



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1281 OF 2011

PATRICK WAWERU MWANGI CLAIMANT

VERSUS

KENYA AIRWAYS LIMITED..... RESPONDENT

RULING

By Notice of Motion dated 19th December 2013 and filed in Court on 20th December 2013 under certificate of urgency the Claimant seeks the following orders:-

- a. That this application be and is hereby certified as urgent and service of the same be dispensed with and it be heard exparte in the first instance.
- b. That this Honourable Court be pleased and hereby enjoins the proposed Interested Party as an Interested party in this suit.
- c. That pending the hearing and determination of this application, and the claim herein an injunction do issue restraining the proposed Interested Party herein, and/or their agents and /or their servants from alienating, selling, transferring and /or attempting to sell by way of public auction, private treaty or otherwise or in any way whatsoever dealing with the claimant's/applicant's property known as L.R.No. 76/401 (Original Number 76/381/15), until the larger dispute herein is resolved.
- d. That the costs of this Application be in the cause.

The application is made under Article 162 (2) (a) of the Constitution of Kenya, Section 12(1) (a) of the Industrial court Act, 2011, the Judicature Act and all other enabling provisions of the law.

The application is supported by the affidavit of CAPTAIN PATRICK WAWERU MWANGI and on the following grounds:-

1. That the Respondent was and still is an employer of the Claimant/Applicant.
2. That the Claimant/Applicant has been under suspension with no pay, by the Respondent since the year 2011 to date.
3. That the Claimant/Applicant, the respondent and the proposed interested party herein had a special arrangement between themselves as appertains Mortgage facilities by the Interested Party to an employee of the Respondent in this case being the Claimant/Applicant as a Senior Pilot working for the respondent.
4. That as a result of the special arrangement between the parties herein sometimes in the year 2009 and 2010 the proposed interested party advanced to the Claimant/Applicant a mortgage facility amounting to Kshs. 19.5 million.
5. That based on the special relationship and existence of a scheme between the Respondent and the proposed interested party it was agreed that the respondent would remit the claimant's/applicant's salary directly to the interested party bank account held by the Claimant/Applicant.

6. That the proposed interested party would deduct the monthly repayment amount of the mortgage from the Claimant's applicant's salary after receiving the same from the Respondent and deposit the balance thereof in the Claimant's account held in the proposed interested party bank account.
7. That this arrangement was honoured by the Respondent as the Claimant/Applicant continued to be a Senior pilot/employee of the Respondent.
8. That under the scheme between the Respondent and Proposed interested party the Proposed interested party gave the claimant/Applicant a special rate as an employee of the Respondent.
9. That to date the Claimant/Applicant remains to be an employee of the respondent but the respondent has refused /neglected to furnish the proposed interested party with employment details of the Claimant/Applicant.
10. That the Respondent has refused to furnish the interested party with the Claimant's /Applicant's salary hence the Mortgage facility running into unpaid arrears.
11. That as a result the interested party has threatened the Claimant/Applicant with foreclosure of its Matrimonial Home and threatened to dispose off the property sometime in January 2014.
12. That unless this Honourable Court intervenes and hears the main suit herein expeditiously the Claimant/Applicant stands to lose his matrimonial home and suffer irreparable harm and damages that cannot be compensated by way of damages.
13. That it is only fair, just and equitable that the property herein, LR.NO. 76/401 (Original Number 76/381/15) be preserved pending hearing and determination of this application and main suit herein on merits.
14. That no prejudice will be caused to any party by this Honourable Court Granting the application.
15. That this Honourable Court has Jurisdiction to hear and determine this matter and issue the appropriate orders sought herein in this application.
16. That this Honourable court has a Constitutional mandate to hear and determine all matters and disputes arising in the Cause of Employment.

The Respondent filed grounds of objection and a replying affidavit of Patrick Wainaina, an Assistant Legal Manager of the Respondent sworn on 27th February 2014 and filed in Court on the same day.

The grounds of opposition by the Respondent are the following:-

1. That the application is res judicata as it raises matters already decided by the Honourable Court in HCCC No. 595 of 2012 Patrick Waweru Mwangi & Lucy Nungari Waweru V Housing Finance Company of Kenya.
2. That the Applicant is invoking a jurisdiction that this Honourable Court does not possess.
3. That the application is fatally and incurably defective.
4. That the Applicant is not entitled to the orders of injunction sought.

The Proposed Interested Party filed a Replying Affidavit. In the Replying affidavit the proposed interested party states that the prayers sought by the Claimant/applicant have been sought before in High Court Civil Case Number 546 of 2012, that this matter is a pure employer/employee claim that does not involve the intended interested party whose relationship with the Claimant is purely commercial and that the prayer to join the interested party is intended to delay the course of justice, the claimant having already filed two cases in the High Court being Civil case No.546 OF 2012 and JR. No. 152 of 2012 both of which are yet to be determined. Mr. Wainaina further depones that the Claimant is guilty of non-disclosure of material facts, that the Claimant is indebted to the 3rd Party which indebtedness the Claimant has previously acknowledged and authorized the interested party to dispose of the property.

The background of this application is that the Claimant is an employee of the Respondent. This is confirmed in the Respondent's Amended Memorandums which is undated and unsigned but filed in court on 24th May 2012 at paragraph 25 A which reads:-

25A. In response to Paragraphs 20-21B, the Claimant's employment has not been terminated. The Respondent's letter dated 11th May informed the Claimant that failure to obtain professional licenses and certificates without reasonable cause are grounds for termination of employment but did not terminate his employment. The Claimant is still an employee of the Respondent and his pay has been

suspended pending his acquiring a requisite medical certificate and clearance by KCAA as he cannot resume active duty as a pilot until obtaining medical clearance.

During his employment with the Respondent, the Claimant obtained mortgage facilities from the intended interested party through a special arrangement between the Respondent and the intended interested party. The facility was to be serviced by the Respondent recovering monthly installments from the Claimant's salary and remitting to the intended interested party. The applicant alleges that mortgage facility was to remain in place unless he ceased being an employee of the Respondent.

In August 2011 the Claimant's salary was stopped following his suspension. As a result the mortgage facility ran into arrears. The Claimant filed the suit herein seeking orders for the lifting of his suspension and re-instatement of his salary. While this suit was pending the proposed interested party has threatened to foreclose the Claimant's property which is also his matrimonial home that was charged as security for the mortgage facility.

The Claimant filed ELC 546 of 2012 Nairobi which suit is pending for determination.

The Claimant wishes to enjoin the proposed Interested Party because the repayment of the mortgage facility is connected with the non-payment of his salary arrears owed by the Respondent.

The application was heard on 3rd March 2014. Mr. Onyango instructed by F.N Njanja & Company Advocates appeared for the Claimant/applicant, Mr. Awele instructed by Oraro & Co. Advocates for the Respondent and Mr. Onguto instructed by J. Louis Onguto Advocates represented the proposed interested party.

Mr. Onyango in his submissions narrated the facts of the case substantively as I have laid them out above.

Mr. Awele raised several issues, First that the Claimant is guilty of non-disclosure of material facts; Secondly that the Claimant's downpayments are incomplete; Thirdly that the applicant has provided selective loan documents; Fourthly that this court has no jurisdiction to grant the orders sought herein.

Mr. Onguto submitted that there is nothing in the claim that touched on the proposed interested party, that the Claimant has been before another forum seeking the very orders for injunction that he seeks in the present application in HCCC 595 OF 2012 which prayers were denied by Justice Havelock on 3rd October 2013, that the Claimant has failed to disclose to this court that there were previous proceedings and that claim should be dismissed can on that basis.

On the joinder of the proposed interested party, he submitted that a party can only be enjoined when there are substantive grounds, that the Claimant owed the proposed Interested Party and that the matter should be dealt with in case No. 546 of 2012. That the fact that the property in issue is matrimonial property should not elicit the court's sympathy. He urged that the application be dismissed.

I have considered the application and the grounds in support thereof together with the exhibits thereof. I have also considered the grounds of opposition, the replying affidavit and annexures, the authorities cited and the submissions by all the parties. It is my opinion that the issues to be determined are the following :-

1. Whether this court has jurisdiction to grant the orders sought in the Claimant's application?
2. Whether the application is res judicata?
3. Whether the Claimant is guilty of non-disclosure.
4. Whether the Claimant is entitled to orders enjoining the proposed Interested Party.
5. Whether the Claimant is entitled to the injunctive orders against the Proposed Interested Party.

1. Whether this court has jurisdiction to grant the order sought by Claimant?

The Claimant seeks orders to enjoin the Proposed Interested Party to this claim and for injunctive orders

against the intended interested party.

Both the Respondent's and the proposed Interested Party's advocates have stated that the claim against the Proposed Interested Party is Commercial and outside the jurisdiction of this court as donated by Article 162 (2) of the Constitution.

There is no dispute that the Claimant is an employee of the Respondent. There is also no dispute that the Claimant was suspended from duty and his salary stopped in August 2011.

There is further no dispute that the Respondent and the Proposed Interested party entered into an arrangement under which the Respondent's employees would become eligible for mortgage facilities at a special rate and that the Claimant was granted a mortgage of 19.5 million shillings under the facility in September 2009. The mortgage facility was to be serviced by the Claimant through check off by the Respondent. Following the Claimant's suspension and stoppage of his salary the Claimant's Mortgage account has been un serviced and has fallen into arrears. On 6th December 2011 the proposed Interested Party wrote to the Respondent seeking confirmation whether the Claimant (borrower) was still in the scheme or whether he should be pursued directly.

I find that this is a claim arising out of an employment benefit that accrued to the Claimant pursuant to the Employment relationship between him and the Respondent. I also find that the determination of this case has a direct impact on whether or not the Claimant's relationship with the Proposed Interested Party shall continue or terminate and to the payment of arrears for the subject matter of the Claimant's prayer for orders against the proposed Interested Party.

I therefore find that this court has jurisdiction to grant the orders prayed for in the Claimant's notice of motion dated 19th December 2013.

2. Whether the Application is Res Judicata?

Both the Respondent and the proposed Interested Party have submitted that the Claimants prayers in the present application are similar and substantively the same as those sought and denied in Nairobi HCC No. 546 of 2012 between the Claimant and his wife suing as 1st and 2nd Plaintiff against the proposed Interested Party. I have read the application referred to in the Affidavit of Patrick Wainaina together with the Ruling by Justice Havelock.

The application is made under the Civil Procedure Act and the Land Act. The present application is made under the Constitution of Kenya, the Industrial Court Act and the Judicature Act.

The application in the High Court deals with the relationship of the Claimant and the proposed interested party as chargee and chargor . The case was determined on the basis of the provisions of the Land Act and the Civil Procedure Act. In the present application the Claimant seeks the orders prayed for on the basis of an employment benefit arising out of a special relationship between the Respondent and the proposed Interested Party to provide an employment benefit to its employees among them the claimant.

Res judicata is defined under the Civil Procedure Act as

7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

8. Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of that cause of action.

Black's Law Dictionary Ninth Edition at page 1426 defines res judicata as

1. An issue that has been definitively settled by judicial decision. [Cases: Judgment 540,584,585.]

2. An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been – but was not – raised in the first suit.

The three essential elements are:-

1. An earlier decision on the issue,
2. A final judgment on the merits, and
3. The involvement of the same parties, or parties in privity with the original parties.

In the present case the parties are not the same, the capacity in which they sue or are sued is not the same and the issues for determination are not the same.

Although the effect of the orders sought and even the wording of the prayers may substantively be the same, I find that the doctrine of res judicata is not applicable in the present application.

3. Whether the applicant is guilty of non disclosure and therefore not entitled to the equitable orders of injunction?

The Respondent and the Proposed Interested Party have both pleaded that the Claimant is guilty of non-disclosure and therefore not entitled to the injunctive equitable orders he is seeking.

The Respondent based its argument of non disclosure on the fact that the Claimant selectively provided the court with documents namely selected pages of the loan documents and a letter which does not show where it came from and who signed it.

Mr. Onguto for the Proposed Interested Party only stated that the Claimant's documents are half baked but did not specify the nature of the short falls he was referring to.

The documents submitted by the Claimant are all either from the Respondent or from the Proposed Interested Party. They did not state that they are not aware of the contents or that the production of the selective pages by the Claimant would prejudice them in any way. Further they did not seek production of the full documents.

I find no merit in this objection as it will not cause any prejudice to either the Respondent or the Proposed Interested Party.

4. Whether the Claimant is entitled to orders enjoining the Proposed Interested Party?

Mr. Onguto for the proposed Interested Party submitted that he had not been served with the Memorandum of Claim in spite of having asked for it. He further submitted that there is nothing in the Claim that touches on the proposed Interested Party. He submitted that the reason those prayers are not there is that the Claimant has been before another court, that is in HCCC No. 546 of 2012, seeking the same orders.

It is a recognized principle in law that a party may be joined in a case for reasons of judicial economy but whose presence is not essential to the proceeding. He may be what is termed as a nominal party and may not have a direct interest in the subject matter but is enjoined to avoid procedural defects. In the present case the issue in dispute is the suspension of the Claimant from employment. Should the prayers filed by the Claimant succeed, it will resolve the issues between him and the proposed interested party by payment of the arrears to which the proposed interested party has threatened to sell the Claimant's property. Had the Claimant not been suspended, there would be no arrears in the Claimant's mortgage account with the Respondent.

In the Replying Affidavit of Patrick Wainaina on behalf of the proposed interested party, he has annexed as Exhibit "PW-2" the letter of offer which reads as follows:

"Housing Finance

Head Office: Rehani House

Kenyatta Avenue/Koinange St.

P O Box 30088

00100 –Nairobi, Kenya

20 September 2010

Ref: FO/CW/600-0008495

Patrick Waweru Mwangi

P O Box 1618 – 00900

KIAMBU

Dear Customer,

RE: MORTGAGE/CHARGE OVER LR/TITLE NO.

78/401 - THINDIGUA, KIAMBU

We refer to the Mortgage/Charge Deed dated the..... day of.....20.....you Mortgaged/Charged al your interest in the above property as security for repayment for a loan of Kshs. 20,174,866 (Kshs.Twenty Million One Hundred Seventy Four Thousand Eight Hundred Sixty Six) (Exclusive of interest and other charges) to Housing Finance Company of Kenya Limited (Housing Finance)Pursuant to a Special Scheme Agreement between us and you employer "hereinafter the said Company") we have agreed subject to certain terms and conditions set out in the said Scheme to offer you some concessions on your loan repayment.

Accordingly, with effect from theday of20.....your interest has been revised to 12.7% per annum.

Consequently with effect from the Day of.....20.... Your monthly repayment installment of principal and interest will now be Kshs. 251,952 per month. All other payments remain the same.

Kindly note that this concessionary rate of payment is subject to the following conditions:-

1. The arrangement between us and Kenya Airways remaining in place and to our satisfaction.
2. Housing finance can withdraw this concessionary rate at any time at its absolute discretion and without proffering any reasons to you or to any third party for the withdrawal. In any event, the concession will be withdrawn forthwith if you cease being an employee of the said Company or if the said Company so requests or if you breach other terms of the Mortgage/Charge instrument.
3. In the event of the withdrawal as aforesaid, your rate of interest will revert to the rate set out in the Mortgage/Charge document or as otherwise advised by Housing Finance.
4. This concession is without prejudice to all other terms of the Mortgage/Charge instrument which will continue to apply in full force and effect as set out in the said instrument.

5. Housing Finance is hereby authorized to provide the Company with details of your mortgage repayment, as and when requested.

If you are in agreement with the aforesaid terms and conditions, kindly sign and return the duplicate of this letter.

Yours faithfully,

Geoffrey Mwaura

Elizabeth Osodo

Manager, Credit

Ag. Asst. Manager, Credit

The proposed interested party granted the mortgage facility “pursuant to a Special Scheme Agreement between us and your employer...” and the concession was to be withdrawn if the claimant ceased being an employee of the company, among other conditions.

That arrangement is still subsisting and as pleaded in Respondents amended Memorandum of Reply and Submissions at paragraph 25, the Claimant is still an employee of the Respondent. From the foregoing I find that the Claimant is entitled to an order enjoining the proposed interested party not as a full party but as a nominal party for the purpose of judicial economy to avoid procedural defects, in the understanding that should the Claimant’s case succeed it will resolve the issues between the Claimant and the Interested Party. Interested Party will be affected by the decision in this case.

5. Whether the Claimant is entitled to an injunctive order against the Proposed Interested Party?

For a party to qualify for the grant of injunctive orders he must show that he has a prima facie case which has a probability of success, and that he is likely to suffer irreparable harm or injury that is incapable of compensation by way of damages should the orders not be granted. The court need also to consider the balance of convenience. This was the decision in the precedent setting case of Giella Vs Cassman Brown.

In the present case the Claimant’s matrimonial home is threatened with sale by the Proposed Interested Party. The property was purchased through a mortgage facility under a special scheme agreement requiring in part that the claimant remains an employee of the Respondent and the scheme remains in force to the satisfaction of the proposed interested party. The Claimant is in default as a result of the stoppage of his salary by the Respondent who is also responsible for deduction from Claimants salary and remittance of the Claimant’s repayments to the Interested Party. The Respondent has in its pleadings confirmed that the Claimant is still in its employment. This means that there are high chances that upon the lifting of the suspension the Claimant will be in a position to pay all the arrears. On the other hand, the proposed interested party will continue to charge interest advanced on mortgage finances. Should the Claimant not succeed in his case herein, the proposed interested party will be free to realize the security whose value is still well above the outstanding mortgage arrears of about Kshs 30 million. This amount I notice from the statement attached to the affidavit of Patrick Wainaina, is based on an interest rate that is higher than the special interest rate that is provided for under the special scheme between the Respondent and the proposed interested party as well as the mortgage terms between the Claimant and the proposed interested party. From the foregoing I find that whether I consider this prayer from the point of view of prima facie case with probability of success or from irreparable harm or even from a balance of convenience the scales invariably tilt in favour of granting the orders sought.

For the foregoing reasons I make the following orders:

1. Housing Finance Company of Kenya Limited is hereby enjoined as a Interested Party to this suit.

2. Housing Finance Company of Kenya Ltd is hereby restrained by itself, its agents, or servants from alienating, selling, transferring by way of public auction, private treaty or otherwise whatsoever dealing with the Claimant's property known as L.R. No 76/401 (Original Number 76/381/15) pending the hearing and determination of the claim herein.

3. The claim herein having been filed in 2011 and taking into account

the nature of orders granted herein is to be fixed for hearing in court immediately upon the delivery of this ruling.

4. Costs of this application shall abide the outcome of the claim.

However, irrespective of the outcome of the case, the Interested Party's Costs shall be paid by the party against whom judgment is delivered.

Orders accordingly.

Delivered and signed in open court on 26th May, 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Nyangayo for Claimant

Nyangayo holding brief for Onguto for Proposed Interested Party

No appearance for Respondent