



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT

NAIROBI

CAUSE NO 1817 OF 2011

PITHON MWANGI NJOROGE CLAIMANT

VERSUS

CO-OPERATIVE BANK OF KENYARESPONDENT

RULING

1. The ruling herein relate to two (2) applications; one dated 9th June 2015 and another dated 8th July 2015. The two shall be considered together.
2. In the application dated 9th June 2015 filed by the respondent, Co-operative Bank of Kenya Limited is seeking for orders of stay of execution of the judgement of the Court delivered on 28th May 2015 pending hearing and determination of the intended appeal. The application is supported by the annexed affidavit of Samuel Kibugi and on the grounds that the Respondent as the applicant has filed a Notice of Appeal against the judgement of the Court and hence seek stay of execution. The decretal amount is for Kshs.2, 019,671.40 with costs and interest and that the decree holder/Claimant is a person whose means are unknown and there is fear that payment of such decretal sum to him may result in substantial and unrecoverable loss should the intended appeal succeed. The Respondent is a commercial bank which will be able to pay the sum ordered should it not succeed in the intended appeal.
3. Other grounds in support of the application are that the Respondent is willing to deposit security by a deposit of the decretal amount in a joint account in the names of both advocates. That if the prayers sought are not granted the intended appeal shall be rendered nugatory.
4. In The affidavit of Samuel Kibugi in support of the application he avers that as the respondent's Head of Legal Services he is aware that the Respondent wishes to prefer an appeal against the judgement of the Court hence the application seeking stay of execution of the Court judgement to enable the Court of Appeal address the intended appeal.
5. In reply and in opposition to the application the Claimant filed his Replying affidavit on 13th July 2015 and avers that the application is made in bad faith as it is meant to delay the course of justice. While there is a decretal amount unpaid the Respondent has commenced recovery proceedings for a staff loan the Claimant had received and fears the auction of his only property acquired during employment with the respondent. The Respondent is claiming the sum of Kshs.2, 957,171.17 as staff loan and Sacco loan and the decretal amount is Kshs.2, 019,671.40. This recovery of the staff loan is meant to defeat the course of justice. The Sacco loan is given by an independent entity and cannot be amalgamated by the respondent.

6. The Claimant also avers that the Respondent holds a legal charge over his property **on LR. No. Ngong Township Block 1/359** valued at kshs.16, 000,000.00 and the Claimant is thus able to pay the decretal amount in the event the appeal succeeds. There are no reasons attached for the intended appeal and has applied for stay of auction over the charged property scheduled for 10th July 2015 and hence the Respondent should pay the decretal amount with interest per the Court judgement herein.
7. In the application dated 8th July 2015 by the claimant, he is seeking for orders that;
 1. *Spent.*
 2. *Spent.*
 3. *Pending the hearing and determination of the respondent's application for stay of execution pending appeal, an injunction do issue restraining the Respondent herein and their agents or servants from alienating, selling, transferring and or attempting to sell by way of auction or otherwise or in any way whatsoever dealing with the claimant's property known as LR. No. Ngong Township Block 1/359;*
 4. *That pending hearing and determination of the respondent's application for stay of execution pending appeal, the Respondent do recalculate the interest payable by the applicant at staff rates from the time of termination/dismissal until judgement;*
 5. *That pending the hearing and determination of the claimant's application against the Respondent herein, the Claimant be allowed to continue servicing staff loan at staff rates and on of monthly instalments;*
 6. *That pending the hearing and determination of the respondent's application for stay of execution pending appeal, the interest on stall loan stopped from accruing any further interest from the date of judgement until the appeal is head and determined*
 7. *That the judgement/decretal amount herein to earn interest at Court rates from date of judgement until the appeal is heard and determined;*
 8. *That this Court do issue such further orders as it may deem fair and just in the circumstances.*
8. This application is supported by the annexed affidavit of the Claimant and on the grounds that he is the registered owner of on LR. No. Ngong Township Block 1/359 and due for auction by the Respondent to recover a staff loan and a Sacco loan. The Claimant was an employee of the Respondent where he obtained a staff loan of kshs.12, 000,000.00 repaid in monthly instalments through his salary. Upon termination of employment the Claimant filed suit before this Court and the Court made a finding that the termination was unfair and awarded compensation. The termination was also established that it was without notice. The Claimant has been servicing his loan without default and has already paid Kshs.1, 200,000.00 for 100 months. The Respondent has since filed a notice of appeal and applied for stay of execution of the judgement herein pending such appeal and effectively this will affect the payment of the decretal amount which could have been used to set off the loan amount.
9. Other grounds are that the Respondent will not suffer any prejudice if the orders sought by the Claimant are granted. He is seeking to pay his due loan in instalments without any default as he has continued to do each month.
10. In his affidavit, the Claimant avers that upon his employment by the Respondent he was unionised and under the collective agreement he was entitled to a staff loan and staff owner occupier allowances. He applied for a staff housing loan facility in 1997 and charged his property on LR. No. Ngong Township Block 1/359 to the respondent. This was to be repaid in 300 months at 4%

interest per year payable through his salary with the Respondent as the employer. The Claimant topped up the charge with additional loans over time. Upon dismissal on 3rd October 2011 the Respondent made effort to immediately recover the staff loan at commercial rates hence attracting interest at the prevailing commercial rates. The Claimant has however continued to pay the loan due in instalments.

11. The Claimant also avers that he is unable to access his loan statements as he has not access to respondent's internal systems and hence unable to know the status of the same. Nguru auctioneers were instructed to auction the property on 10th July 2015 and by applying to stay execution of judgment herein is meant to frustrate the Claimant from enjoying the judgement. The Respondent has combined the staff loan and the Sacco loan while the matter was ongoing in Court and the current due is the amount of Kshs.2, 957,171.17. The Sacco loan was with a separate entity outside the Respondent and should not be involved as the Claimant has sued the Sacco before the Co-operative Tribunal Case No.52 of 2012 which is still pending. The Respondent will not suffer any prejudice if the orders sought are granted.

12. The Respondent filed Grounds of Opposition to the claimant's application on

16th July 2015. Such grounds are that this Court does not have the jurisdiction to issue an injunction restraining the exercise of a reserved statutory rights of sale which is purely a private commercial matter; LR. No. Ngong Township Block/359 over which the injunction has been issued is not the subject matter of the employment cause which has been finalised and judgement entered and the reliefs granted did not in any way relate to or are connected to the charge between the parties over LR. No. Ngong Township Block/. Other grounds are that the upon judgement delivered on 28th May 2015 the Court became *functus officio* to issue the reliefs sought by the Claimant and the injunction issued herein is without basis as the Court has no jurisdiction in a matter that is not employment and labour relations as what exists is a relationship between a charger and charge. There is no correlation between the application for stay of execution filed by the Respondent and the one filed by the Claimant stopping the Respondent from exercising its statutory power of sale.

Submission.

13. On 22nd July 2015, both parties Agreed to file their written submission with regard to both application now pending and a mention on 14th September to confirm the same and be allocated a ruling date. On 14th September 2015 when the Court mentioned the matter, only the Claimant had filed their written submissions on 2nd September 2015. The respondents though represented in Court on this day did not make any submissions as directed.

14. The Claimant submitted that the Respondent has filed an application seeking stay of execution pending their intended appeal and the Claimant has filed an application to restrain the Respondent from auctioning LR. No. Ngong Township Block/359 secured under staff loan scheme. In the judgement of the Court delivered on 28th May 2015 the Court held that the Claimant had been terminated without due process as section 41 of the Employment Act was not adhered to and that the dismissal of the Claimant was unfair under the provisions of section 43 and 45 of the Act. The Respondent has not stated why they have failed to release the judgement amount to the Claimant and their application for stay lacks merit and should be dismissed.

15. The Claimant also submits that upon realisation that the Respondent was not willing to pay the judgement amount to him and that they have now instructed auctioneer to move in and sell his property, he is seeking for restraining orders stopping the alienation, sale or interference with LR. No. Ngong Township Block/359 as this had been obtained from a loan he got by virtue of his employment with the respondent. The Claimant has been repaying his loan since termination and should be allowed to continue with similar payments until final repayment at the same rate and percentage as he had done while employed. This Court has jurisdiction to grant as prayed under the provisions of Article 162(2) and section 12(1) (a) of the Industrial Court Act [Employment and

Labour Relations Court Act].

16. The Claimant also submits that under the provisions of Article 40(1)(a) and (b) every person has the right to acquire and own property and the Court herein is not *functus officio* and can grant the orders sought by the claimant.

Determination

Whether the Court has jurisdiction to grant the orders sought by the claimant;

Whether the Court should grant a stay of execution herein; and Whether the Court should grant restraining orders against the auction of LR. No. Ngong Township Block/359 and the property of the claimant.

17. there are two applications now pending and dated **9th June 2015** and **8th July 2015** respectively one seeking stay of execution pending the respondent's intended appeal and the other by the Claimant seeking to stop the Respondent from alienating, selling, transferring and or attempting to sell by way of auction or otherwise or in any way whatsoever dealing with the claimant's property known as LR. No. Ngong Township Block 1/359. The Respondent in opposition to the claimant's application has submitted that the Court lacks jurisdiction to grant an injunction in a matter that is purely commercial in nature as the sale of the claimant's property stems from a relationship of a charger and charge and the Respondent is simply exercising their statutory power of sale.

18. The jurisdiction of the Court stems from the provisions of Article 41, 162(2) and (3) of the Constitution as well as from section 12 of the Employment and labour Relations Court Act and any other written law conferring jurisdiction. The Court under Article 41 of the Constitution is granted an inherent right to address constitutional violations with regard to employment and labour relations while under Article 162 of the Constitution the Court is established with original jurisdiction for address any case of employment and labour relations under any statute passed by parliament. In this regard section 12(3) of the Employment and Labour Relations Court Act give this Court exclusive jurisdiction to grant the following orders thus;

(3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—

- i. *interim preservation orders including injunctions in cases of urgency;*
- ii. *a prohibitory order;*
- iii. *an order for specific performance;*
- iv. *a declaratory order;*
- v. *an award of compensation in any circumstances contemplated under this Act or any written law;*
- vi. ...
- vi. ...
- viii. *any other appropriate relief as the Court may deem fit to grant.*

19. Under the above provisions, where the court, on good basis is presented with a claim, application or any matter stemming from an employment and labour relations, the constitutional and legal provisions and the jurisdiction conferred upon the court, can grant such orders in the interim or as final orders. Section 12(3) (viii) give the Court wide powers and the discretion upon good grounds and in the interests of justice to grant;

viii. *Any other appropriate relief as the Court may deem fit to grant.*

20. These are provisions that the Court has to apply judiciously and upon good basis. Such is the case here where the claimant, moved the Court on 8th July 2015 seeking for interim orders stopping the Respondent from alienating, selling, transferring and or attempting to sell by way of auction or otherwise or in any way whatsoever dealing with this property, LR. No. Ngong Township Block 1/359. Having established a *prima facie* case for the grant of interim orders, and upon the Court finding sufficient reason to so grant, it cannot thus be said the Court lacked the jurisdiction to grant such orders. The principles antecedent to granting such orders are also well laid out in **Giella Vs Cassman Brown & Company Limited[1973] EA 358** and As deponed by the Claimant in his application and the grounds of his Notice of Motion, his parcel of land and or property in LR. No. Ngong Township Block 1/359 was charged following a staff loan he had secured with the Respondent from his employment as an employee. That he enjoyed such interest rates and repayment terms based on his employment and continued service with the respondent. Such matters thus stated cannot be herein separated from employment and labour relations between the parties herein so as to oust the jurisdiction of the court.

21. On the application by the Respondent for stay of execution, this Court has set the parameters in several cases for the grant of such orders one being **Collins Osoro Lukhale versus AAA Growers Ltd, Cause No. 100 of 2012** where the Court held that;

An application of this nature must establish the following;

- a. *Substantial loss may result to the Applicant unless the order is made;*
- b. *The application has been made without unreasonable delay and*
- c. *Such security as the Court orders for the due performance of the decree has been given by the Applicant.*

22. In this case the Court went on to hold that;

*Sufficient cause being a technical as well as a legal requirement will depend entirely on the Applicant satisfying the Court that **Substantial loss may result to the applicant unless the order is made**, and therefore the Court may direct for the deposit of **Such security for the due performance of the decree or order as may ultimately be binding on the applicant** where an applicant has been able to satisfy to the Court that **the application has been made without unreasonable delay**. The conditions share an inextricable bond such that the absence of one will affect the exercise of the discretion of the Court in granting stay of execution. The Court of Appeal in **Mukuma V Abuoga (1988) KLR 645** reinforced this position.*

23. In the current application by the respondent, the grounds are that stay of execution is sought to enable them file their intended appeal and a draft memorandum is annexed to the affidavit of Samuel Kibugi. There is also a Notice of Appeal that has been filed. The Respondent is also offering to deposit the judgement amount in the joint account of the advocates herein. However, an intended appeal is not an Appeal to the Court of Appeal nor is a draft memorandum of appeal and notice of appeal thereof matters before the Court of Appeal. These are intentions expressed by the Respondent to secure their right to appeal which appeal has not been filed before the Court of Appeal. The Claimant herein has a valid judgement of the court, and he should be allowed to enjoy such as this Court has already expressed itself in this regard. It is not sufficient that the Respondent is keen to deposit the decretal sum in a joint interest earning account. By the award of the court, the Claimant has a right to the judgement amounts awarded his current status of unemployment or indigence notwithstanding, the Court has already established that he was unfairly dismissed and made a finding.

24. Stay of execution of the judgement herein shall not be granted.

25. On the application by the Claimant seeking to stop the Respondent from auction his property LR.

No. Ngong Township Block 1/359 on the basis that he secured a staff loan and charged the property and received such terms as his employment allowed. That during the continuation of his employment, he was repaying the staff loan and has since continued to repay despite his dismissal. It is trite that in employment, an employee enjoys rights and benefits. Such rights and benefits flow from the employment relationship. Parties to an employment relationship have certain legitimate expectations that in the development of an employee, during the pendency of his employment, the benefits and rights can be enjoyed in good faith.

25. That said, the Claimant by virtue of his employment with the Respondent enjoyed staff loan facility and out of such had a mortgage on such terms that were not commercial but on mutual rates negotiated specifically for the respondent's staff. The Claimant thus received the staff loan/mortgage repayment rates as part of his terms of service.

26. It is common cause that the Court has made a finding that the termination of the Claimant was unfair and an award made in this regard. Therefore had it not been for the unfair termination, the Claimant would have remained in the employment of the Respondent and would have continued to repay his staff loan at the same rates as agreed with his employer the respondent.

27. Where there is an unfair labour practice that lead to dismissal of the employee, the unfair practice cannot take away the rights enjoyed by such an employee by virtue of his employment. The mortgage facility and the rates enjoyed by an employee before termination cannot be separated simply because of a termination which should not have been the case had it not been unfairly exercised. Once the Court has made a finding that termination/dismissal is unfair, the terms of staff loan cannot be unfairly applied. To so apply and use commercial rates would be double punishment and eschewed to further an inherent injustice. This would go contrary to the provisions of Article 28 of the Constitution on the right to dignity by reducing an employee to a homeless person by the sheer fact of the unfair loss of employment and by extension, the loss of his home. This is ultimately an unfair labour practice.

28. In **Banking Insurance & Finance Union (Kenya) Vs Consolidated Bank of Kenya Limited, Cause No 900 of 2012** the Court held that;

- *The loan agreement in the context of this dispute flowed from an employment relationship. The dispute over 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 determine the final issues that may arise out of this dispute."*

29. Similar views were taken in **Abraham Nyambane Asiago versus Barclays Bank of Kenya Limited, Cause No.149 of 2013** where the Court held that;

- *It is not in contest that the Claimant was granted a staff housing loan because he was an employee of the Respondent. It is also factual that the reason why the Respondent has recalled the loan is that the Claimant's employment has been terminated, which termination is contested by the Claimant. It cannot therefore be that the employment and labour Court has no jurisdiction to adjudicate on a matter arising from the staff housing loan.*

30. That aptly said, the cases cited above in **Banking Insurance & Finance Union (Kenya) Vs Consolidated Bank of Kenya Limited** and **Abraham Nyambane Asiago versus Barclays Bank of Kenya Limited, Cause No.149 of 2013** related to preliminary issues raised before the final determination of the claims before court. In this case, judgement has since been delivered on 28th May 2015. Matters now brought to the attention of the Court by the Claimant vide application dated 8th July 2015 are after the fact. Even where the Claimant may have had a right to his property undercharge terms that he enjoyed during his employment with the respondent, such are matters that were not part of the issues for determination by the Court during the hearing and at the judgement stage. To address such new and separate claim over his property is to seek to

litigate afresh through an application. To make further orders in this regard on matters that the Claimant should have placed before Court at the pleading stage or hearing and before judgement was read is to go contrary to due process and fair action against the other party, the respondent. This is a Court of fairness, justice and must ensure the rule of law for all parties engaged in labour relations. Fairness cuts across the board – to all parties.

31. The application of the Claimant is therefore overtaken by events. It must fail.

In conclusion, applications dated 9th June 2015 and 8th July 2015 one by the Respondent and the other by the Claimant respectively lack merit and must fail. Applications are dismissed. Each party shall bear their costs.

It is so ordered.

Delivered in open court at Nairobi this 23rd Day of September 2015.

M. Mbaru

Judge

In the presence of:

Court Assistant.....