



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 57 OF 2017

CHRIS KISIRE CHEPKOIT.....CLAIMANT

VERSUS

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT

RULING

1. The claimant, through application and Notice of Motion made under the provisions of Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016, article 159 of the constitution, 2010 and sections 1A and 1B of Civil Procedure Act and seeking for orders that;

Pending the hearing and determination of this application and cause this court be pleased to issue an injunction restraining the respondent by itself, its agents, servant and or employee or otherwise however from repossessing, offering for sale, selling, charging and or disposing off whether by private treaty and or auction all that property known as Town House Number 3 on L.R. Number 207/7153/4 Nairobi forming part of the subject of this application.

Pending the hearing and determination of this cause, the court be pleased to issue an order directing the respondent to forthwith reschedule the claimant's house loan facility from 16.78% p.a. to 3% pa.

In the premises the claimant be allowed to continue servicing his said house loan with the respondent at the former staff rates namely 3% p.a. until the hearing and determination of this cause.

An order do issue directing the respondent to forthwith cause the removal of the claimant's listing with the Credit Reference Bureau Africa Limited.

2. The application is supported by the claimant's affidavit and on the grounds that the claimant was at all material times in the employment of the respondent and has since filed suit seeking a declaration that this employment was wrongfully and unfairly terminated. Since the termination of employment the respondent has rescheduled the interest rates for a house and car loan granted to the claimant from 3% to 16.78% and 19.83 % p.a. respectively.

3. The claimant was repaying his loan from his salary and is now unable to service the same at the enhanced rates charged after dismissal from employment. The respondent has also caused the listing of the claimant with the Credit Reference Bureau (CRB) thereby disabling the claimant from accessing any other loan facility. The respondent has also threatened to repossess and sell the town house belonging to the claimant.

4. In his affidavit, the claimant avers that he was employed by the respondent on 19th June 2013 as Chief Finance Officer at a monthly salary of Kshs.1, 150,000.00 exclusive of bonuses and other benefits. The claimant took out a house loan of kshs.54.5 million and a car loan of kshs.7 million respectively and at 3% p.a. interest rates. The claimant purchased his matrimonial home and motor vehicle now subject of enhanced interest rates by the respondent.

5. By letter dated 29th march, 2016 the respondent maliciously and unfairly gave the claimant less than 48 hours' notice of disciplinary hearing and show cause letter rewiring him to submit written representation to the respondent b 31st March, 2016. The claimant replied and by notice dated 13th April, 2016 the respondent unfairly terminated the claimant's employment by summary dismissal.

6. The termination of employment was malicious and oppressive by the respondent giving the claimant a short notice for hearing; such denied the claimant a fair hearing; the reasons given were not justified and the alleged incident causing the hearing and termination of employment took place when the claimant was on leave. The claimant stands to suffer greatly in reputation, financial loss and damage to his career and future pension earnings. The unfair loss of staff policy has resulted in the enhanced interest rates to the house and car loan and other terminal benefits.

7. The claimant filed suit to protect his interests on 12th January, 2017 seeking among other orders that that the rescheduling of his house and car loans and the penalties made be reversed. Upon termination of employment, the respondent has converted the loans to commercial rates.

8. The claimant has requested his wife to assist in the servicing of the loan after his employment was terminated and when making efforts to do so from her personal bank account with NIC bank but since November, 2016 the claimant has been unable to pay the loans as his spouse ceased her job as a consultant. The car loan has since been repaid by his wife and the car security discharged.

9. The claimant has made plans to mitigate the house loan through application to the manager MEB Bank but this was rejected as the claimant has been listed with the CRB. The respondent has not threatened to repossess the house to recover the loan and it has been the family home and if repossessed the family will not have an abode.

10. In reply the respondent filed Replying Affidavit sworn by Linnet Anyika the Head of Employee Services with the respondent and avers that upon the employment of the claimant he voluntarily applied for loan facilities for a house and car at kshs.54.5 million and Kshs.7 million respectively. Such were governed by the respondent Staff Loan policy.

11. The claimant's employment with the respondent terminated in April 2016. The same was justified after the claimant was taken through the due process. Upon the release of the claimant from the respondent, the staff loan policy applicable to employees of the respondent and the benefits thereon ceased and the loans issued converted to commercial rates.

12. By letter dated 19th April, 2016 the claimant requested to have all his outstanding loans consolidated and have the house title as his collateral. He also asked for an extension of the repayment period to 25 years.

13. On 30th June, 2016 the respondent gave notice to the claimant that all his outstanding loans unpaid for 90 days would be converted to prevailing market rates. The claimant is in default of his loan repayments.

14. In line with the CRB regulations, 2013 the respondent is required to share credit information of all borrowers and the respondent by letter dated 1st august, 2016 notified the claimant of the intention to adversely list him with the CRB in view of his default in loan repayment. The respondent listed the claimant with the CRB and notified him on 3rd January, 2017.

15. The respondent has issued the claimant with all stator notices to enforce the security created over the

house and there has been communication with the claimant and impressed upon him to clear his arrears. On 3rd January, 2017 the claimant paid Kshs.600, 000.00 in part payment but no other payment has been made to date.

16. It is only fair for the respondent to be allowed to run its business in accordance with the set guidelines and policies applied uniformly to all emotes and ex-employees of the respondent

17. Both parties agreed to file written submissions. Only the claimant filed his written submissions.

18. It is common ground that the claimant was employed by the respondent and his employment terminated on 13th April, 2016 by summary dismissal. In the letter of summary dismissal issued to the claimant stated that;

...we regret that the board was not able to communicate its decision within a week as indicated at the hearing because of the seriousness of the matters raised and the volumes of documents that we have had to review.

19. The letter of summary dismissal appreciates that the claimant was invited to a disciplinary hearing and he was given an opportunity to make his representations and which representations were found insufficient to remove the claimant from blame and that his terminal dues would be paid upon the decision to dismiss his employment. The exact reasons leading to the summary dismissal is not set out. My great effort to deduce the reason for dismissal from the letter of the respondent does not yield much. A perusal of the documents and records of the respondent is not helpful as well. I take it a hearing is the only method for the court to discern the same. Thus section 47(5) of the Employment Act, 2007 requires an employer, upon a complaint being lodged by an employee that there is wrongful dismissal of employment to justify the grounds for the termination of employment.

(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

21. The rationale is to be found under section 43 of the Act which requires an employer to prove the reason(s) for termination of employment and also that;

(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.

22. Therefore, the claimant has filed suit and the issues in dispute are the unfair termination of his employment, unfair rescheduling of stall loan; non-payment of terminal dues and damages; and costs of his suit. The claim is based on alleged termination of employment on 13th April, 2016 over allegations and incidents that took place while the claimant was on leave.

23. The court is therefore required to interrogate the claims and address as to whether there is any element of proof of the matters set out in dispute. The requirement that all contracts of employment be terminated within the law is mandatory pursuant to the provisions of section 41, 43, 45 and 47 of the Employment Act, 2007. Until there is a determination of the same, to make the claimant lose a benefit that was available within his employment which has now been terminated and the same alleged to be unfair would be to deny him a fair hearing before this court. such would remove the claimant from his employment with the respondent and deny him work benefits that were denied of him upon the termination of such employment.

24. As submitted by the claimant, the court In **Esther Mbinya Musau versus National Bank of Kenya Limited [2015] eKLR** held 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.

25. The claimant has made request to have the loan facility repayment period be extended so as to be able to service the same. Such I find to be an act of a willing loanee willing to go the extra mile to take charge of his liabilities and organise a repayment modality. Such should be encouraged as the claimant has not ignored his loan in total taking into account the loss of his employment with the respondent.

26. On the CRB listing, with the orders above, it is only fair and just that the respondent do remove the claimant from the CRB by writing to them about the ruling herein and to enable the claimant access other facilities to remove his liabilities with the respondent. Justice demands that where the claimant has since made effort to clear his loan over the car loan, such effort should be seen in good stead and thus by seeking to be removed from the CRB listing he is willing to give effort to repay the loans due from him.

27. In looking at the principles set out in **Mrao limited versus First American Bank of Kenya Ltd & 2 others [2003] eKLR** an applicant such as the claimant should move the court expeditiously so as to protect his rights. The requirement that the balance of convenience must be in favour of the party seeking for interlocutory orders as set out in the case of **Giella versus Cassman Brown & Co. Limited** put into account, where the claimant filed his claim on 16th January, 2017 and noting the issues in dispute as being the unfair staff loan rescheduling among others but failed to secure urgent orders to protect his interests thereon and up and until this application was filed on 16th March, 2017. It does not serve the claimant justice that he exposed himself to liability since the termination of his employment in April, 2016 and until he filed suit in January, 2017. In between the claimant made commitments to the respondents to repay his outstanding loan facility secured with his matrimonial home.

28. On 27th March, 2017 when the claimant's application came for inter parties hearing, he remained absent. Such is not conduct of a party keen on getting urgent orders. I however note that despite the respondent entering appearance, filing a Replying Affidavit, no effort has been made to file a defence or make any court attendance as directed. No written submissions were filed.

Accordingly, the application dated 16th March, 2017 is hereby allowed pending hearing and determination of the claim herein and the following orders issue;

(a) the claimant shall repay the due instalments payable to the respondent as of 16th March, 2017 as directed and agreed upon by the parties;

(b) noting (a) above, all other subsequent and due instalments shall be repaid based on the respondent's Staff Loan Policy and at 3% per annum until further orders of the court;

(c) The respondent shall cause the delisting of the claimant with the Credit Reference Bureau within the next 30 days; and

(d) Costs in the cause.

Delivered in open court at Nairobi this 7th day of November, 2017.

M. MBARU JUDGE

In the presence of:

David Muturi & Nancy Bor – Court Assistants

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