



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT NAIROBI
CAUSE NO 1777 OF 2014

PETER MUTISYA MUSEMBI1ST CLAIMANT

PETER NJANJA NJUGUNA2ND CLAIMANT

Versus

NATIONAL BANK OF KENYA LIMITED..... 2ND RESPONDENT

Mr. Muumbi for Claimant/Applicant

Mrs. Omondi for Respondent

RULING

1. Serving before court is an application dated 20th May, 2015, filed on 21st May, 2015 brought under a Certificate of Urgency seeking for orders that;
 - a. this application be certified as urgent and be heard ex-parte in the first instance due to the urgent nature of the reliefs sought and Service of this application be dispensed with in the first instance,
 - b. the Respondent be and is hereby restrained by itself, its servants, agents, officers or any person whomsoever from in any way disposing off, auctioning, repossessing, selling or otherwise interfering with the Applicant's ownership and possession of the suit property being L.R. No. KJD/KAPUTEI NORTH/33103 (hereinafter "the suit property") pending the hearing and determination of this application *inter partes*,
 - c. The Respondent be and is hereby restrained whether by itself its servants, agents, officers or any person whomsoever from in any way disposing off, auctioning, repossessing, selling or otherwise interfering with the Applicant's ownership and possession of the suit property being L.R. No. KJD/KAPUTEI NORTH/33103 (hereinafter "the suit property") pending the hearing and determination of this suit,
 - d. Such other or further orders as the Court may deem fit to grant,

- e. The cost of this application be in the cause.
2. The court granted interim orders ex-parte in terms of prayers 1 and 2. The Applicant seeks for orders 3, 4, and 5.
3. The Application is based on the grounds set out on the face of the Notice of Motion which may be summarized as follows;
4. The 1st Claimant was granted a loan of Kshs.6,000,000.00 by the Respondent, Employer on or about 13th September, 2013. The Applicant charged his property L.R No. KJD/KAPUTEI NORTH/33103 in favour of the Respondent to secure the loan. The Applicant has been making payments to the Respondent towards the settlement of the loan facility on a monthly basis.
5. On or about the 30th April, 2-14, the Respondent terminated the employment of the Claimant and the lawfulness or otherwise of the termination is the subject of this suit.
6. The termination of the employment of the Claimant by the Respondent has rendered the Claimant impecunious and therefore unable to regularly service the loan granted to him by the Respondent on the strength of his employment.
7. The Respondent on 25th March, 2015 has purported to issue a statutory notice to the Claimant/Applicant demanding payment of the loan balance in the sum of Kshs.6,742,048.55 failing which the Respondent threatens to exercise its statutory power of sale over the aforesaid loan security.
8. The 1st Claimant/Applicant submits that his employment was maliciously, wrongfully and unfairly terminated just a few months after the Respondent gave him a loan thus rendering him unable to discharge his obligations under the loan agreement.
9. That the Respondent by its unlawful conduct, is the author of its own misfortune and cannot place the Claimant in double jeopardy until this matter is heard and determined.
10. The 1st Claimant further submits that it has good prospects of success in the pending suit; he is likely to suffer irreparable harm incapable of being adequately remedied by way of damages if the interim relief is not granted; and that the balance of convenience is in favour of granting the relief sought.

Response

11. The Respondent filed a Replying Affidavit to the Application on 10th September, 2015 in which it opposes the reliefs sought.
12. The facts of employment, grant of the loan, the termination of employment and the intention to exercise statutory power of sale by the Respondent have not been placed in dispute.
13. The Respondent however states that the termination of the employment of the 1st Claimant by the Respondent is lawful and the 1st Claimant has been paid his terminal benefits in accordance with the law and his contract of employment.
14. That employees of the Respondent are not entitled to loan facilities as part of their benefits of employment and such facilities are premised on separate contracts and not their contracts of employment.
15. That eligible employees of the Respondent may apply and at the discretion of the Respondent obtain loan facility governed by the staff loan policy attached to the Replying Affidavit and marked 'JM2'.

16. That under the Staff Loan Policy, the Respondent extends staff loans as a privilege accorded to deserving employees at a preferential rate strictly governed under the Policy which ceases to apply to the ex-members upon termination and dismissal.
17. That the loan facility is governed by the respective letter of offer and the charge registered against the security.
18. The grant of the loan is not in dispute but Respondent submits the 1st Claimant/Applicant is contractually bound by the charge which is governed by the Land Act, 2012.
19. That the 1st Claimant is contractually bound to service his loan facility and in breach of the same the Respondent has a right to realize the security irrespective of termination.
20. That Abuodha J. in his Ruling delivered on 25th February, 2015 declined to restrain the Respondent from reviewing, revising, converting or charging the preferential rate of interest enjoyed by the 1st Claimant/Applicant while in employment of the Respondent to market rates.
21. That following this ruling, the 1st Claimant/Applicant has failed to service his loan facility at the rate prescribed in the Notice of Charge of Interest Rates annexed herein and marked 'JM5'.
22. The Respondent prays this Application be dismissed as the same is misconceived and an abuse of the court process.

Determination

23. The issue for determination herein is whether the 1st Claimant has satisfied the requisite for grant of interim injunction pending the hearing and determination of the suit.
24. The court has dutifully and carefully considered the rival submissions by learned counsel on this application, the evidence and the law on the subject and has come to the following conclusion;
25. One, the granting or refusal of a temporary injunction, which is an interlocutory order is an exercise of judicial discretion which must be exercised judiciously. (See: Sargent –V-Partel [1949] 16 E.A.C.A 63).
26. Two, the purpose of a temporary injunction is to preserve the status quo. (See: Noor Mohammed Hanmohammed –V- Kanamali Virji Madhani [1953] 20 E.A.C.A 8 and Garden Cottage Food Limited –V- Milk Marketing Board [1984] A.C 130).
27. Three, the conditions for the grant of an interlocutory injunction are now well settled in East Africa –
 - a. an applicant must show a *prima facie* case with a probability of success;
 - b. an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages,
 - c. if the court is in doubt, it will decide an application on the balance of convenience (See: Giella – V- Cassman Brown Co. Ltd; E.A. Industries –V- TruFoods, [1972] E.A. 420).
28. In the light of the aforesaid general principals, we now turn to the facts of the present case. Having regard to the facts set out in the Notice of Motion and the Supporting Affidavit, the Replying Affidavit of the Respondent and the written submissions by the parties, I find that the totality of the facts do not disclose a *prima facie* case in that the loan granted and repayment thereof is premised on a separate contract from the contract of employment. That the 1st

Claimant/Applicant is contractually bound by the charge which is governed by the Land Act, 2012. That the 1st Claimant is contractually bound to service his loan facility whether he is in employment or not and the Respondent has a right to realize the securities if the 1st Claimant is in default in respect of the loan.

29. That the 1st Claimant has been paid his terminal benefits and is therefore not impecunious as he alleges or at all.

30. The relief sought under paragraph 3 of the Memorandum of claim other than a declaration that the termination of the Claimant's employment by the Respondent was unlawful and unfair is of monetary nature and therefore the 1st Claimant/Applicant does not meet the requirement of granting a temporary injunction in that he has not shown that he would suffer loss in capable of adequate redress by way of damages.

31. Fourthly, if the 1st Claimant/Applicant does not service his loan, the escalation of interest on the principal amount be it at commercial or staff rate will place the 1st Claimant/Applicant in peril of inability to service the loan at all and the Respondent in peril of not realizing the full worth of the loan even by realizing the securities. The balance of convenience therefore does not favour the grant of the relief sought.

32. The court had granted interim relief on 22nd May, 2015 pending the hearing and determination of this application. To balance the equity of the case, the court directs that the repayment and/or the process of realization of the securities commence with effect from the date of this Ruling without any compounded interest accumulated during the period of the stay.

Dated and delivered in Nairobi this 15th day of January, 2016.

MATHEWS N. NDUMA

PRINCIPAL JUDGE