



**REPUBLIC OF KENYA**

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

**CAUSE NO 1765 OF 2016**

**JACOB KELLY OMONDI ONYANGO.....CLAIMANT**

**VERSUS**

**THE NATIONAL BANK OF KENYA.....RESPONDENT**

**RULING**

1. This ruling flows from three (3) applications, all filed by the Claimant. The first two dated 31<sup>st</sup> August 2016 and 23<sup>rd</sup> November 2016 seek orders restraining the Respondent from reviewing the interest rates attached to the Claimant's loans advanced by the Respondent.

2. Pursuant to the application dated 23<sup>rd</sup> November 2016, my brother **Abuodha J** granted an *ex parte* order barring the Respondent from adjusting the interest rates applicable to the Claimant's mortgage and other loans, from the preferential rate of 4.5% to commercial rates.

3. The *ex parte* order was to last until 6<sup>th</sup> December 2016 when the matter was placed before me for *inter partes* hearing. On this date, Counsels for the parties agreed to dispense with the application by way of written submissions. It however emerged that the Claimant was in fact not servicing his loans even at the preferential rates directed by the Court. On this basis I declined to extend the *ex parte* order granted by my brother Judge.

4. The Claimant subsequently filed a third application dated 14<sup>th</sup> December 2016 seeking reinstatement of the order granted by **Abuodha J** on 23<sup>rd</sup> November 2016. The application which is supported by the Claimant's affidavit and further affidavit sworn on 14<sup>th</sup> December 2016 and 24<sup>th</sup> January 2017 respectively is based on the following grounds:

- a) That the Court erred in vacating the order granted on 23<sup>rd</sup> November 2016;
- b) That despite the existence of the suit herein, the Respondent had insisted on revising the loan interest rates applicable to the Claimant from 4.5% to the obtaining market rate of 14.5%;
- c) That the Respondent has threatened to dispose of the Claimant's property;
- d) That the Claimant had written to the Respondent on 25<sup>th</sup> November 2016, giving a full account of his situation and affirming his commitment to satisfy his loan obligations despite his poor financial status, which letter is yet to elicit a response from the Respondent;
- e) That the Claimant has been unable to satisfy his loan obligations in adherence to the initial

structure of the loan and has therefore sought a modification of the loan terms to accommodate his financial ability. The Claimant is yet to receive a response from the Respondent;

f) That the Claimant has expressed his commitment to repay the loans owed to the Respondent and has every intention to satisfy his obligations to the full.

5. In his supporting affidavit sworn on 14<sup>th</sup> December 2016, the Claimant depones that prior to the termination of his employment, he was making a monthly loan repayment of Kshs. 137,805.40. In his further affidavit sworn on 24<sup>th</sup> January 2017, he depones that since the termination, he has been making a monthly payment of Kshs. 30,000.

6. In its grounds of opposition filed on 30<sup>th</sup> November 2016, the Respondent states that the Claimant has failed to establish a legal or factual basis for the reliefs sought. The application is therefore an abuse of the court process.

7. In its written submissions filed on 15<sup>th</sup> March 2017, the Respondent hazards the argument that this Court has no jurisdiction to entertain the Claimant's application, on the basis that the issues raised are commercial in nature.

8. The jurisdiction of the Employment and Labour Relations Court is anchored in Article 162(2)(a) of the Constitution which provides as follows:

***(162)(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-***

***(a) employment and labour relations and***

***(b).....;***

9. Pursuant to this constitutional provision, Section 12 (1) (a) the Employment and Labour Relations Court Act provides that:

***12(1) 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;***

***(b) .....;***

10. In determining a similar application in ***Abraham Nyambane Atsiago v Barclays Bank of Kenya [2013] eKLR*** this Court stated the following:

***“The question then is what constitutes a dispute relating to or arising out of employment between an employer and an employee. Is it confined to issues that are ordinarily found in employment contracts or does it extend to all matters emanating from the employment relationship?***

***By its nature, the employment relationship generates a multiplicity of rights and obligations, some of which are not to be found in the express provisions of the employment contract. In my view, all these fall under employment and labour relations as intended by the law makers. To rule otherwise would be to create a situation where an employer or an employee traverses different courts to enforce different rights arising from the employment relationship. That in my***

***view could not have been the intention of the legislators.”***

11. In an earlier decision in ***Banking Insurance & Finance Union (Kenya) v Consolidated Bank of Kenya Limited (Industrial Court Cause No 900 of 2012)*** Rika J rendered himself as follows:

***“The loan agreement in the context of this dispute flowed from an employment relationship. The dispute over the charge created to secure the staff loan, is a matter of employment. The Environment and Land Court is not entirely divested of jurisdiction, but would in the view of this Court not be the appropriate forum.....to determine the final issues that may arise out of this dispute.”***

12. The gist of the foregoing jurisprudence is that if the dominant cause of action arises from employment, then the jurisdiction of this Court to entertain auxiliary matters such as staff loan agreements is firmly grounded. In the case before me, the issue arises from loan facilities granted to the Claimant by his former employer. The dominant issue is employment related and the Court therefore has jurisdiction to entertain the application, which I will consider on its merit.

13. The Claimant seeks injunctive orders against the Respondent. The conditions upon which such orders may be granted were well articulated in ***Giella v Cassman Brown & Co Ltd (1973) E.A*** as follows:

- a) That the applicant has a *prima facie* case with a probability of success;
- b) That an interlocutory injunction will not normally issue unless the applicant might suffer irreparable injury which would not adequately be compensated by an award of damages;
- c) If the court is in doubt it will decide the application on the balance of convenience.

14. So does the Claimant have a *prima facie* case? A *prima facie* case was defined by the Court of Appeal in ***Mrao v First American Bank of Kenya & 2 others [2003] KLR*** as:

***“a case which on the material presented the court or tribunal properly directing itself will conclude that there exists a right which has been infringed by the opposite party as to call for an explanation or a rebuttal from the latter.”***

15. In the case now before me I have this to say; 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 has been terminated within the law.

16. The Claimant has filed a claim for unlawful and unfair termination of employment which in my view, merits consideration by the Court. To this extent, he has a *prima facie* case.

17. On the issue of the injury to be suffered if the order sought is not granted the Claimant has, in his supporting affidavit, demonstrated in figures the substantial difference in monthly installments as between the special interest rates and commercial rates.

18. I would have ended this ruling at this stage, but there is a unique complication in this case. It turns out that the Claimant has in fact, not been servicing his loans fully, even at the preferential rate allowed by the Court.

From the evidence on record, he has since November 2016, been paying Kshs. 30,000 per month as against an expected installment of Kshs.137,805.40. The Court did not see any restructuring agreement between the Claimant and the Respondent and I do not think the Court has the power to restructure loans. The effect of the order granted by **Abuodha J** on 23<sup>rd</sup> November 2016 was that the Claimant would continue servicing his loans, at obtaining staff rates.

19. Faced with a similar situation in ***Elijah Arap Bii v Kenya Commercial Bank [2001] eKLR Ringera J***

(as he then was) held that an employee who fails to service loans advanced by his former employer is undeserving of any equitable relief. I must agree. Banks operate in a strictly regulated environment and every borrower whether an insider or the man from the street must meet their financial obligations to their bank.

20. The reasons for this are not hard to find; first, banks operate with customers' funds which must be available on call; second, non-performing loans interfere negatively with the macro-economic stability of the country; third, to allow borrowers to go into perpetual default in loan repayments is to hand them a rope for financial suicide. Overall, it is never in the public interest to allow non-performing loans.

21. Ultimately, the Court finds that by failing to pay the full monthly loan installment, the Claimant failed to adhere to the order granted in his favour by **Abuodha J** on 23<sup>rd</sup> November 2016. He has therefore come to equity with soiled hands and his three applications dated 31<sup>st</sup> August 2016, 23<sup>rd</sup> November 2016 and 14<sup>th</sup> December 2016 are dismissed.

22. The costs of these applications will be in the cause.

23. Orders accordingly.

**DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 28<sup>TH</sup> DAY OF JULY 2017**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Jamal Hassan for the Claimant

Miss Gunjiri for the Respondent