



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**CAUSE NO. 846 OF 2014**

**BANKING INSURANCE & FINANCE UNION (KENYA).....CLAIMANT**

*VERSUS*

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

Tom O. Odera for claimant/applicant

Chacha Odera for respondent

**RULING**

1. By a notice of motion application filed on 25<sup>th</sup> June 2016, the claimant applicant seeks the court to injunct the respondent bank from realizing the loan securities from defaulting grievants as governed by the respective agreements between the bank and its former employees Janet Patricia Maina and Andrew Kiptoo Kotut pending the hearing and determination of the pending suit for unlawful and unfair termination of employment.
2. The sale of the charged properties is envisaged.
3. The application is supported on grounds set out in the notice of motion and in the supporting affidavits to wit, *interalia*;
  - a. The loans were granted on special terms to the grievants by virtue of being employees of the respondents and the monthly instalments were being deducted from the paybill and credited to the employees loan accounts.
  - b. That the loans were pegged on each employee's retirement age. The employee's employment was terminated and they had no other source of income.
  - c. That the termination of employment is challenged in this suit. That the respondents ought to await the outcome of the suit before attempting to recover the outstanding loan balances.
  - d. That the grievants seek restatement, re-engagement and or compensation. Therefore, the grievants have opportunity to either continue repaying the loans if reinstated or re-engaged or liquidate the outstanding loan from the compensation quantum.
  - e. That the grievant will suffer irreparable harm if their properties are sold and this suit succeeds. That they have prima facie case and the balance of convenience is in favour of granting the application. That the matter is not a pure commercial dispute, it arises from an employer and employee relationship and by dint of section 12 of the Employment and Labour Relations Court

Act, 2011, as amended by Misc. amendment law No. 18 of 2014, this court has jurisdiction to determine the dispute and grant the orders sought.

f. That the balance of the loan ought to be computed on the favourable employee interest rates but not commercial rates since until the employment status of the grievant is determined by the court.

g. That the interim orders be confirmed injuncting the sale and levying commercial interest rates.

## **Response**

4. The application is opposed vide grounds of opposition filed on 25<sup>th</sup> July 2016 and the replying affidavit filed on the same date.

5. The grounds of opposition are set out thus;

1. That no legal nexus exists between the claimants' claim for termination of their contracts of employment and realization of the security LR No. Eldoret Municipality Block 9/1168 and Ngong/Ngong 55765.

2. That this Honourable court lacks the jurisdiction to hear and determine this application as the Employment and labour Relations Court has no jurisdiction over proceedings relating to title, lease or charge under the Land act, 2012 (Cap 6) which is the exclusive jurisdiction of the Environment and Land Court established under the Environment and Land Court Act, 2011.

3. That the claimant has no cause of action against the respondent warranting the grant of injunctive relief.

4. That parties cannot confer jurisdiction on the court by waiver and/or otherwise.

5. That the claimant has sought to invite the court to rewrite the contract between the parties.

6. That the claimant's application is misconceived, mischievous, in bad faith, is frivolous and vexatious.

7. That the application is an abuse of this Honourable Court's process;

and same are augmented in the replying affidavit of Linet Anyika and the attached staff loans policy.

6. That the grievants are contractually bound by the charge which is governed by the Land Act, 2012.

7. That they are also bound to service their loan facilities and in breach of the same the respondent has a right to realize the securities.

8. That the respondent issued statutory notices to the two grievants having been in breach of express covenants of the charge by failing to pay outstanding sums secured under the charge.

9. The two grievants have continued to be in default and the respondent has a right to commence the process of selling the property charged in accordance with the provision of section 96 (1) as read with sections 90 (1) and 90 (3) of the Land Act, 2012.

10. That due process has been followed by the respondent in exercising its statutory power of sale. That the application be dismissed with costs.

## **11. Determination**

i. Has the court got jurisdiction to entertain this application?

ii. If so, has the applicant satisfied the requirements of granting injunctive relief sought pending the hearing and determination of the suit.

### Issue i

12. In the Industrial Court of Kenya, **Cause No. 900 of 2012 between Banking Insurance & Finance Union (Kenya) and Consolidated Bank of Kenya Limited**, the issues raised in the suit are in fours with those raised in the present matter. James Rika, J. while adjudicating on a similar application for injunctive relief to restrain the respondent bank from realizing securities for preferential loan in respect of defaulting ex-employees, held;

*“the main issue is whether termination was fair. The loan element in the context of this dispute flowed from an employment relationship. The dispute in respect of the charge created to secure the staff loan is a matter of employment. The environment and land court is not entirely divested of jurisdiction, but would in the view of this court not be the appropriate forum to support the conciliation process, and determine the final issues that arise out of this dispute. The preliminary objection is not entirely without some merit but for reasons explained in this ruling, the court finds it is the most appropriate jurisdiction to hear and dispose of the dispute.”*

13. This court is in full agreement with the determination by Rika, J. and finds that this is the most appropriate court to hear and determine the present cause of action and any matters arising out of the main dispute. The court therefore has jurisdiction to hear this suit.

### Issue ii

14. On the issue whether the applicant has satisfied the requirements for grant of injunctive relief the court relies on its decision in **ELRC Cause No. 846 of 2014, Banking Insurance and Finance Union – vs- National Bank of Kenya Limited** which dealt with similar dispute as the present suit where the court is dealing with an application for injunctive interim relief relying on the Court of Appeal at Mombasa in the case of **Mr Rao –vs- First American Bank of Kenya Ltd. & 20 others, where Kwach, Bosire & O’Kubasu JJA** held that the power of a court in an application for an interlocutory injunction is discretionary and that;

- 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 balance of convenience.

15. In this case, as was in Cause No. 846 of 2014, supra, the grievants acquired properly vide preferential loans provided by the respondent in their capacity as employees of the respondent.

16. The court finds as it did in that case as follows;

*“In this regard the court refers to the decision in **Abraham 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.”*

17. In the present case, the claimant has an arguable case that the grievants ought to continue repaying the loans on preferential terms until the hearing and determination of the suit. However this does not shield the employees who have defaulted in repayment of the outstanding loan.

18. The court cannot condone such digression from contractual obligations.

19. The claimant has therefore not established a *prima facie* case to warrant grant of injunctive relief to stop loan repayment pending the hearing and determination of this suit.

20. Had the grievants left employment voluntarily, they would have continued to repay the loan on commercial rates. The obligation remains if the termination is contested subject to the retention of special rates until the lawfulness or otherwise of the termination is determined.

**21. The final orders of the court are as follows;**

**i. The application to stop the loan repayment pending the hearing and determination of the suit is refused.**

**ii. The respondent to continue recovering the loan repayment on the special rates granted to the grievants until this suit is heard and determined.**

**iii. The process of computing the loan arrears at special rates and the realization of the security to commence afresh after giving the grievant the necessary statutory notice from the date of this ruling.**

**iv. Costs in the cause.**

**Dated and delivered at Nairobi this 9<sup>th</sup> day of December 2016**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**