



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 972 OF 2015

RUTH NJERI MBURU.....CLAIMANT

VERSUS

CO-OPERATIVE BANK OF KENYA LIMITED.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. By a Notice of Motion dated 7th May, 2015, the claimant applicant seeks the orders of this Court that she be granted leave to amend her memorandum of claim in terms of the draft amended memorandum and secondly that an order of injunction do issue restraining the respondent, its servants, agents or employees from advertising for sale, selling by private treaty or public auction two parcels of land known as RUIRU/MUGUTHA BLOCK 2/79 AND KIAMBU/MUNICIPALITY BLOCK 5 (KIAMUMBI) 2684 pending the hearing and final determination of the suit herein or further orders of the honourable Court.

2. The application was based on the grounds that:-

a. That the plaintiff was working as an employee of the 1st defendant as a Court clerk/teller until the time she was wrongfully and unlawfully dismissed from her said employment by the 1st defendant and hence institution of this suit.

b. That during her said employment, she was granted some loan facilities by the 1st defendant and hence the charging of her two parcels of land mentioned herebefore and she used to service the said loan through deductions made from her salary but now that she was dismissed from her said employment by the 1st defendant she is jobless as she had not been able to secure another employment elsewhere and so she is not in a position to service her said loans as demanded by the 1st defendant/respondent.

c. That although in her prayer number (c) in her plaint has prayed that the loans she had obtained from the 1st defendant be ordered to be repaid as per the initial arrangement between her and the 1st defendant, the 1st defendant has applied the bank prevailing co-operative base rates currently at 17.5% p.a. and penal charges of 9.5% per month and the outstanding amounts are therefore now so high even before this suit is finalized and the 1st defendant is threatening to exercise its statutory power of sale of the two properties the subject matter of this application and if they do so the plaintiff will suffer irreparable damages as she is residing on one of the said parcels of land and

which may defeat the whole purpose of this case if it happens before this case is finalized and hence the necessity of seeking orders sought herein.

d. That to add insult to injury the 1st defendant has reported the plaintiff to C.R.B. (credit Reference Bureau) which has clipped the plaintiff financially completely as she cannot now be advanced money from any bank or any other financial institution.

3. The application was further supported by the affidavit of the applicant sworn on 7th May, 2015 in which she deponed on the main that:-

a. That she was an employee of the 1st defendant bank herein where she used to work as a clerk/teller until when the said bank dismissed her from her said employment after some amount of Kshs.500,000/= which was in her custody got lost in the course of her work and when a criminal case that had been instituted against her was ending in court yet to be finalized and which later was to be finalized in her favour as she was acquitted of the criminal charge of theft that had been preferred against her.

b. That in the course of her said employment she had been advanced two loans by the 1st defendant bank in her capacity as their employee and repayment of which the 1st defendant bank used to deduct from her monthly salary.

c. That she had given two of her parcels of land namely RUIRU MUGUTHA BLOCK 2/79 and KIAMBU/MUNICIPALITY BLOCK 5 (KIMUMBI) 2684 as sureties for repayment of the said two loans advanced to her by way of charging them.

d. That she was advanced an amount of Kshs.1,600,000/= for each of the said loans making a total of Kshs.3,200,000/=.

e. That when she was charged with criminal case number 1324 of 2012 in the Chief Magistrate's Court at Milimani Court, she was soon thereafter suspended from her employment with the 1st defendant and soon thereafter and before the said criminal case was even heard, she was summarily dismissed from her said employment and the 1st defendant demanded her immediate repayment of the outstanding amounts of the said loans she had been advanced "by virtue of her status as a staff member in the said bank.

f. That the said criminal case was heard by a competent court of law which heard all the evidence relating to the loss of the amount of Kshs.500,000/= which had been charged with stealing and on the 28th day of June 2013 the said Court acquitted her.

g. That she filed the current suit on the 29th day of October 2013 whereby she was claiming damages for among others having been irregularly or unlawfully terminated from her employment with the 1st defendant and a declaration that her summary dismissal from employment by the 1st defendant was irregular and unlawful and therefore all the loans the plaintiff had advanced to her should be repaid a per their initial arrangement with the 1st defendant.

h. That on the 3rd day of January 2014 the first defendant wrote to her informing her that the loans they had advanced her were accruing interest at the bank prevailing co-operative base rates which were by then at 17.5% and penal charges of 0.5% and that she was therefore owing the said bank a sum of Kshs.3,967,604/50 dr and which amount continued to attract interest at the said foregoing rates.

i. That in their said letter of 3rd January 2014, the 1st defendant also informed her that they had disclosed her personal information and credit account details to credit references Bureau which action clearly is an extension of malicious way the 1st defendant had been handling her all through

and apparently with a calculated aim of completely ruining her financially as she cannot be advanced any loan by any bank now.

j. That the 1st defendant has now gone further and notified her that it was now in the process of selling her said two properties to recover their outstanding amounts of the said loans advanced to me which stood at Kshs.4,728,670/87 dr as of the 4th day of March 2015 when they gave her 90 days notice.

4. The respondent opposed the application and filed notice of Preliminary Objection in which it stated that:-

a. The application seeks to amend the plaint so as to introduce the issue of a financial contractual obligation pertaining to the charge executed by the claimant in favour of the 1st respondent over title Nos. Ruiru Mugutha/Block 2/79 and Kiambu municipality Block 5 (Kiamumbi) 2685 (“the securities”) and which issue does not fall within the jurisdiction of this Honourable Court.

b. The issue in respect of the aforesaid securities can only be determined and/or dealt with by the Commercial & Admiralty Division of the High Court of Kenya but not this Honourable Court.

5. The respondent further filed Replying Affidavit through one John Wambugu who deponed on the main that:-

a. That in answer to paragraph 9 of the Affidavit, he deponed that the claimant’s suit against the 1st respondent is misconceived and without any basis whatsoever as her services were terminated after she failed to respond to the disciplinary enquiry and to account for loss of Kshs.5000,000/= which was in her custody as clearly spelt out in her letter of dismissal dated 1st October 2012.

b. That in further answer to paragraph 10 of the Affidavit, he deponed that the loans advanced to the claimant by the 1st respondent were at the staff rate of interest as per the terms and conditions of employment which terms stipulated that upon termination and/or cessation of employment any outstanding loan shall attract interest at the prevailing commercial rates.

c. That in further answer to paragraph 12 of the Affidavit and in answer to paragraph 13 thereof, he deponed that the claimant having defaulted in the repayment of the loan due and owing to the 1st respondent and which stood at Kshs.4,728,670.87 as at 4th March 2015 and in respect of which the claimant had charged her two properties known as title Nos. Ruiru Mutha/Block 2/79 and Kiambu Municipality Block 5 (Kiamumbi)/2684 (“the suit properties”) in favour of the 1st respondent, the 1st respondent’s statutory power of sale provided by law had crystallized.

d. That in further answer to paragraph 13 of the Affidavit, he deponed that the contention by the claimant that she will suffer irreparable damages if the suit properties are sold by public auction is with no metis whatsoever as the value of the properties can be quantified in monetary terms and the 1st respondent being a financial institution can be able to meet any award of damages that the Court may decree in favour of the claimant in the event her suit succeeds but which suit he is advised by the 1st respondent advocates on record and which advise he holds to be true that it has no chances of success.

e. That further, if an injunction order sought by the claimant is granted, it is the 1st respondent who will suffer irreparable loss and damage in that the debt amount which stood at Kshs.4,728,670.87 as on 4th march, 2015 and which is not being serviced at all will continue to accrue interest and thereby diminish the value of the securities.

f. That in further answer to the claimant’s application, he deponed that her claim is grounded on a malicious prosecution by the 2^{ns} respondent in the criminal case No. 1324 of 2012 and save for the

complaint lodged by the 1st respondent of the loss of the said sum of Kshs.500,000/= while in the custody of the claimant, the decision to arrest and arraign her in Court for theft of the same was at the sole discretion of the 2nd respondent and the 1st respondent cannot be held liable for the same.

g. That further, the claimant had admitted in her pleadings before this Honourable Court having lost and/or being unable to account the loss of the said sum of Kshs.500,000/= which came into her possession in the course of her duty as a teller and therefore, the 1st respondent was within its constitutional and legal right to lodge a complaint with the Anti Bank Fraud Unit of Kenya Police so as to have the said loss investigated and the person culpable brought to book. In the circumstances, the 1st Respondent cannot in law or otherwise be blamed for having reported the theft and/or loss of the said sum of Kshs.500,000/=

6. In his submissions in support of the application, Mr. Kamatta for the claimant submitted that the two plots in issue were purchased by the claimant when she was an employee of the 1st respondent and paid for them through money advanced by the 1st respondent which was to be repaid through monthly deductions from claimant's salary. According to counsel, the Court therefore has jurisdiction to entertain the claim. In support of the submission, counsel sought reliance on the case of Abraham Nyambane Asiago vs. Barclays Bank of Kenya Ltd.

7. Mr. Wanjohi for the respondent on his part submitted that the suit properties were yet to be included as part of the claim hence no injunction could issue in respect of them. According to counsel, a Court can only adjudicate on matters or disputes before it hence until an order for leave to amend is granted, the application for injunction is incompetent and ought to be struck out. In support of the submission, counsel sought reliance on the case of Moses Ndungu Mungai v. Co-operative Bank of Kenya HCCC No. 106 of 2009 where Justice Koome dismissed an application for combining a prayer for amendment of claim with that of injunction.

8. On the issue whether the Court can interfere by way of injunction, Counsel submitted that the claimant having defaulted in the repayment of the loan, the 1st respondent was entitled to exercise its statutory power of sale as provided under section 96(1) of the Land Act, 2012. On this point Counsel sought reliance on the case of National Bank of Kenya vs. Pipeplastics & Another (2001) eKLR where the Court of Appeal held that a Court of law cannot re-write a contract between the parties.

9. The claimant seeks as against the respondents, general, aggravated and exemplary damages for unlawful arrest, confinement malicious prosecution and defamation. She further seeks as against the 1st respondent a declaration that her summary dismissal was irregular and or unlawful hence all loans she took while working for the 1st respondent should be repaid as per initial arrangements between her and the 1st respondent.

10. The claimant further sought an order of injunction restraining the 1st respondent from selling or disposing of the suit properties.

11. On the issue of whether it is proper for the claimant to combine an application for amendment with that of an injunction, the Court would like to invoke the provision of article 159(2) (d) which enjoins the Court to dispense justice without undue regard to procedural technicalities. The Court has carefully considered the application and became of the honest view that no prejudice incapable of compensation by an award of costs would be occasioned to the 1st respondent if the amendments sought were granted.

12. It is not disputed that the properties sought to be included in the claim were bought by loans advanced to the claimant and that the 1st respondent intends to liquidate the same in exercise of its statutory power of sale. These loans were granted to the claimant in the course of her employment with the 1st respondent, which employment has since been terminated. These are facts within the knowledge of both the claimant and 1st respondent. The Court will therefore overrule this objection. Concerning the case of Moses **Ndungu Mungai Vs. Co-operative Bank**, this decision was made prior to the enactment

of the new Constitution hence the learned Judge might not have had the benefit of the provisions of article 159(2) (d) of the Constitution cited above.

13. On whether the claimant is entitled to injunctive orders, the Court notes that the claimant contests the reasons and manner of her dismissal. She further seek damages for malicious prosecution and defamation against both respondents. The claimant was advanced a loan to purchase the suit properties. This loan was granted on account of her employment with the 1st respondent which has since been terminated. She is disputing the reasons and manner of her termination. Under the principle of lis pendens, it would therefore not be right for the 1st respondent to deal with the suit properties as if no litigation was pending. As observed by my sister Lady Justice Ndolo in the case of **Abraham Nyambane Asiago Vs. Barclays Bank of Kenya**, property that an employee buys through staff loan scheme is very dear to the employee. In most cases it is also their home and is the only asset they may ever own. Loss of such an asset cannot therefore be adequately compensated by an award of damages. I am persuaded by the sentiments of the learned Judge and will follow the same in respect of this application with consequence that the application dated 7th May, 2015 is hereby granted but on terms that the claimant continues to service the loan at staff rates pending the hearing on conclusion of the suit herein.

15. It is so ordered.

Dated at Nairobi this 18th day of August 2016

Abuodha Jorum Nelson

Judge

Delivered this 18th day of August 2016

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha Jorum Nelson

Judge