



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NUMBER 760 OF 2015**

**PETER KAMAU MWAURA.....1<sup>ST</sup> CLAIMANT**

**PETER NJANJA NJUGUNA.....2<sup>ND</sup> CLAIMANT**

**VERSUS**

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

**RULING**

1. By an application dated 6<sup>th</sup> May, 2015 the claimant sought the following orders among others:-
  - a. The Respondent be and is hereby restrained whether by itself, its servants, agents, officers or any other person whomsoever from collecting any monies from the Claimants whether as principal, interest, penalties or other charges whatsoever in repayment of the various loan facilities obtained by the claimants from the respondent during their employment with the respondent and from accruing any interests, charges, penalties or other charges therein pending the hearing and final determination of this suit.
  - b. In the alternative to payer 4 above, the respondent and is hereby restrained by itself or its servants, agents, officers, or any other person whosoever from reviewing, revising, converting, changing from the preferential rates previously enjoyed by the claimants to market rates or in any way interfering with the interest rates chargeable on loan facilities held by the claimant with the respondent pending the hearing and final determination of this suit.
2. The application was brought on the grounds that:-
  - a. The claimants were employed by the respondent on diverse dates to work in various capacities and in various branches of the respondent.
  - b. That the respondent, sometimes in April 2015, unlawfully terminated the claimants' employment without any genuine, just, valid or fair reason and in an unfair procedure on allegations of poor performance.
  - c. The respondent is also in the process of converting/reviewing the interest rates chargeable on loan facilities taken by the claimants at preferential rates to market rates chargeable on loan facilities taken by the claimants at preferential rates to market rates notwithstanding that is it the

respondent who have caused the claimants unemployment and therefore it is detrimental to require the claimants to service the loans at market rates which are much higher.

3. This application was further supported by the affidavit of Peter Kamau Mwaura which elaborated in factual details, the grounds upon which the application was based.

4. The respondent on the other hand opposed the application and filed a replying affidavit through Jacob Makanga who deponed on the main:-

- a. That the respondent has in place a Performance Management Policy whose primary aim is to promote and facilitate the attainment of the respondent's objectives through effective management of employee's performance.
- b. That as per the Performance Management Policy, the 1<sup>st</sup> claimant was to be appraised yearly.
- c. That in accordance with the Respondent's Performance Management Policy, the respondent terminated the 1<sup>st</sup> claimant's employment on the grounds of unacceptable performance via a letter dated 13<sup>th</sup> April, 2015 which he acknowledged receipt on 14<sup>th</sup> April, 2015.
- d. That sometime in 2014, the 2<sup>nd</sup> claimant underwent an annual appraisal where he scored a 1 (one) being unacceptable performance.
- e. That in accordance with the Respondent's Performance Management Policy, the Respondent terminated the 2<sup>nd</sup> Claimant's employment via a letter dated 13<sup>th</sup> April, 2015 which he refused to acknowledge receipt.
- f. That the claimants were lawfully and procedurally terminated from employment.
- g. That with respect to various loan facilities, the said facilities are granted to staff who are under the employment of the Respondent and who are eligible to apply and receive the loan facilities under the terms governed on the Staff Loan Policy and the same is not entitlement.
- h. That at the discretion of the Respondent Bank, preferential interest rates are privilege accorded to deserving employees which under the Staff Loan Policy may be suspended, withdrawn, amended and is subject to review from time to time.
- i. That the claimants as members of staff of the Respondent on 13<sup>th</sup> April, 2015 all privileges accorded under the Staff Loan policy ceased with the Respondent Bank charging the current/normal commercial rate of interest on the facility upon giving a notice of thirty (30) days.

5. In the submissions in support of the application Mr. Muumbi for the claimants submitted that the claimant had established a prima facie case. According to him, the claimants in the application alleged that it would be unfair and capricious if the respondent were to be allowed to convert the rates of the loans advanced to the claimants on preferential rates to normal prevailing market rates. Counsel submitted that the respondent unlawfully terminated the applicant's employment without any genuine, just or valid reason. The claimant has all his life worked for the respondent and since termination have been unable to secure alternative employment. Mr. Muumbi therefore submitted that the respondent was the architect of the applicants' misfortune and should not be allowed to benefit from its unlawful action to the detriment of the applicant.

6. On the issue of jurisdiction, counsel submitted that the issue was within the jurisdiction of the Court and in this regard relied on the case of **Abraham Nyambane Asiago v. Barclays Bank of Kenya Ltd and BIFU vs. Consolidated Bank Ltd.** According to Counsel, the subject of the application was the charge created on the applicant's parcel of land L.R. No. KJD/KAPUTEI NORTH/33103 for purposes of securing a loan facility of Kshs.6,000,000 and that the applicant was given the said loan by reason of his

employment. Concerning the issue of irreparable injury, Counsel submitted that if the orders sought are not granted, the respondent will most certainly sell or otherwise interfere with the applicant's ownership and possession of the suit property which will render any future order of the Court useless.

7. Mrs. Omondi for the respondent on her part submitted that the applicant has to show on material before Court that there is a right that has been infringed. According to her the Staff Loan Policy upon which the applicant was lent money clearly showed that staff loans are a privilege to the staff and are independent of the Collective Bargaining Agreement. These loans are not subject to negotiations and can be recalled or reviewed by the employer at any time and at its discretion. Counsel further submitted that the termination letters issued to the applicants indicated that the outstanding loans held by them would be converted to the market rates in the event that they are not paid up within 90 days. This according to Mrs. Omondi was in line with the Staff Loan Policy. The applicants thus lacked the basis to claim they would suffer any prejudice in the event the rates are converted as they were well aware at the time of signing the staff loan policy. To support this contention, Counsel relied on the case of **Mrao Limited v. First American Bank Ltd & 2 others**. Regarding irreparable injury, Counsel submitted that the applicants do not stand to suffer any damage since in the event that the loan is converted to the market rates, the amount paid can always be converted downwards to offset the debts if the Court found otherwise.

8. On the issue of statutory power of sale, counsel submitted that the applicants wanted to use the Court to stop the respondent from realizing the monies lent to them. This according to counsel is grossly unjust and to this end Counsel invited the Court to rely on the case of **Harrischandra Bhovanbhai Jobanputra & Another v. Paramount Universal Bank Ltd.**

9. Mrs. Omondi further submitted that the applicants have nowhere in their memorandum of claim prayed to the Court that they be reinstated. On the other hand they seek from the Court a declaration that their termination was unlawful and that they be awarded 12 month's compensation for wrongful and unfair termination. Counsel therefore wondered how the applicants can ask the Court to enforce that which is purely a privilege of those in employment.

10. This being an interlocutory application, the concern of the Court is to see whether the subject matter of the dispute can be preserved pending the full determination of the dispute. That is to say would there be any loss or prejudice incapable of compensation by way of damages which the applicant will suffer if the subject matter of the dispute is interfered with. Alternatively, would it be more convenient to preserve the subject matter of the dispute than to leave it unprotected pending the outcome of the main dispute? In order to decide whether to make the interlocutory order or not the Court is usually guided by the principles set in the famous case of **Giela vs. Cassman Brown** which is that the applicant must demonstrate that he has a prima facie case with probability of success and that damages would not be an adequate remedy if successful and if in doubt the Court would consider whether it would be more convenient either to refuse or grant an injunction. This is called the balance of convenience.

11. The applicants contest the termination of their services and seek an order of this Court declaring their termination unprocedural, unfair and unlawful. They further contend and want the Court to find that the action of the respondent in terminating their services violated their right to fair administrative action under article 47 of this Constitution, unfair labour practice under article 41 and discrimination under article 27 of the Constitution. They further want the Court to order that they were entitled on termination, to terms similar to those accorded by the respondent to employees who left employment under voluntary early retirement plan. Among other prayers, these are by no means simple claims. They raise very important questions concerning the manner and reasons for termination of the applicant's services. They therefore raise a prima facie case with some probability of success.

12. On the issue of damages, the applicants want the Court to restrain the respondent from collecting money from them in repayment of the various loan facilities they obtained from the respondent during their employment. Alternatively they seek an order restraining the respondent from reviewing or converting the preferential rates previously enjoyed by them to market rates.

13. Concerning the 1<sup>st</sup> prayer, the Court does not hesitate to say that it would be unconscionable for the

applicants to enjoy a loan facility and have the respondents restrained from collecting any repayment whether as principal or interest. The respondent is a financial institution entrusted with depositors money and it would be wrong to give this money out in form of loans and be restrained from collecting it back with interest.

14. Concerning the second prayer, the applicants contest the reason and procedure of termination of their services with the respondent. It is this contested loss of employment which triggered the threat of conversion of the loan advanced from staff to market rate. If the claimants were not terminated, they would continue to service the loans at staff rate and should the Court agree with them, there would be a possibility of ordering that they service the loan at staff rate despite the fact that they are no longer in employment of the respondent. It therefore reasonably follows that no prejudice or loss at all would be occasioned to the respondent if the applicants continue to service their loans at staff rate pending the hearing and determination of this claim. The Court therefore grants payer 5 of the Notice of Motion dated 6<sup>th</sup> May 2015 pending the hearing and determination of this suit.

15. It is ordered.

**Dated at Nairobi this 20<sup>th</sup> day of November 2015**

**Abuodha J. N.**

**Judge**

**Delivered this 20<sup>th</sup> day of November 2015**

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

**Abuodha J. N.**

**Judge**