



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 716 OF 2015

ZACHARY NDUNG’U GICHIA.....CLAIMANT

VERSUS

FAMILY BANK LIMITED.....RESPONDENT

RULING

1. By a motion dated 29th April, 2015 the claimant sought orders among others that:-

(a) That the Claimant/Applicant be and is hereby allowed to continue servicing the loan he had with the Respondent at the rate of Kshs.72,316/= per month pending the hearing and determination of this Application interpartes.

(b) That the Claimant/Applicant be and is hereby allowed to continue servicing the loan he had with the Respondent at the rate of Kshs.72,316/= per month pending the hearing and determination of the claim herein.

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

(a) The Claimant/Applicant stands to suffer loss which an award of damages will not be sufficient compensation of.

(b) The Claimant/Applicant was employed by the Respondent as a Collections and Recoveries Manager on the 1st day of September, 2011 until the 22nd day of August, 2014 when his services were terminated.

(c) It is the Claimant’s/Applicant’s case that his services were terminated unfairly as the auction, which resulted in his services being terminated, was done by the Respondent’s appointed auctioneers as set out in law.

(d) As at the time of his services being terminated, the Claimant/Applicant had an outstanding loan with the Respondent which he had been servicing at a rate of Kshs.72,316/= per month.

(e) On the services of the Claimant/Applicant being terminated, the Respondent has now reviewed the rate of interest from 8% to 17.5% p.a. resulting in the monthly payment increase by a whopping

sum of Kshs.35,339.15 to Kshs.107,665.15 per month.

(f) Given that the Claimant/Applicant's services were terminated unfairly it is important that the Respondent is barred from increasing the interest rate payable on the loan as it will result in double loss on the part of the Claimant/Applicant.

3. The respondent in resisting the application raised a preliminary objection essence of which was that the conversion of interest rate from staff rate to commercial rate was a commercial dispute hence should be tried by the High Court's Commercial and Admiralty Division.

4. Mr. Kingara for the respondent submitted that section 4(1) of the Industrial Court Act confers on the Court jurisdiction to settle employment and industrial relations disputes and the furtherance, and maintenance of good employment and labour relations. According to Counsel Section 12 of the Industrial Court Act gives the Court exclusive jurisdiction to hear and determine disputes relating to employment and labour. In support of this submission Counsel relied on the case of **James Davies Njuguna v. Simon Mithano & 3 Others (2014) eKLR**. According to Counsel, variation of interest rate payable by a former employee is not one of the disputes contemplated under section 12 of the Industrial Court Act. Further, the loans granted were not a condition precedent for employment. They were separate and distinct from the employment contract.

5. The claimant's counsel, Mr. Kimakia on the other hand submitted that the application was for an injunction under Order 40 rules 1, 2, 3, and 4 and was essentially asking the Court to stop increment of interest rate on the loan until the matter is heard and determined. According to Counsel, the applicant has not asked the Court to order variation of interest payable as alleged by the respondent's counsel.

6. Mr. Kimakia further submitted that the authorities relied on by the respondent did not support their preliminary objection since they propounded on the legality and interpretation of loan contracts. According to Counsel the two contracts were inseparably related given that the terms of the loan contract were premised and crafted on employer-employee relationship hence the favourable interest rates enjoyed by the applicant. He contended that clause 9 of the loan agreement used the words "***upon applicant leaving employment...***" According to him the applicant did not leave employment as envisaged but was unfairly terminated. Counsel further submitted that a close look at section 87(1)(b) of the Employment Act clearly demonstrate that the matter was within the jurisdiction of the Court.

7. The objection raised by the respondent is not new to this Court. The creation of specialists Courts under article 162(2) of the Constitution has somewhat created uncertainty of jurisdiction in certain cases and this case is one of such.

8. The objection rekindles the debate on what a Court should do in mixed grill cases. Would an employee who during the tenure of his employment borrowed money or took a mortgage predicated on the employment relationship upon contesting termination of his services split his claim among the various Court? This Court in the case of **Peter Mutisya Musembi & another v. National Bank of Kenya (2014) eKLR** borrowing from the Australian cases of **Dean Patty v. Commonwealth Bank of Australia 2000 FCA 1072** and **Philip Morris Inc. v. Adam P. Brown Male Fashions Ltd (1981) 148 CLR** became of the view that the argument that this Court and indeed other Courts of concurrent jurisdiction properly siezed of a matter cannot adjudicate upon consequential or factual question which on the face of it appear to be within the exclusive jurisdiction of another Court in the same judicial tier would unreasonably emasculate and whittle down the inherent power of a Court of law to do justice without undue regard to technicalities.

9. Courts must adopt an inclusive approach in mixed grill cases for to do otherwise would create overlap and duplicity of evidence not to mention costs. Section 87(1) (b) provides as follows:-

87 (1) subject to the provisions of this Act whenever-

(b) any question, difference or disputes arises as to the right or liabilities of either party the

aggrieved party may file a suit in the Industrial Court.

10. A dispute over a loan or mortgage facility which is predicated on the contract of employment is a dispute between an employer and an employee hence within the jurisdiction of the Court.

11. The objection is therefore disallowed and the application shall proceed for hearing on merit.

12. It is so ordered.

Dated at Nairobi this 30th day of October 2015

Abuodha J. N.

Judge

Delivered this 30th day of October 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge