



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 846 OF 2014**

**BANKING INSURANCE AND FINANCE UNION.....CLAIMANT**

**VERSUS**

**NATIONAL BANK OF KENYA LIMITED.....RESPONDENT**

Tom O. Odera for Claimant/Applicant

Mr Chacha Odera for Respondent

**RULING**

1. The Claimant filed this suit on 21<sup>st</sup> May 2014 and an amended memorandum of claim was filed on 23<sup>rd</sup> October 2015. A similar suit was filed on 18<sup>th</sup> December 2014 then being I.C. Case No 1777 of 2014 and has since been withdrawn to allow this matter to proceed.
2. The claimant seeks reinstatement and in the alternative compensation and payment of terminal benefits in respect of the 25 grievants whose employment was terminated for poor work performance.
3. The application dated 25<sup>th</sup> November 2015 supported by the Supporting Affidavit of Mr Joseph Ole Tipepe seeks conservatory orders to restrain the respondent from selling and/or attempting to sell or auction the property of M/s Phyllis Nicole Okwiri, one of the grievants being L.R No. 12715/450 Block J wing B Apartment B. 202 (Great Wall Apartments Mlolongo), situated along Beijing road in Mlolongo area of Machakos County by public/private auction until the hearing and determination of the suit.
4. Interim orders were granted on 25<sup>th</sup> November 2015 pending interpartes hearing of this application. The application is opposed vide a replying affidavit of Linnet Anyika sworn on 22<sup>nd</sup> January 2016.

**Determination**

5. The issue for determination in this dispute is whether the Claimant/Applicant has established the preliquisites of granting an interim injunction pending the hearing and determination of the suit.
6. The brief facts of the case are that M/s Phyllis Okwiri was engaged by respondent as a customer service officer in January 2009 and worked for the respondent continuously until her termination on 30<sup>th</sup> April 2014.
7. On 26<sup>th</sup> June 2013, the grievant applied for credit facilities. The respondent considered the loan

- application, approved and advanced a house loan of Kshs 4,993,880 and an emergency loan of Kshs 40,000 totaling to 5,033,880. The credit facilities were secured by a legal charge created over property L.R. No. Nairobi/Block 12715/450 Nairobi.
8. The grievant has been in default for over a year having absolutely failed to service the loan which continues to accrue interests. All the documentations are attached to the replying affidavit. The respondent sought to realize its statutory power of sale. The respondent followed due process culminating to an advertisement for sale that was stated for Friday 27<sup>th</sup> November 2015 which action prompted the filing of this application.
  9. The grievant continues to be in default even after issuance of the statutory notices. Whereas the respondent argues that there is no legal nexus between the grievant's claim for unfair termination of her contract of employment and the credit facilities advanced to her, it is the claimant's case that the loan facility was offered to the grievant upon application primarily on the strength of her position as an employee of the respondent.
  10. That notwithstanding the provision of the purchased property as security for the loan, performance of the loan was wholly predicated on the grievant's ability to repay the loan from the salary given to her by the respondent. That the unlawful termination of her employment frustrated the grievant's ability to service the loan and it is therefore in the interest of justice and fair play that the court determines whether or not the termination of the grievant's employment was lawful or not to give the grievant opportunity to repay the loan and not unfairly lose the house.
  11. The Court of Appeal at Mombasa in the case of **Mrao Vs First American Bank of Kenya Ltd & 20 Others, Kwach, Bosire & O'kubasu JJA**, held that the power of a court in an application for an interlocutory injunction is discretionary. The court went ahead to lay down the principles for granting an interlocutory injunction thus;

*“a, The 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 be adequately compensated by an award of damages;*

*c, if the court is in doubt it will decide an application on the balance of convenience.”*

12. The court went on to say that;

*“A prima facie case in a civil application includes but is not confined to a ‘genuine and arguable case’ It is a case which on the material produced to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”*

13. The court was referred to a decision by Abuodha J in **ELRC Cause No 1777 of 2014 Peter Mutisya Musembi & Another Vs national Bank of Kenya** in which the court held;

*“Considering the array of prayers sought by the claimant/applicant and in view of the fact that the loan taken on the preferential arrangement was not invested in some immovable property whose value more often than not becomes intrinsic and incapable of adequate financial compensation, the court is not persuaded that the loss if at all incurred by the applicant will not be adequately assuaged by damages. To this extent the dispute herein does not meet the threshold set in the *Giella Vs Cassman Brown* case to warrant grant of interlocutory injunction.”*

14. This case is clearly distinguishable from the present case where the grievant acquired a house with the preferential loan he was given by the respondent.
15. In this regard the court refers to the decision in **Abraham Nyambane Asiago Vs Barclays Bank of Kenya Ltd (2013) eKLR** where the court stated that an employer who grants an employee a loan facility on special terms is entitled to vary the terms of the facility once the relationship ceases to exist but the basic assumption was that the relationship was terminated within the Law.
16. In the present case the claimant has an arguable case that the grievant ought to continue repaying

the loan on preferential terms until the hearing and determination of the suit. However, this does not shield the employee who has out rightly defaulted from payment of the outstanding loan all together. Were the court to grant injunctive relief to stop employees who have pending disputes with the employer to be cushioned from repaying such loans, the employer in the sector would stop advancing their employees with such preferential loans altogether. This is not a reasonable proposition therefore to constitute prima facie case to warrant stoppage of the loan repayment altogether.

17. The court is in doubt as to whether the grievant would suffer irreparable harm not remediable by way of damages if the interim injunction is not granted because the repayment of the loan was not wholly predicated on the existence of an employment relationship between the grievant and the respondent. Even if the grievant had voluntarily left the employment of the respondent she would have continued to repay the loan but on commercial rates.
18. The court therefore refuses to grant the injunction meant to cushion the grievant from the loan repayment but in the interest of equity, the grievant is entitled to levying of preferential rates of interest applicable to employees of the respondent from date of termination until this suit is heard and determined.
19. Therefore the process of computation of loan arrears at preferential rates and the realization of the security should commence afresh, after giving the grievant the necessary statutory notice from the date of this ruling.
20. Costs in the cause.

**Dated and delivered at Nairobi this 6<sup>th</sup> day of May, 2016.**

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**