



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NUMBER 1777 OF 2014

PETER MUTISYA MUSEMBI.....1ST CLAIMANT

THOMAS KIPLETING TENAI.....2ND CLAIMANT

VERSUS

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT

RULING

1. The applicant in this motion which was brought under Certificate of Urgency seeks in the main, an order of this Court restraining the respondent or its servants or gents or any other person acting in that behalf from reviewing, revising, converting, or changing the preferential rates of interest previously enjoyed by the claimant while in employment of the respondent to market rates, in respect of loan facility advanced to the 1st claimant by the respondent pending the hearing and final determination of this suit.
2. The application is brought on the grounds that the claimant who was sometimes in January, 2010 was employed as a clerical officer by the respondent was allegedly unlawfully dismissed from employment in April, 2014.
3. Further that the claimant had obtained a loan facility from the respondent at preferential interest rates during his employment and was unable to service the same owing to loss of employment which was purely attributable to the respondent.
4. The applicant averred that the respondent was in the process of converting, reviewing the interest rates chargeable on the loan facility taken by the 1st claimant at preferential rates to market rates notwithstanding that it is the respondent who caused the 1st claimant's unemployment.
5. The circumstances leading to the termination of the claimant's services as deponed in his supporting affidavit were as follows:-

Sometimes in 2014 the respondent came up with voluntary early retirement plan whereby it invited its employees to take up voluntary early retirement package under which willing employees would retire from employment in return for certain benefits which included

rebates on existing loans, preferential interest rates for existing loans and medical benefits for employees and their families for a period of one year after retirement. Since the plan was voluntary the 1st claimant opted not to take it up and continued in service of the respondent. However by a letter dated 30th April, 2014, the respondent terminated the 1st claimant's employment allegedly for poor performance yet no issue had been raised about poor performance.

6. The respondent on its part filed a replying affidavit through one Dismas Omondi who deponed that he was the Human Resources Partner Business division of the respondent.

7. He deponed that in an effort to restructure its operations in order to realize optimum level operation, the respondent put in place performance management policy whose primary aim was to promote and facilitate the attainment of the respondent's objective through effective management of employee's performance. In line with this policy the respondent identified a number of employees whose performances were below the prescribed performance standard during the review of 2013 performances.

8. Mr. Omondi further stated that as a remedial measure the employees whose rating was below the accepted performance standard were placed on a performance employment plan but in respect of those whose rating were unacceptable they were exited from the Bank on 30th April, 2014. This included the 1st claimant. The 1st claimant, like the rest affected, were informed of their right of appeal against termination which they exercised albeit unsuccessfully. Mr. Omondi therefore depones that the claimant was lawfully and procedurally terminated.

9. Concerning the preferential interest loan, Mr. Omondi deponed that this facility was granted to staff who were under the employment of the respondent. It was given at the discretion of the respondent under staff loan policy and could be suspended, withdrawn or amended and was further subject to review from time to time.

10. On termination of the 1st claimant's employment on 30th April, 2014, all privileges accorded under staff loan policy ceased and the respondent was entitled to change the current/normal commercial rate of interest on the facility upon giving a thirty days' notice.

11. In his submissions in support of the application, Mr. Njomo for the applicant submitted his client had satisfied the criteria for grant of the injunctive orders sought. He submitted that in an application of that nature, the Court ought not to concern itself with matters for determination in the main suit. In support of this point, counsel sought reliance on the case of **Dorris Kanini Ndunda v. Family Bank Limited (2013) eKLR** where the Court followed an earlier decision in **Mbuthia v. Jimba Credit Corporation & Another (1988) KLR 1.**

12. Regarding principles for consideration in an application for grant of interim orders, Counsel relied on **Giella v. Cassman Brown (1973) E.A. 75.** Counsel concluded this limb of submission by stating that if the orders sought are not granted his client would suffer injury that could not be adequately compensated by an award of damages.

13. On the issue of prima facie case, counsel submitted that a prima facie case is established where an applicant produces evidence to satisfy the Court that there are issues that are capable of judicial determination. In essence, all one has to demonstrate is that there exists a real dispute between the parties and one need not show that he or she will win the case.

13. Counsel has thus submitted that his client has established a real dispute for determination which was whether his termination was unlawful and unfair. In support of this submission counsel relied on the case of **Mrao v. First American Bank of Kenya & 2 Others (2003) eKLR.**

14. On the issue of irreparable loss, Counsel submitted that the claimant having lost his

employment will be unable to service his loan hence risk being cited for default by Credit Reference Bureau thereby denting his creditworthiness.

15. Relying on the case of **Abraham Nyambane Asiago v. 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; Counsel submitted that if the orders sought are not granted, the claimant would suffer irreparable loss.

16. Counsel for the respondent on the other hand submitted that the applicant had not demonstrated that it had a prima facie case. Relying on **Mrao Ltd v. First American Bank** cited earlier in this ruling counsel, submitted that a prima facie case is more than an arguable case, the evidence must show infringement of a right, and the probability of success of the applicant's case upon trial.

17. Counsel further submitted that the issue raised by the applicant in the present application concerns interest rates on mortgage repayment. Such issues according to counsel are purely contractual and independent of the employment dispute before this Court. As such, the Court according to Counsel ought not to adjudicate private commercial contracts as its jurisdiction is limited to employment disputes. To support this point, counsel cited the **Lilian "S" case**.

18. On the question of preferential interest rates, Counsel submitted that the low interest rate of 3% per cent was an exclusive benefit afforded to employees of the respondent and to maintain these rates, the respondent was legally obligated to remit fringe benefit tax. It was Counsel's position that the loan agreement dated 2nd July, 2013 which the applicant executed had special conditions inter alia that the low interest rate was to be reversed to normal commercial rates if for any reason he left the service of the respondent. To support this argument, counsel cited the case **of Harilal & Company & Another v. The Standard Bank Limited (1967) EA 512**.

19. Counsel further submitted that it was not in dispute that the applicant was no longer in the service of the respondent. His services were terminated pursuant to clear provisions of his contract of employment, after affording him an opportunity to be heard and general due process followed. As such, the benefits available to staff of the respondent were no longer available to the applicant.

20. On the question of damages as an adequate remedy, Counsel cited the case of **Kenya Commercial Finance Co. Ltd v. Afraha Education Society (2001) 1 EA86** where the Court of Appeal stated that the principles for grant of temporary injunction apply sequentially and the second condition would only apply if the first condition had been satisfied. According to counsel, injunctions should only be granted where the applicant has demonstrated that it will suffer an injury which cannot be adequately compensated by an award of damages. To this end, counsel cited **Giella v. Cassman Brown**.

21. To my mind, Counsel for both parties are upto speed on the principles governing the grant of interlocutory injunctions and the Court will not delve more in that respect. The only aspect the Court requires to address is whether the applicant has brought himself within these principles to warrant the grant of interlocutory injunction.

22. According to the claimant and which is not disputed by the respondent; sometime in 2013 his employer, the respondents herein came up with a voluntary retirement plan whereby employees were invited to take up early retirement in return for certain benefits which included loan rebates, preferential interest rates for existing loans and medical cover for one year after retirement. The claimant did not take up the offer and instead opted to remain in employment.

23. Thereafter sometimes in May, 2014 the respondent terminated the applicant's services on grounds of poor performance. The termination triggered other consequential processes which

included the conversion of the preferential loan enjoyed by the applicant to commercial/market rates. These consequential processes form the basis for this litigation and in respect of which I have endeavoured to analyse each parties position above.

24. According to the respondent, the applicant was among employees who after carrying out the Performance Management Policy, scored a rating below the accepted performance standard. His colleagues who were affected, were exited from employment on 30th April, 2014 but he chose to continue working for the respondent since the early retirement offer was voluntary. The respondent however terminated his services by a letter dated 30th April, 2014.

25. The termination letter informs the applicant that during H1 review he was rated as 1 implying unacceptable performance. He was consequently put on a performance improvement plan which required him to improve his performance but several performance discussions held between him and his supervisors rated him at 2 which was still below performance standards. According to the respondent therefore, no alternative was left but to terminate the applicant's services.

26. Under section 43(1) of the Employment Act, in any claim arising out of termination of a contract of employment, the employer shall be required to prove the reason for termination and where the employer fails to do so, the termination shall be deemed to be unfair.

27. Further under section 45(2) of the Act, a termination shall be considered unfair if the employer fails to prove that the reason for the termination was valid; that the reason for termination was a fair reason related to the employees conduct, capacity or compatibility or based on the operational requirements of the employer and that the termination was done in accordance with fair procedure.

28. This is an interlocutory application and the Court is careful not to delve too deep into the merits and demerits of the reason and process of terminating the applicant. All the Court needs to be satisfied about at the moment is whether the applicant has made out a prima facie case with any probability of success and if so, would the loss suffered if he is ultimately found successful in the main claim be impossible to adequately recompense by way of damages.

29. The applicant complains that sometime in December, 2013 the respondent unilaterally reviewed the notice period of termination of employment contained in letter of appointment from 3 months to 1 month. He further complains that on 30th April, 2014 without any notice, and without according him any hearing, the respondent terminated his services on grounds of poor performance.

30. Section 41(2) of the Employment Act requires that an employer prior to terminating employment of an employee, hear and consider any representations which the employee may make on the grounds of misconduct or poor performance.

31. The respondent has not filed any response to this claim however the replying affidavit of Mr. Omondi in opposition to the orders sought is not sufficiently detailed on how the respondent could possibly have endeavoured to comply with the provisions of the law adumbrated above. Perhaps these will emerge more when the memorandum of response and supporting documents are filed or ultimately at the trial. All Mr. Omondi has stated in his affidavit is that the applicant who was among those whose performance were found to be unacceptable were terminated. Nothing much is said about the process of termination as contemplated under section 41(2) of the Act referred to earlier in this ruling. To this extent the Court is of the opinion that the applicant has demonstrated a prima facie case with probability of success.

32. The next question therefore is if the applicant ultimately succeeds, would damages be adequate remedy?

33. The applicant in his memorandum of claim seeks among others:-

(a) 12 months' salary for wrongful and unfair termination of employment.

(b) General damages for violation of fundamental rights and freedoms.

(c) Three months' salary in lieu of notice.

(d) Payment of accrued leave days

34. Further the letter of offer for loan dated 19th February, 2014 seem to be the only evidence tendered by the applicant of a loan taken under the preferential loan scheme enjoyed by the respondent's staff. According to the letter the applicant borrowed Kshs.520,000/= payable by monthly instalments of Kshs.11,049 inclusive of interest for 60 months. It was one of the terms of the loan agreement that upon leaving the bank's services for any reason, the Bank would charge current/normal commercial rate of interest upon giving 30 days' notice. The purpose of this loan was for the construction of a greenhouse presumably for agribusiness.

35. 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 v. Cassman** Brown case to warrant grant of interlocutory injunction.

36. There is one last but important argument advanced by Counsel for the respondent on the issue of jurisdiction of this Court which I felt I should make a pronouncement on.

37. Counsel argued that the issues raised in the present application concern interest rates on mortgage repayment hence are purely contractual and independent of the employment dispute before the Court. As such the Court ought not adjudicate private commercial contracts as its jurisdiction is limited to employment disputes.

38. This argument, profound as it might appear, raises an interesting legal question that is presently causing uncertainty over choice of forum in what I might call "mixed grill" cases.

39. That is to say would an employee who during the tenure of his employment, borrowed money or took out a mortgage which was predicated upon the fact that he was working for his employer and whose services, he considers wrongfully terminated, split his claims among the various courts or is it jurisdictionally permissible to file all the claims in one suit before any of the Courts with jurisdiction in one of the claims?

40. To answer this question I will seek recourse to the Australian case of **Dean Patty v. Commonwealth Bank of Australia (2000) FCA 1072** where Justice Paul L. G. Brereton stated as follows:-

"When a Federal Law confers jurisdiction on a court in respect of a "matter" arising under the Constitution or a Federal statute, the jurisdiction so conferred extends to authorize determination of the whole "matter". It has long been established that a matter is a "justiciable controversy", the determination of which may involve both Federal and State law. The accrual of State jurisdiction to the High Court, so that it could determine non-federal parts of a "matter" arising under the Constitution or a federal law has been recognized for many years. This means that once the jurisdiction of the High Court is attracted by reason of the matter arising under Federal law, the Court is clothed with full authority essential for the complete adjudication of the "matter", and not merely the federal aspect of it. Subsequently, it was recognized that other courts exercising federal jurisdiction also had accrued jurisdiction.

41. In an earlier Australian case of **Philip Morris Inc v. Adam P. Brown Male Fashions Ltd (1981) 148 CLR** at p. 535 Aickin J stated that:-

“The vesting of Judicial power in the specific matter permitted by the Constitution carries with it such implied power as is necessarily inherent in the nature of the judicial power itself”.

42. To argue therefor that this Court and indeed other Courts of concurrent jurisdiction properly seized of a matter, cannot adjudicate upon a consequential legal or factual question which may on the face of it appear to be within the exclusive jurisdiction of another Court of the same judicial hierarchy, would unreasonably emasculate and whittle down the inherent power of a Court of law to do justice without undue regard to technicalities.

43. Failure to adopt an inclusive approach in mixed grill cases will not only create overlap and duplicity of evidence but also inexorably increase the cost of litigation. This Court and indeed all Courts and tribunals are bound by article 159 of the Constitution while exercising their judicial authority to among other things ensure that justice is dispensed without delay and that it is administered without undue regard to procedural technicalities. I say no more.

44. The foregoing having been said, the application herein fails on merit and is hereby dismissed with costs.

45. It is so ordered.

Dated at Nairobi this 25th day of February 2015

Abuodha J. N.

Judge

Delivered this 25th day of February 2015

In the presence of:-

.....**for the Claimant and**

.....**for the Respondent.**

Abuodha J. N.

Judge