full hearing before the court can effectively be able to deal and make a finding. However on the application up for consideration and based on the materials before court, the claim for unfair termination of employment of the Claimant requires consideration by the court and thus the orders sought warrant audience and consideration to ensure that the Claimant's rights are secured until the full determination of all matters set out in the claim.

Noting the above, the Claimant having admitted to enjoying a loan facility on terms agreed between the parties, the going interest rates as at the time of employment should continue to apply. The Claimant should also not use this claim to avoid paying the due instalments to the Respondent as non-payment of the loan facility will only attract penalties and the court will not protect the Claimant within these proceedings from the same where there is non-payment of the due instalments.

The application dated 13th September, 2016 is hereby allowed in the following terms;

(a) The Respondent is hereby restrained from converting the loan facilities advanced to the Claimant for a car and personal loan to commercial rates and shall continue to charge a rate applicable as at the time of employment until the claim herein is heard and determined;

(b) The Claimant shall continue to repay the due loan facility instalments as at the time of his employment;

(c) The Respondent shall file defence within 14 days; and a hearing date allocated on priority basis.

(d) Costs in the cause.

Dated, signed and read in open court at Nairobi this 2nd May, 2017.

M. MBARU

JUDGE

In the presence of:

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