



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**  
**CAUSE NO. 989 OF 2015**

**ESTHER MBINYA MUSAU ..... CLAIMANT**

**VERSUS**

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

**RULING**

1. The ruling herein relate to claimant’s application dated 10<sup>th</sup> June 2015. The Respondent filed Replying Affidavit on 2<sup>nd</sup> October 2015. Parties were directed to file their written submissions on 5<sup>th</sup> October 2015 but only the Claimant complied. On the mention date on 26<sup>th</sup> October 2015 the Respondent was absent and had not filed any written submissions. Such submissions were only filed on 27<sup>th</sup> October 2015 after the due time. The mention date had been allocated in court by consent of both parties herein. However on the ruling date on 5<sup>th</sup> November 2015, counsel for the Respondent was present and the ruling had to be delayed noting that written submissions had since been filed and remained in the custody of the respondent. In the interests of justice, such submissions shall be put into account.

2. On 10<sup>th</sup> June 2015 the Claimant filed application dated 8<sup>th</sup> June 2015 through Notice of Motion under the provisions of section 3(1) of the Industrial court Act [Employment and Labour Relations Court Act] and rules 16(1), (3), (4), (5) and (8) of the court rules and seeking for orders;

1. *Spent.*

2. *The Respondent be and is hereby restrained whether by itself, its servants, agents, officers or any other person whatsoever from collecting any monies from the Claimant whether as a principal, interest, penalties or any other charge whatsoever, in repayment of the various loan facilities obtained by the Claimant from the Respondent during her employment and from accruing any interests, penalties or other charges whatsoever therein pending the hearing and determination of this application inter parties.*

3. *In the alternative to prayer 2 above, the Respondent be and is hereby restrained by itself or its servants, agents, officers or any other person whomsoever from reviewing, revising, converting from the preferential rates previously enjoyed by the Claimant to market rates or in any other way interfering with the interest rates chargeable on loan facilities held by the Claimant with the Respondent pending the hearing and determination of this application inter parties.*

4. *the Respondent be and is hereby restrained by itself or its servants, agents, officers or any other person whomsoever from reviewing, revising, converting from the preferential rates previously*

*enjoyed by the Claimant to market rates or in any other way interfering with the interest rates chargeable on loan facilities held by the Claimant with the Respondent pending the hearing and determination of this suit.*

*5. In the alternative to prayer 4 above, the Respondent be and is hereby restrained by itself or its servants, agents, officers or any other person whomsoever from reviewing, revising, converting from the preferential rates previously enjoyed by the Claimant to market rates or in any other way interfering with the interest rates chargeable on loan facilities held by the Claimant with the Respondent pending the hearing and determination of this suit.*

*6. The Respondent be and is hereby ordered whether by itself or its servants, agents, officers or any other person whomsoever to issue a favourable recommendation letter to the applicant.*

*7. Such other or further orders as the court may deem fit to grant.*

*8. The costs of this application be in the cause.*

3. The application is supported by the annexed affidavit of the Claimant and on the grounds that she was employed by the Respondent on 1<sup>st</sup> September 1995 as a Clerical Officer but in April 2015 was unlawfully terminated. The Claimant had before the unfair termination been granted various loan facilities from the Respondent at preferential rates during employment and is now unable to continue servicing the same owing to market rates notwithstanding that the Respondent caused the unemployment of the claimant. other grounds in support of the application are that the actions of the Respondent in causing the termination of the Claimant and application of market rates to the loans are detrimental to the claimant; the Respondent has refused to issue the Claimant with a recommendation letter thus negatively affecting her future career having worked with the Respondent for long; the case against the Respondent has high chances of success and thus the orders sought should be granted so as to help the Claimant meet the cause of justice.

4. In her affidavit, the Claimant avers that by virtue of her employment with the respondent, she obtained loan facilities which included a personal loan, mortgage, study loan and other facilities at preferential interest rates as opposed to market rates. The preferential mortgage facility was 3% against the market rate at 16%; and personal loan at 10% against 18%. In 2014 the Respondent came up with a voluntary early retirement plan and invited employees to take the package with benefits which included rebates on existing loans, preferential interest rates for existing loans and medical benefit for employee and family for a period of one (1) year upon retirement. The Claimant did not volunteer for the early retirement package.

5. The Claimant also avers that as a result, the Respondent changed her termination notice period from three (3) months to one (1) month without any consultations and vide letter dated 13<sup>th</sup> April 2015 the Claimant was terminated from her employment on the reasons of poor performance which was an issue never raised before. In the letter of termination, the Respondent notified the Claimant that the loan facilities will attract interest rates at market rates if not cleared within 90 days. That this was in disregard of the Claimant having lost employment unfairly and this would allow the Respondent to unfairly benefit from an unlawful process.

6. The Claimant also avers that she was not paid all her terminal dues noting the notice period was unilaterally changed and arising from the unfair termination, there was no compensation. There was no hearing before termination and the allegation of poor performance was never proved and hence the Claimant has a good case with high chances of success and the application herein should be allowed to enable her service the loans at preferential rates as agreed while in employment with the respondent.

7. In reply, the **Respondent filed Replying Affidavit by Jacob Makanga sworn on 2<sup>nd</sup> October 2015** and filed on the same date. He depones that he works at the human resource department of the Respondent and has knowledge of all the material facts herein. The Claimant was the Respondent employee since 1<sup>st</sup> September 1995 as a Clerical officer and was promoted to Credit Administration

department where she remained until her termination. The Respondent has a performance management policy whose objective is to promote and facilitate attainment of its objectives and the Claimant was appraised yearly.

8. Mr Makanga also avers that in 2014 the Claimant was appraised and scored 2 out of 5 as per the Respondent performance management policy and rating guide which resulted in marginal performance of the Claimant for the year having failed to meet the prescribed targets. The Claimant signed off the ratings and was placed under a Performance improvement Plan (PIP). Performance did not improve. The Respondent therefore terminated the Claimant due to unacceptable poor performance on 13<sup>th</sup> April 2015. The termination was lawful and procedural.

9. The Respondent gives loan facilities to its employees. The loans are governed under the Staff loan Policy and this is not an entitlement. The Respondent has the discretion to apply preferential interest rates as a privilege accorded to deserving employees which can be suspended, amended and is subject to review from time to time. While the Claimant was an employee of the respondent, she received loans under the policy and upon termination, all privileges accorded to employees ceased and notice to this effect was given. The Claimant had a 90 days period to repay the loans or the same be converted to market rates. There will be no prejudice suffered by the Claimant as the loan terms are contractual and binding and will suffer no damage as she is not seeking to be reinstated. There is no legal nexus between the claims herein and the contract of employment with regard to the loan facilities given to the claimant. All terminal dues have since been paid and there exists no other claims and the current application is an abuse of the court process and should be dismissed.

### Submissions

11. In submissions the Claimant stated that the application satisfies the principles of granting injunctions as set out in **Mbuthia versus Jimba Credit Corporation & Another [1988] KLR** and the same set out in the case of **Giella versus Cassman Brown Company Ltd [1993] EA**. The Claimant has set out a prima facie case noting the circumstances of her termination were unfair upon refusing to voluntarily take early retirement and her employment terms changed unilaterally. That there exists good grounds for the case and the set out claims have high chances of success. If the orders sought are not granted, the Claimant will suffer irreparable damage and loss and render the suit useless. The Claimant has since lost her employment and unable to service her loans at market rates as there are exorbitant interest rates. The Claimant will suffer injury and damage that cannot be compensated by way of damages as she stands to lose essential property if the orders sought are not granted. The Claimant has been repaying all her loan facility despite not being in employment.

12. Cases referred to are **Dorris Kanini Ndunda versus Family Bank Limited [2013]eklr; Mrao versus First American Bank of Kenya & 2 Others [2013] eklr; Abraham Nyambane versus Barclays Bank of Kenya limited [2013] eklr; and Alfred Muthomi & 2 others versus National bank of Kenya [2014] eklr.**

13. In submissions, the Respondent stated that the Claimant has not satisfied the principles set out in the case of **Giella versus Cassman Brown**, and in this case there is no **prima facie** case as set out in the case of **Mrao versus First American Bank of Kenya & 2 Others**, where the Court of Appeal held that;

*... [A prima facie case] is it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.*

14. That the court further held that there must be an infringement of a right and not just have an arguable case. Such a case must have chances of success for the court to find there exists a *prima facie* case. In this case there was an employment contract and what is raised is the question of interest rates on a loan facility advanced to the Claimant which issues are purely contractual and separate and distinct from the employment contract and removed from the jurisdiction of this court. By this application, the Claimant is seeking to re-write the terms of the charges and contract for the due loans which were

separate from her employment contract. There is no right that has been infringed or set out in the claim.

15. The Respondent also submits that the Claimant is not entitled to off-set the loan amount from anticipated damages and on the presumption that the court will make a finding that termination was unlawful. A legal claim only exists upon prove and determination and no liability exists until such a finding as held in **Elijah Kipng'eno Arap Bii versus Kenya Commercial Bank Ltd [2001] eklr.**

16. The Respondent also submitted that the court has no jurisdiction over the matter as the same relates to interests to land and the interest rates applicable to a loan secured by land and governed by respective charges to land. Such issues cannot be addressed before this court as under section 12 of the Employment and Labour Relations Court Act. The jurisdiction of the court is set out in statute and has a peculiar jurisdiction with exclusive limits. In this case, section 36(4) of the Central Bank Act sets the base of lending rates the current begin at 11.5% and the rate of 3% offered to the Claimant was exclusive to its employees on which the Respondent submits tax. The Respondent has the right to vary the terms of loan facilitates for its employees and the principles set for injunctions must be applied to protect the rights of all parties to a dispute. In this case the Claimant can be compensated by way of damages and the balance of convenience tilts in favour of the Respondent who shall suffer damage in the payment of fringe benefit tax and other costs should the court grant the interlocutory injunction sought by the claimant.

17. The respondents have relied on the cases of **Abraham Asiago versus Barclays Bank Ltd [2013] eklr; Kenya Commercial Finance Co. Ltd versus Afraha Educational Society (2001) 1 EA; American Cyanamid versus Ethicon ltd (1975) All ER; Peter Mutisya Musembi & Another versus Kenya Commercial Bank Ltd (2001) eklr.**

### **Determination**

18. The Claimant has set out several prayers in the Notice of Motion but what is important at this stage and before the entire suit is heard is for the court to determine as to whether an interlocutory injunction should issue. To determine this the court must be certified that there is indeed a *prima facie* case with a probability of success as held in the case of **Giella versus Cassman Brown & Co. Limited.** Once this is done, the next test is to satisfy that there is a right that has been infringed and such a rights once adjudged there is a high chance of success and that damages would not be an adequate remedy if the claim ultimately succeeds. However in the event that the Court is in doubt concerning the two limbs the Court will decide the matter on a balance of convenience.

19. In the **American Cyanamid versus Ethicon 1 (1975) A.C.** the court also held that;

*... The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. ...*

20. The court in **Sita International Networking Computing B.V. & Another versus Transport and Allied Workers Union, Cause No.991 of 2012** made reference to the **American Cyamid case** in an application where the Claimant was seeking to stop its employees from undertaking a strike thus; e

*... where an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when the existence of the right or the violation of it, or both is uncertain and will remain uncertain until final judgment is given in the action.*

21. Unlike in ordinary contracts, an employment contract is founded on special circumstances that are

regulated by statute unlike the ordinary law of contract. An employment contract has its foundational basis under the provisions of article 41 of the constitution and where an employee cites the violation of their rights, such rights must be assessed under the applicable law as well as under the constitution. To thus cite an unfair practice; a wrongful termination of an employment contract; or the illegal termination of an employment contract, special attention must be given into the allegations and circumstances of such stated wrongful action; illegal practice/s for the court to make a finding as to the unfair conduct. In the case of **Elizabeth washeke and 62 others versus Airtel Networks Limited & Another, Cause No.1972 of 2013** the court held;

*... To determine the ambit of this open-ended right, regard must be had, first, to what is meant by a labour practice, and, thereafter, to what is meant by a fair labour practice. In both issues, reference must be made to the unfair labour practice jurisprudence by the Industrial Court. ... **When granted the its 'unfair labour practice' jurisdiction, the Court decided not to define precisely what it understood by the concept of 'fairness' or its acronym, 'equity'. What it did say, however was that fairness was something more than lawful. This meant that even though conduct was lawful, it was not necessarily fair.***

22. In this regard therefore, an employment relationship and thus in an employment contract, the concept of fairness is a matter separate and distinct as against other contracts and which requires interrogation before the court can make a finding. Such are matters that were not in issue before the Court of Appeal in the case of **Elijah Kipng'eno arap Bii** and in the case **Mrao Limited**. This court is bound by the provisions of article 41 and 162 (2) of the constitution, section 43 and 47 of the Employment Act in ensuring that each case citing unfair labour practices is assessed on its merits. In this regard therefore, the determination of whether there was an unfair labour practice must give regard to evidence of the parties as this cannot be adjudged in the interim as against the holding by the court in the case of **Elijah Kipng'eno arap Bii**.

23. The issue in dispute in this case is the wrongful and unfair termination of the claimant; failure to give notice; and the violation of the claimant's right to fair administrative action, fair labour practices and freedom from discrimination. The Claimant has also set out that her claim that the termination was based on the grounds of poor performance. The Respondent in the affidavit of Mr Makanga admit that indeed they had a PIP process that resulted in the Claimant getting a poor score hence leading to her termination. Such are matters contested as leading to the termination of the claimant.

24.. The issue in dispute cannot be addressed within the current application as the same requires the call of evidence with regard to the claim of unfair termination and the grounds upon which the Claimant wishes to rely upon. Pending that determination, the Claimant while in the employment of the Respondent obtained a loan through the Staff Loan Policy such loan was lawfully granted under terms and conditions agreed upon by the parties and by virtue of the claimant's employment with the respondent. Such employment has since been terminated and the fairness or the unfairness of the same is under challenge. The question as to whether the termination of the Claimant was wrong or not forms the main issue for arbitration as with it, the privileges, benefits and rights in employment must be determined including the loan facility and the preferential interest rates the Claimant enjoyed while in employment with the respondent.

25. The Claimant is also seeking for a favourable recommendation letter to be issued by the respondent. My reading of employment laws, the constitution and current jurisprudence on employment and labour relations does not make this a right. However, section 51 of the Employment Act make it a requirement that upon termination of employment, whatever the reason, an employer should issue a Certificate of Service. Non-issuance of such a Certificate has sanctions as such a Certificate should issue together with the letter of termination and it should not be left to the employee to demand for it. This is not a matter that should wait for the final determination of the suit herein. The Certificate of Service should be issued without any further delays and unconditionally.

26. The matters herein stem from an employment relationship between the parties and cannot be separated so as to have the issues with regard to the issues in dispute heard by separate court. I find the

Claimant while in the employment of the Respondent was advanced various loan facilities as an employee and claims continued preferential interest rates on that basis. Such cannot be separated from the suit herein as the determination of one affects the other. Without going into the merits of the issues in dispute, I find the court has jurisdiction over the dispute based on the foundational relationship between the parties herein was employment and labour relations.

27. I therefore find that pending the determination of the issues in dispute herein, the Respondent should not change the terms and conditions of the staff Loan Policy with regard to the Claimant and an interlocutory injunction should issue herein.

**I therefore direct as follows;**

**(a) An injunctions hereby granted restraining the Respondent and any other party from changing in any form the terms and conditions of the various loan facilities obtained by the Claimant from the Respondent during her employment with them and the Claimant shall continue to repay such loan facilities at the same terms and conditions as enjoyed while in employment with the respondent.**

**(b) Noting orders above (a) parties shall be allocated a hearing date on priority basis; parties to be allocated a mention date before the Deputy Registrar within the next 14 days to be allocated a hearing date;**

**(c) All considered and in the interests of justice especially where the Claimant is not seeking reinstatement, the Respondent shall comply with section 51 of the Employment Act forthwith and issue the Claimant with a Certificate of Service within seven (7) days; and**

**(d) Costs shall be in the cause.**

Delivered in open court at Nairobi this 9<sup>th</sup> day of November 2015.

**M. MBARU**

**JUDGE**

In the presence of:

Lilian Njenga: Court Assistant

.....

.....