



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
CAUSE NO.2117 OF 2017

PAUL MAGOTO NYAGARI.....CLAIMANT

VERSUS

FIRST COMMUNITY BANK LIMITED.....RESPONDENT

RULING

1. The Claimant by application dated 25th October, 2016 is seeking for orders against the Respondent that;

Pending the hearing and determination of this suit the court do issue an injunction restraining the Respondent whether by itself, its servants, employees, agents, assigns and or any other person howsoever working or claiming under it from selling, advertising for sale, transferring, disposing off, attaching, auctioning, advertising for sale, dealing or in any other way interfering with the claimant's quiet possession of Title Number Njoro/Njoro Block 2/102 (Njokerio) and title Number Njoro/Njoro Block 2/146.

Pending the hearing and determination of this suit this court do issue a mandatory injunction compelling the Respondent to de-list or ensure the delisting of the Claimant with Credit Reference Bureaus.

This court do grant any other order or directions that it may deem fit to grant in the circumstances

The costs of this application be provided for.

2. The application is supported by the claimant's affidavit on the grounds that the claimant's properties are currently charged to the Respondent as security to a loan advanced by the Respondent as its former employee which loan was given on terms applicable to employees, under the Staff Loan Policy. The lending contract is linked to claimant's employment with the respondent. The Respondent has since unlawfully terminated the employment of the Claimant without notice or reasons. The Respondent has moved with malice to cripple the Claimant financially by seeking to sell properties charged with the Respondent through whichever means possible and thus frustrated attempts by the Claimant to seek a take-over of the facilities by another bank. The Respondent seeks to sell the properties despite the fact that with great sacrifice, the Claimant has been repaying his loan at Kshs.380, 000.00 per month without fail.

3. On 11th march, 2016 the Respondent issued the Claimant a 90 days statutory notice threatening to sell the claimant's properties namely Title Number Njoro/Njoro Block 2/102 (Njokerio) and title Number Njoro/Njoro Block 2/146 to recover monies owed to it by the claimant. The statutory notices arose from

the claimant's employment termination where the Respondent invited the Claimant to propose on how he wished to settle the outstanding amounts which he Respondent to with an offer and upon negotiations by letter dated 18th April, 2016 parties signed an agreement. On this letter the Claimant has honoured his part and made the following payments;

May, 2016	Kshs.350, 000.00;
June, 2016	Kshs.420, 000.00;
July, 2016	Kshs.380, 000.00;
August, 2016	Kshs.380, 000.00;
September, 2016	Kshs.380, 000.00;
October, 2016	Kshs.380, 000.00
Total	Kshs.2, 290,000.00.

4. Despite these payments, on 10th May, 2016 the Respondent wrote a letter purporting to demand the entire outstanding amount of loan at Kshs.32,237,895.65 in disregard to letters of offer dated 18th April, 2016 where the Respondent had restructured the loan and the repayment terms and which the Claimant relied upon to his detriment. The Claimant has been paying his loan and seek the Respondent be restrained from selling his properties following termination of his employment as a further punishment and by acting in bad faith.

5. The genesis of the claimant's cash flow problems started with the conduct of the Respondent who unfairly terminated the Claimant from his employment and left him without any source of income; the Respondent failed to follow up the insurance cover taken at the claimant's cost with Takaful Insurance of Africa to help repay the loan for up to 9 months in the event the Claimant lost his employment, which fact took place; listing the Claimant with Credit Reference Bureau (CRB) therefore frustrating the claimants efforts to get another lender to take-over the facilities from the respondent; upon complaint of illegal listing with CRB the Respondent removed the same but this fact of being listed as a defaulter has given the Claimant a bad credit history and cannot get another lender to take over the facilities; and following the Respondent terminating the claimant's employment they have frustrated him in any attempt to obtain a similar job to the one he held with the Respondent despite the Claimant being qualified for the such a job.

6. The Claimant managed to get a new job with a 25% pay cut and is now able to reorganise his finances and to repay its facilities with the Respondent in accordance with agreement. The Claimant has been unable to obtain a lender to take over the facilities from the Respondent partly due to the illegal listing with CRB and due to the fact that his current employer is not a licenced bank.

7. The Claimant wrote to the Respondent to confirm whether the statutory notices had been cancelled/withdrawn but the Respondent did not respond. The Respondent has gone ahead to issue notification of sale of the charged properties and despite the fact that he has been repaying his loan as agreed.

8. The Respondent has consistently shown disregard to the law, illegally imposed upon the Claimant procedures contrary to what is agreed upon and may now proceed and sell the charged properties without following due process. Such instances can be demonstrated by the facts that the Claimant was terminated from his employment contrary to the law; termination was without reason or hearing; illegally listing and re-listing the Claimant with CRB and making attempt to cover the listing through various letters; issuing statutory notices for Kshs.76,718,633.94 at 11th March, 2016 by exaggerating the claim for unclear reasons but this was changed to Kshs.32,237,895.65 vide letter of 10th May, 2016; and acting illegally to

the detriment of the Claimant despite not following the law and acting with malice and in bad faith in terminating the claimant's employment.

9. Unless the orders sought are issued, the Claimant will suffer irreparable loss and damage. The application is filed at the earliest opportunity to prevent further damage and loss and to ensure the interests of justice.

10. In his **Supporting and Supplementary Affidavits**, the Claimant supports his application and avers that he was employed by the Respondent by letter of 4th December, 2007. With the contract the Claimant was entitled to access financing under the Staff Loan Policy and in September, 2013 and July, 2014 he was advanced a facility of Kshs.32, 350,000.00 for the purchase of motor vehicle; purchase of land; and purchase and construction of rental houses. The facilities were linked to the claimant's employment with the Respondent and were repayable through instalments and check off from his monthly salaries.

11. On 7th August, 2015 the Claimant received a letter of termination without the Respondent giving any grounds, notice or hearing. The letter was to take effect on equal date. Such termination has had effect on the facilities advanced to the Claimant by the Respondent as they were linked to his employment and therefore the application and orders sought to secure the charged properties pending the hearing of the claim herein.

12. In reply, the Respondent filed **Replying Affidavit sworn by Emma Ogongo**, manager – Legal Services at the Respondent bank and avers that the court has no jurisdiction to hear and determine the issues raised by the Claimant as the claim arise from the loan agreement between the parties and realisation of security offered as opposed to an employer and employee relationship.

13. The Claimant was an employee of the Respondent following an employment contract dated 13th January, 2009 and he had access to staff loan facility in accordance with the Respondent staff policy which was revised from time to time. The Claimant got a loan of Kshs.32, 350,000.00 and was secured by charging his properties being Title Number Njoro/Njoro Block 2/102 and vehicle registration Number KBU 998X. The Claimant was under an obligation to repay the loan which was not assignable to his employer or third party; the offer was not conditional upon employment and the obligation to repay was to survive termination of employment; and there is no evidence of the Claimant repaying monthly as stated as no such payments have been effected. The Claimant was terminated procedurally following the bank restructure and reorganisation of the claimant's position which was declared redundant. This is a right provided for under the law and there is no basis upon which the claim herein can be allowed as no evidence to demonstrate unfair dismissal has been adduced save for mere averments. The Claimant was paid all terminal dues which he acknowledged.

14. The Respondent has nothing to do with the Claimant securing a new job. He defaulted in repaying his loan as require din the letter of offer. The insurance cover taken was over the facilities under clause 4.5 was to apply to the insured member should have continuous unemployment period of at least 30 days and the cover was to pay for 9 months or a maximum of Kshs.1,000,000.00 whichever was higher. It is clear that the claimant's claim was not admissible. The insurance taken is with a third party and any failure by such party cannot be visited upon the Respondent or make the Claimant fail to repay the due loan instalments.

15. The listing of the Claimant with CRB was legal, the Claimant got notice and the rules make it mandatory for banks to share non-performing loans information and thus the Respondent was within a statutory requirement to comply. The reasons leading to the listing or delisting are matters that require hearing at the main trial.

16. The Claimant failed to service his account and upon claimants offer his repayments were restructured but the Claimant failed to sign the letter of offer putting the Respondent to exercise its statutory power of sale. The Claimant paid the loan for some time but he stopped and the thus the notice of sale for monies indicated in the statutory notice of sale.

17. It is the duty of the Claimant to repay the loan due; the offer letter was tailored to survive employment and cannot be assigned to a third party; and the Claimant has had access to his bank statements to ascertain the correct amounts that are due and owing to the respondent.

18. The Claimant has not demonstrated what irreparable loss and damage he shall suffer if the orders sought are not granted. The orders in place are extremely prejudicial to the Respondent business and to stop the Respondent from recovering an outstanding loan that is due should not be used as such will deny the Respondent of its property.

19. Both parties filed written submissions.

Determination

20. Before delving into the issues raised by the Claimant in his application, I note a glaring error, omission, lapse and or mistake that go right into the heart of the matter before court in terms of any challenge to the claimant's application. The Respondent filed a *Replying Affidavit* on 25th January, 2017 by *Emma Ogongo* described at the *Manager-Leal Services at the respondent's company* and thus conversant with the facts of the case and thus the reply.

21. This *Replying Affidavit* is sworn before a Commissioner for Oaths on 25th January, 2017 by *Aisha Mohamed Sheikh*. Whose *Replying Affidavit* is this? That of Emma Ogongo or that of Aisha Mohamed Sheikh?

22. What is clear, in terms of the Statutory Oaths and Declarations Act, the person who makes an affidavit and attends before the Commissioner for Oaths and appends their signature thereon that is the person whose oath is taken to confirm the averments in the affidavit. In this case therefore, where the affidavit in reply to the claimant's application is deposed by Emma Ogongo as the Manager-Legal Services of the respondent, then a third party, Aisha Mohamed Sheikh cannot take up the same and confirm the oath in affirmation as s/he is not the one seized of the matters deposed to therein.

23. This is not a mere technicality that the court can address otherwise. It goes to the root of the reply and negates the same in its form, character and content. It cannot stand the test of any rule, statutory or constitutional machinations to have the reply stand. It is of no probative value.

24. On the claimants application seeking injunctive orders against the Respondent from dealing with his property to alienate or otherwise deal in a manner that is prejudicial to his case before court, on the merits of the same, the Claimant avers that he was an employee of the Respondent and was terminated vide letter dated 7th August, 2015 attached at page 37 of the Memorandum of Claim. The reason for termination is not set out in this letter save that the Respondent offers to pay final dues which includes;

Payment for 5 days of August 2015;

Three month's salary in lieu of notice;

Severance pay package (7 years);

Severance pay (prorated 233 days);

Payment for 11 leave days earned and not taken

25. On the payments for 'severance' pay, I take it the Respondent relied on provisions of section 40 of the Employment Act on redundancy provisions to pay the same. Even where this position is not correct and noting the assessment of no reply to the application herein as noted above, without assigning any reason for the termination of employment as required under section 43 and 45 of the Employment which requires that;

43. *Proof of reason for termination (1) in any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.*

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee

26. Under section 45(2) of the Act it requires that;

(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) That the reason for the termination is valid;

(b) That the reason for the termination is a fair reason—

(i) Related to the employee's conduct, capacity or compatibility; or

(ii) Based on the operational requirements of the employer; and

(c) That the employment was terminated in accordance with fair procedure

27. The Claimant therefore has the right to challenge his termination in terms of section 47 of the Employment Act and the Respondent has the duty to prove that the termination of employment was justified. Without setting out the reason(s) for termination in the termination letter, the general reading of it and the challenge by the Claimant that he was wrongfully and unfairly terminated, the court must stop all else and delve into the same.

28. Noting the above, the claimant's application is premised on facts that while he was in the employment of the Respondent he enjoyed a loan facility and charged his properties to secure the same. He enjoyed the staff rates under the Respondent Staff Loan Policy and as such, due to the unfair and unlawful termination of his employment he was unable to service the same as he relied on his employment to repay the same. That he had cash flow problems, was not covered by the contemplated insurance to help repay the loan upon termination and now he faces the loss of his property which has been advertised for sale by the Respondent under the statutory power of sale.

29. The facts as set out by their nature are a relationship arising from employment and rights at work within which the Claimant enjoyed work benefits and secured facilities with his properties. Such are matters that fall within the jurisdiction of his court as set out under section 12 of the Employment and Labour Relations Court Act, matter not for trial before any other court within the Republic of Kenya save for this court. See **Esther Mbinya Musau versus National Bank of Kenya Limited [2015] eKLR** and the court finding that;

... the Claimant while in the employment of the Respondent obtained a loan through the Staff Loan Policy such loan was lawfully granted under terms and conditions agreed upon by the parties and by virtue of the claimant's employment with the respondent. Such employment has since been terminated and the fairness or the unfairness of the same is under challenge. The question as to whether the termination of the Claimant was wrong or not forms the main issue for arbitration as with it, the privileges, benefits and rights in employment must be determined including the loan facility and the preferential interest rates the Claimant enjoyed while in employment with the respondent.

30. Also in the case of **Abraham Nyambane Asiago versus Barclays Bank of Kenya Limited [2013] eKLR** the court held that;

... an employer who grants an employee a loan facility on special terms is entitled to vary the terms of the facility or even recall it altogether once the employment relationship ceases to exist. However, there is a basic assumption in all such cases, that the employment relationship terminates within the law. If there is a whiff of unlawfulness in the termination of employment, then the employer's right to withdraw the special loan facility advanced to the employee is withheld.

31. On the above analysis of facts, and in application of the principles in **Giella versus Cassman Brown** there being no statement of defence of probative reply to challenge such facts, I find the Claimant has a *prima facie* case and unless the orders sought the Claimant shall suffer irreparable loss and damage and the application and orders sought at this instance have merits, pending the hearing of his claim his properties should remain secured on terms and conditions subsisting during his employment with the respondent.

32. On the question of the de-listing of the Claimant with the CRB, the Claimant in his affidavit in support to the application avers that he was listed and then delisted with the CRB. Before making any orders herein, on the facts set out, there is need for clarity on these facts of being listed and de-listing and the effect and impact of the same and would require court to interrogate the same. Such cannot be done within this ruling on set out facts. I will leave this to the main hearing.

In the circumstances, I am persuaded to grant an interlocutory injunction in the following terms:

a) pending the hearing and determination of the Claimant's claim, an injunction is hereby issued restraining the Respondent herein, and/or their agents and/or their servants from alienating, selling, transferring and/or in any manner dealing so as to alienate the claimant's interests and quiet possession of Title Number Njoro/Njoro Block 2/102 (Njokerio) and title Number Njoro/Njoro Block 2/146

b) the Claimant shall continue to make monthly repayments of due loan facility with the Respondent at the rate of Kshs.380,000.00 until further directions; and

c) Costs granted to the claimant.

Dated, signed and read in open court at Nairobi this 15th day of June, 2017.

**M.
JUDGE**

MBARU

In the presence of:

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