



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 202 OF 2017

ELIUD KIMAILE.....CLAIMANT

VERSUS

COOPERATIVE BANK OF KENYA LIMITED.....RESPONDENT

RULING

1. This ruling is in respect to the Claimant's application brought by Notice of Motion dated 31st January 2017 seeking orders compelling the Respondent to maintain the subsisting interest rate on the Claimant's loans with the Respondent pending the hearing and determination of the claim.

2. The application which is supported by the Claimant's application is premised on the following grounds:

- a) The Claimant was an employee of the Respondent pursuant to an employment contract dated 12th November 2015;
- b) The Respondent issued the Claimant with a termination notice on 25th May 2016;
- c) As per the termination letter he was allowed to lodge an appeal within 21 days which he did on 30th May 2016;
- d) The Respondent ought to have communicated to the Claimant its decision on his appeal within thirty (30) days;
- e) The Claimant has not received communication regarding his appeal;
- f) The Claimant's termination was harsh as the Claimant had no prior warnings;
- g) It is fair and in the interest of justice that this application is allowed as the Respondent will not suffer any prejudice if it is allowed.

3. In its grounds of opposition filed on 21st February 2017, the Respondent objects to the Claimant's application on the following grounds:

- a) The Court lacks jurisdiction to grant the prayers sought in the application in light of Article 162(2)(a) of the Constitution and Section 12 of the Employment and Labour Relations Court Act;
- b) Section 101 of the Land Registration Act, No. 3 of 2012 confers jurisdiction on the Environment and Land Court to deal with the matters raised in this application;

c) This Court lacks jurisdiction to hear and determine commercial matters pertaining to bank securities and their contractual obligations which are binding between parties;

d) The prayers sought by the Claimant seek to restrain the Respondent Bank from exercising its statutory powers provided under Part VII of the Land Act, 2012 and Part V of the Land Registration Act, No 3 of 2012;

e) The Claimant has not provided the Court with any documentation in support of the prayers sought;

f) The Claimant has not produced the contractual security documents he signed to demonstrate his obligations nor has he demonstrated the alleged departure by the Respondent in respect of the interest rates.

4. In its grounds of opposition filed on 21st February 2017, the Respondent challenges the jurisdiction of this Court to entertain the Claimant's application on the basis that it touches on land.

5. 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).....;

6. 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)

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

“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.”

8. 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.”

9. To my mind, 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.

10. In the case before me, the issue arises from loan facilities granted to the Claimant by his employer. The dominant issue is employment related and the Court therefore has jurisdiction to entertain the application which I now proceed to consider on its merit.

11. The Claimant seeks injunctive orders against the Respondent. The conditions upon which an interlocutory injunctive order may be granted are well articulated in the case of **Giella Vs 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.

12. 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 terminates within the law.

13. The Claimant has filed a claim for unlawful and unfair termination of employment which merits consideration by the Court. In the submissions filed on behalf of the Claimant on 3rd March 2017, reference was made to the decision in **Mrao v First American Bank of Kenya & 2 others [2003] KLR** where a *prima facie* case was defined 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.”

14. In similar vein, the Court of Appeal in **Syner-Med Pharmaceuticals Ltd v Glaxo Group Limited [2010] eKLR** held that:

“an arguable point does not in any way connote a point that will succeed if and when it is fully ventilated.”

15. Applying this standard, I find that the Claimant has raised substantive points of law and fact and he therefore has an arguable case.

16. On the question whether the Claimant might suffer injury that may not be remedied by an award in damages, I have this to say; there is a world difference between the special interest rates enjoyed by the Claimant and the market rates applicable to ordinary borrowers. In accessing the loan facilities, the Claimant anticipated to remain in employment in the foreseeable future. When he lost his job his steady source of income came to an abrupt end. To allow the Respondent to convert these loans to commercial rates at this stage would be the last nail on the coffin. The ensuing injury including loss of collateral and credit default listing cannot in my view, be adequately compensated by an award of damages.

17. In light of the foregoing, I grant the following orders:

a) The Respondent is hereby restrained from varying the Claimant's loan terms pending the hearing and determination of the main claim;

b) The Claimant will continue servicing the said loans at subsisting interest rates until further orders of the Court.

18. The costs of this application will be in the cause.

19. Orders accordingly.

DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 21ST DAY OF JULY 2017

LINNET NDOLO

JUDGE

Appearance:

Mr. OKatch for the Claimant

Miss Kanyiri for the Respondent