



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 1189 OF 2014**

**ALFRED MUTHOMI MUTIRIA.....1ST CLAIMANT**

**TERESIA WAIRIMU KARANJA.....2ND CLAIMANT**

**JOSEPH MWANGI MAINA.....3RD CLAIMANT**

**VS**

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

**RULING**

**Introduction**

1. On 6th August 2014, I issued the following interim orders in favour of the Claimants:

a) That pending the hearing and determination of the claim herein, the Respondent be and is hereby restrained by itself or its servants, agents, officers or any other person whomsoever from reviewing, revising, converting, changing from the preferential rates previously enjoyed by the Claimants to market rates or in any other way interfering with the interest rates chargeable on loan facilities held by the Claimants;

b) That pending the hearing and determination of the claim herein, the Claimants shall continue servicing their loans at the rates applicable prior to the termination of their employment.

2. It would appear that following these orders, the Claimants did not service their loans at all, prompting the Respondent Bank to issue a notice of sale of the charged properties. The 1st and 3rd Claimants therefore came back to Court by way of Notice of Motion dated 18th May 2015 seeking orders restraining the Respondent from exercising its statutory power of sale.

**The Notice of Motion**

3. The Claimants' Notice of Motion which is supported by the affidavit of the 3rd Claimant Joseph Maina Mwangi sworn on 18th May 2015, seeks the following orders:

a. That the Respondent be and is hereby restrained whether by itself, its servants, agents, officers or any other person whomsoever from in any way disposing of, auctioning, repossessing, selling or otherwise interfering with the 1st Claimant's ownership and possession of the suit property being L.R No. 13425/8 Kiambu Flat No. GA 16 pending the hearing and determination of this suit;

- b. That the Respondent be and is hereby restrained whether by itself, its servants, agents, officers or any other person whomsoever from in any way disposing of, auctioning, repossessing, selling or otherwise interfering with the 3rd Claimant's ownership and possession of the suit property being L.R No. Kariobangi South Housing Scheme, phase 4 Nairobi Land ref. No. 12062/257 Hse No. S102B pending the hearing and determination of this suit.

4. In the supporting affidavit sworn by Joseph Mwangi Maina it is deponed that although the Court allowed the Claimants to continue servicing their loans at staff rates, they had been unable to service the loans owing to lack of alternative employment. Maina further depones that no prejudice will be occasioned upon the Respondent if the orders sought are granted.

### **The Respondent's Reply**

5. In a replying affidavit sworn by Jacob Makanga of the Respondent's Human Resources Division it is deponed that the Claimants are contractually bound to service their loans irrespective of the termination of their employment. Makanga further depones that the Claimants are in breach of the order of this Court granted on 6th August 2014 requiring them to continue servicing their loans at the rates applicable prior to the termination of their employment.

6. Makanga goes on to depone that this Court lacks jurisdiction to entertain the Claimants' application as it relates to interest in land under the Land Act, 2012 which is the exclusive jurisdiction of the Environment and Land Court.

### **Determination**

7. The issues for determination in this application are as follows:

- a) Whether this Court has jurisdiction to entertain the Claimants' application;
- b) Whether the Claimants have made out a case for granting of the orders sought.

### **Jurisdiction of the Court**

8. The Respondent submits that this Court lacks jurisdiction to entertain the Claimants' application as it relates to land which is the preserve of the Environment and Land Court.

9. The jurisdiction of this Court is anchored in Article 162(2)(a) of the Constitution which provides as follows:

***(162)(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-***

***(a) employment and labour relations and***

***(b).....***

10. Pursuant to this constitutional provision, Section 12 (1) (a) the Employment and Labour Relations Court Act provides that:

***12(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—***

***(a) disputes relating to or arising out of employment between an employer and an employee;***

(b) .....

11. In addressing the question of the jurisdiction of the Employment and Labour Relations Court in as far as it relates to a loan facility advanced by an employer to an employee in ***Banking Insurance & Finance Union (Kenya) Vs Consolidated Bank of Kenya Limited (Cause No 900 of 2012) Rika J*** held that a dispute over a charge created to secure a staff loan is a matter of employment.

12. I hold a similar view on this matter and in ***Abraham Nyambane Asiago v Barclays Bank of Kenya Limited [2013] eKLR*** I stated as follows:

***“By its nature, the employment relationship generates a multiplicity of rights and obligations, some of which are not to be found in the express provisions of the employment contract. In my view, all these fall under employment and labour relations as intended by the law makers. To rule otherwise would be to create a situation where an employer or an employee traverses different courts to enforce different rights arising from the employment relationship. That in my view could not have been the intention of the legislators.”***

13. I find no reason to depart from my finding in the ***Asiago Case*** (supra) and consequently find that this Court has the jurisdiction to entertain the Claimants' application and now proceed to consider it on merit.

### **The Application on Merit**

14. The Respondent asked the Court not to grant the orders sought because the Claimants had failed to comply with the orders granted by this Court on 6th August 2014. On their part, the Claimants submitted that they could not service their loans even on the preferential staff terms because after the termination of their employment by the Respondent, they had no source of income. The Claimants urged the Court not to allow the Respondent to benefit from its wrongful action of terminating their employment.

15. The Claimants seek an injunctive order to stop the Respondent from exercising its statutory power of sale. The conditions upon which an interlocutory injunctive order may be granted are well set out in ***Giella Vs Cassman Brown & Co Limited [1973] EA 358*** as follows:

a) That the applicant must show a *prima facie* case with a probability of success;

b) That an interlocutory injunction will not normally issue unless the applicant might suffer irreparable injury which would not adequately be compensated by an award of damages;

c) If the court is in doubt it will decide the application on the balance of convenience.

16. The Claimants came to this Court in July 2014 and on 6th August 2014, I granted orders barring the Respondent from withdrawing the preferential loan terms enjoyed by the Claimants. I further directed the Claimants to continue servicing their loans at the rates obtaining prior to the termination of their employment. They now say that they cannot service the loans at all because the Respondent wrongfully terminated their employment.

17. Both sides submitted that they would suffer irreparable harm if the Court does not rule in their favour. The Claimants will lose their properties and the Respondent will carry the burden of non-performing loans. The Claimants' narrative is that they are not able to service their loans because the Respondent terminated their employment wrongfully. This issue is pending determination

before the Court.

18. In my ruling of 6th August 2014, I ruled that the Claimants would suffer great harm if the orders sought were not granted and I therefore gave relief by ordering that they continue enjoying the preferential loan terms extended to the Respondent's employees.

19. By the current application, the Claimants ask the Court to freeze servicing of the loans. This is an unusual request. Commercial banks, such as the Respondent operate in a regulated environment with strict parameters. While staff borrowers may enjoy preferential loan terms, this does not place them outside the prudential guidelines issued by the Central Bank of Kenya which is the regulator of commercial banks. More importantly, a non performing loan portfolio impacts negatively not only on the lending bank but also on the banking industry and by extension, the economy of the country. It is certainly not in the public interest to have a non performing loan in any bank.

20. In granting an injunction, the Court must be satisfied that the party seeking the order is making every effort towards mitigating losses and ameliorating the situation. The Court did not see any tangible effort by the Claimants towards this end and in view of the fact that the Claimants already have an order of injunction in their favour, I find the current application to be without merit and proceed to dismiss it.

21. The costs of this application will be in the cause.

22. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS**

**6TH DAY OF NOVEMBER 2015**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Muumbi for the Applicants

Mrs. Omondi for the Respondent