



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1540 OF 2016

(Before Hon. Justice Hellen S. Wasilwa on 10th November, 2017)

BANKING, INSURANCE AND

FINANCE UNIONCLAIMANT

-VERSUS-

BARCLAYS BANK OF KENYA LIMITEDRESPONDENT

RULING

1. The application before Court is the one dated 24.1.2017 and filed in Court on even date. The application has been brought through a Notice of Motion filed under Section 12 (4), of the Industrial Court Act No. 20 of 2011, Section 74 of the Labour Relations Act No. 14 of 2007 and all other enabling provisions of the law.

2. The Applicant/Claimant seeks the following orders:

1. That the Honourable Court be pleased to certify this Application as being urgent and the same be heard ex-parte in the first instance and service be dispensed with.

2. That the Honourable Court do issue an interim ex-parte order restraining the Respondents by themselves or their agents or principles from continuing to charge commercial/exorbitant rates of interests on all the loans of the former employee James Kyumbua Kiio until this Application is heard and determined inter-parties.

3. That the Honourable Court do issue orders compelling the Respondents to compute and refund 434,961.20 already overcharged interests on the loans of James Kyumbua Kiio by the time of filing of this application until the trade dispute on the unfair/unlawful termination of James Kyumbua Kiio is heard and determined.

4. That the Honourable Court issue injunctive orders restraining, prohibiting and compelling the Respondents by themselves or by their recognized against or principals to stop overcharging the interest rates on the loans of the former employee James Kyumbua Kiio until the fate of the trade dispute is fully disposed of.

5. That this Honourable Court do award costs in favour of the Applicants as foresaid.

3. The application is grounded on the affidavit of Mr. Joseph Ole Tipape the 1st Respondent General Secretary of the Claimant herein on the following grounds:

- (i) That James Kyumbua Kiio was employed by the Respondents' in 1993 as a Clerical Officer.*
- (ii) That the grievant herein worked in several stations including Harambee Avenue, Kitui, Queensway, Barclays Plaza, Bishops gate etc among other branches.*
- (iii) In 2007 he was promoted to a B2 grade a position which was still unionisable. He was a supervisor and a custodian.*
- (iv) The Claimant was finally transferred to Bishops Gate building as a supervisor for international payments.*
- (v) On 11th May, 2015 the Claimant was invited for a disciplinary hearing for alleged involvement in lending money to other staff at an interest a practice which was against the bank's policy.*
- (vi) That the grievant was finally terminated from the employment of the bank on 18th May, 2015 for involvement in lending money to other staff at an interest, a practice which was against the bank's policy.*
- (vii) That the matter was reported to the Claimants and a conciliation process has been concluded, a certificate of unresolved dispute including the Conciliator's report has been issued.*
- (viii) That the suit on unfair/unlawful termination of employment is pending hearing and determination before the Employment and Labour Relations Court at Nairobi.*
- (ix) That on or around 27th December 2011 Mr. James Kyumbua Kiio as an employee of the bank was offered a housing loan facility by the Respondents.*
- (x) The loan facility was for Kshs.5,200,000/= (five Million Two Hundred Thousand only) to buy a house LR.No.NGONG/NGONG 48528.*
- (xi) That the housing loan was repayable in 216 consecutive monthly instalments of Kshs.39,425/= (interest rate calculation inclusive) each.*
- (xii) That the grievant has religiously paid the loan since the date of disbursement of the loan to date.*
- (xiii) That the agreeable interest rate was 6% per annum and that will be calculated to an instalment amounting to Kshs.39,425/= per month.*
- (xiv) That on or around 16th June 2014 the grievant was availed another loan facility Kshs.1,000,000/= (One Million Only) for the purposes of home improvement.*
- (xv) That the rate of interest on this loan was 7% culminating on an installment of Kshs.19,801.20 per month for a period of sixty (60) months.*
- (xvi) That the grievant has repaid the loan facility regularly upto date without any default.*
- (xvii) That even after he unfairly and unlawfully lost his job in May, 2015 he has continued to service these loans regularly and without default.*
- (xviii) That on or around 24th September 2015 the Respondents unfairly and illegally increased the interest rates from the agreed 6% per annum to 15.76% per annum culminating into an*

instalment of Kshs.64,576.35 per month creating an over payment of Kshs.25,151.35 monthly.

(xix) In addition the grievant was availed another facility of Kshs.1,000,000/= in which he was repaying a monthly instalment of Kshs.19,801.20 an interest rate of 7%. The loan was unlawfully and unfairly adjusted to Kshs.27,189.45 per month and increased to 16.61% per month creating an overpayment of Kshs.7,388.25 monthly.

(xx) That the grievant has already over paid a total of Kshs.434,961.20 due to the increased interest rates on the two loans by time of filing of this application.

(xxi) That the matter of unfair and unlawful termination of employment of Mr. Kiio is awaiting hearing and determination before the Court.

(xxii) That the Respondents behavior and hurry to adjust the interests to commercial rates is suspect and ill-motivated as it attempts to pre-empt the outcome of the termination dispute.

(xxiii) That the grievant was availed the two loans by virtue of being an employee of the Respondents and the only source and ability to repay the loans was form the monthly wages.

(xxiv) That it would be quiet harsh and uncalled for the Respondents to adjust the rates of interests to commercial levels before the trade dispute is concluded.

(xxv) That some of the prayers the Claimant has laid before the Court are re-instatement and compensation among other prayers.

(xxvi) That in any event any of the above prayers are granted, the grievant would be in a position to service the loans until liquidation.

(xxvii) That in the interest of justice, it would only be fair for the Respondents to wait for the decision of the Court on the unfair/unlawful termination of employment before the adjustment to commercial rates of interests is implemented.

(xxviii) That in the Agreement between the parties, there is no mention that when the employee leaves employment then the interest shall be adjusted to commercial rates.

(xxix) That is appears to the Claimant that the Respondents have ulterior intentions in the property of the grievant.

(xxx) That it is the Claimant's contention that the grievant stand to suffer irreparable damage by paying rates which are exorbitant and unaffordable.

(xxxi) That the orders sought are within the jurisdiction of this Honourable Court.

(xxxii) That any other grounds shall be adduced during the hearing of this application inter-partes.

4. The Respondents opposed this application. They filed a replying affidavit dated 6th June, 2017 on 7th June, 2017. The affidavit was deponed to by one Vaslas Odhiambo the Respondent's Employee Relations Manager. In the Affidavit the Respondent depones that it is true that the Applicant Members were given various loans at the staff interest rate.

5. However that Clause 24 of the Respondent's Staff Manual provide that upon exit from employment the loan accounts are to be placed in the customer section and interest to be charged at the normal customer rate plus other fees. They therefore contend that some grievant are no longer employees of the Respondent having been terminated, they cannot be enjoyed to preferential interest rates.

6. They aver that the grievant have not proved that they have a prima facie case with a probability of success and proved that they will suffer irreparable injury if the orders sought are not granted. They therefore want this application dismissed accordingly as being vexatious.

7. I have examined all the averments of both parties plus the submissions herein. The issue to determine is whether the Applicant has a prima facie case with probability of success to warrant issuance of orders sought.

8. The principles for grant of injunctive reliefs such as those sought herein have been laid down in various case law starting with the principle in **Giella vs Cassman Brown**. These principles have been laid down in Order 40 rule 2 which states as follows:-

1. "Injunction to restrain breach of contract or other injury. 2. (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

2. The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit".

9. The principle in general state that the Applicant should demonstrate that they have a cause of action and which has been threatened by the act or omission of the Respondent. That if left unaltered the said act or omission will render the Applicant suffering irreparable injury which cannot be adequately compensated in damages. When the Court is in doubt, the Court will rely on the lesser injurious action.

10. In the instant case, the Applicants have filed suit claiming unfair termination. This suit is pending before this Court. The contention is yet to be resolved. Should then the Respondent be allowed to continue to alter the interest rates midstream?.

11. It is yet to be demonstrated before Court who is the wrong doer. However in determining this application so that the lesser injurious actions results, I note that the grievant have dutifully continued to service their loans at the staff rates despite termination. This is commendable. For the Respondent to move further and seek to levy interest at commercial rates will be adding salt to injury especially so that the Applicants are claiming unfair termination.

12. In cases where it is alleged that the Respondent is the author of the problem facing the Applicant, it would be unfair for the Court to overlook this aspect. The lesser evil be not to punish the Applicant at this stage given his seemingly weaker position than to punish him by altering the interest rate payable at this stage and later discover they were unfairly terminated. In my view the balance of convenient tilts in favour of allowing the application than not allowing it.

13. I therefore allow the application by the Applicant in part and order that the interest rate payable against the loans taken up by the grievant to remain at staff rates until this case is heard and determined. Other prayers sought in the application to be levied within the main claim.

14. Costs in the cause.

Read in open Court this **10th day of November, 2017**.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Oyombe for Respondent - Present

Odero for Applicant – Present