



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT MOMBASA**

**CAUSE NO. 207 OF 2013**

**FRANCIS KALAMA MULEWA .....CLAIMANT**

**VERSUS**

**KENYA COMMERCIAL BANK .....RESPONDENT**

**RULING**

**BACKGROUND**

The Motion before the court is dated 17/7/2013. It seeks interlocutory injunction to restrain the respondent from selling, alienating and/or in any way interfering with the property known as L.R. No. Kwale/Ukunda/3183 pending the hearing and determination of the suit herein. The Motion is supported by the affidavit of the claimant sworn on 17/7/2013 and the ground set out on the body of the Motion.

The gist of the Motion is that the claimant was unfairly dismissed from employment by the respondent and the claimant has brought suit to recover accrued employment dues amounting to ksh.4,211,755. That in the meanwhile the respondent has threatened to auction the suit premises to recover a staff loan which was advanced to him during his tenure of service with the respondent. That the reason for his inability to repay the loan has been occasioned by his dismissal from employment and he also disputed the computation of the outstanding loan balance which he argues that it should under staff terms. He believes that he will be able to settle the loan due from his employment dues which he is confident to get upon determination of the suit herein.

The Motion is opposed vide relying affidavit sworn on 4/9/2013 by Lorna Nyandat an Assistant legal manager for the respondent. The gist of the reply is that the claimant owes a loan to the respondent bank which he has defaulted in paying the loan as per the loan agreement. As a consequence of the foregoing default the respondent submits that she has the right to exercise her statutory power of sale under the relevant law.

**ANALYSIS AND DETERMINATION**

The issues for determination are:

- a. **whether the Motion meets the threshold of granting an interlocutory injunction.**
- b. **Which orders should the court make in the circumstance.**

**Threshold for grant of interlocutory injunction**

The law on this matter remains as per the decision in **GIELLA VS CASEMAN BROWN LTD [ 1973] EA 358** in which three principles were established

- a. **The applicant must make out a *prima facie* case with probability of success.**
- b. **The applicant must demonstrate that irreparable harm will be suffered which cannot be adequately compensated by damages unless the injunction is ordered.**
- c. **If the court is in doubt to decide on a balance of probability.**

In applying the foregoing principles to this case, the court appreciate that the application before it concerned unique circumstances whereby none of the parties is disputing the financial claim of the other as a whole. The applicant has not denied that he owes a loan to the respondent save that he disputes the amount.

On the other hand the respondent only contends that the dismissal of the claimant was in accordance with the law but does not deny that she owes the claimant any employment benefits that have accrued during his tenure of employment which can be applied to settle all or part of the loan due. In other words the respondent has not demonstrated that she has calculated and paid all the claimant's dues that had accrued upto the time of dismissal. Such dues should include salaries, leave earned, service pay, or bonus to name but a few.

The court is of the opinion that where an employee claims unfair dismissal and prays for monetary benefits accruing from the said dismissal plus others accruals by virtue of service to an employer, the same should be considered as the main factor to decide whether there is a *prima facie* case against the employer in an application like the present one. Such claim should be specific and reasonably within the provisions of Section 35,40 and 49 of the employment Act 2007 which deal with financial compensation of employees against their employers. Consequently, if the claim is vague, weird and manifestly unfounded, the employee should not benefit from equity in terms of interlocutory injunction.

Arising from the foregoing, this court has considered the claimants claim for benefits as particularized under paragraph 15 of the claim and prayer (a) (i) -(iii). In all fairness and without going to the merits of the suit, the court finds that some of the items prayed for in the claim are strange if not **weird** in relation to the said Section 35,40 and 49 *supra*. If the claimant was unrepresented by counsel, the court would possibly have appreciated his limitations. Consequently no *prima facie* case has been proved.

Without any *prima facie* case with probability of success being shown, the court does not see the need to consider the elements of irreparable harm and balance of convenience. As much as the respondent did not prove that she owes no money to the claimant, the latter has also desperately failed to demonstrate that the respondent owes him compensation and accrued employment benefits which this court can order within the meaning of either Section 35,40 or 49 of the Employment Act and which at the end could be applied to settle either all or part of the loan owing. Consequently the application must fail for lack of merits.

### **DISPOSITION**

The Notice of Motion dated 17/1/2013 is dismissed with no orders as to costs.

**Dated, Signed and delivered this 14<sup>th</sup> day of February 2014.**

**O. N. Makau**

**Judge**