



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU
CAUSE NO. 331 OF 2014

FLORA NJOKI MWANGI CLAIMANT

V

FAMILY BANK LIMITED RESPONDENT

RULING

1. Flora Njoki Mwangi (Claimant) filed a Memorandum of Claim against Family Bank Ltd (Respondent) on 28 July 2014. The issue in dispute was stated as *wrongful/unlawful termination*. The Claimant sought the following prayers
 - (a) *A declaration that the Claimants termination illegal or unfair and the Claimant be paid her full terminal dues and damages.*
 - (b) *An order for the Respondent to pay the Claimant Kshs 7,388,499.99.*
 - (c) *The court be pleased to compute the compensation for lost earnings.*
 - (d) *Certificate of service.*
 - (e) *Cost of this claim.*
 - (f) *Interest on (b) & (c) above at 14%.*
2. Together with the Memorandum of Claim was a Notice of Motion brought under section 12 of the Industrial Court Act, rule 36 of the Industrial Court Rules, 2010 and all other enabling provisions. Amongst the orders sought in the motion were
 3. ***The respondent be restrained from advertising, selling, transferring, realizing or in any other term so referred, from disposing off the plaintiffs properties number Bahati/Kabatini/Block 1/6018 and Naivasha/Mwicingiri 4/4909 and charged as security in respect to the claimant's loan and mortgage facilities respectively pending the hearing and determination of this application.***
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 7. *The respondent be restrained from advertising, selling, transferring, realizing or in any other term so referred, from disposing off the plaintiffs properties number Bahati/Kabatini/Block 1/6018 and Naivasha/Mwicingiri 4/4909 and charged as security in*

respect to the claimant's loan and mortgage facilities respectively pending the hearing and determination of this claim herein.

3. The motion was placed before Ongaya J on 28 July 2014 and he granted prayer 3 cited herein above amongst other orders.
4. The motion and the Claim were served upon the Respondent and on 30 July 2014 when the motion came up for *inter partes* hearing, the Respondent had entered an appearance through Murimi, Ndumia, Mbago & Muchela Advocates and also filed a Notice of Preliminary Objection and a replying affidavit sworn by Bernard Kiprotich.
5. The replying affidavit aforesaid made depositions as the competency of the application dated 25 July 2014. It was further deposed that the Claim was defective and bad in law on the ground that it is the Environment and Land Court which has jurisdiction over property disputes, as in the instant case.
6. The Preliminary objection was to the effect that the Court has no jurisdiction to hear and determine the said application and the same is thus for striking out *ex-debito justitiae*.
7. The Court directed that the application be heard on 1 October 2014, and further directed the Respondent to file and serve its Response, documents and grounds of opposition before 21 August 2014. A Response was not filed as ordered. The Claimant was given liberty to file a replying affidavit before 15 September 2014.
8. On 1 October 2014, the Claimant sought leave to file a further affidavit and the Court granted her leave and also directed that the preliminary objection be argued on 14 October 2014.
9. On the day set for the Preliminary objection, the Claimant filed an Amended Memorandum of Claim and a supplementary affidavit. Mr. Murimi for the Respondent informed the Court that the amendments went to the basis of his preliminary objection and that the Claimant had enjoyed interim orders for long. In response, Mr. Mwangi for the Claimant submitted that because pleadings had not closed, it was open to the Claimant to amend the Memorandum of Claim without leave.
10. It is obvious and clear that the orders sought in the motion relating to *Bahati/Kabatini/Block 1/6018* and *Naivasha/Mwicirigi 4/4909* and which were granted as order 3 in the court order given and issued on 28 July 2014 were not anchored on pleadings in a substantive suit.
11. On that basis alone, and without determining the jurisdiction issue, which is not necessary at this point, the motion dated 25 July 2014 was incompetent and the orders granted should not have been granted.
12. The Court would therefore strike out the said motion and vacate the orders which were given on 28 July 2014.
13. The Claimant, as already mentioned filed an Amended Memorandum of Claim on 14 October 2014. It is correct to state that the Respondent since filing a Memorandum of Appearance on 30 July 2014 has not filed a Response. Under the Industrial Court (Procedure) Rules, 2010, a Memorandum of Appearance is not a requirement after service of Notice of Summons. A Respondent ordinarily has 14 days to file a Response.
14. In the view of the Court, the Claimant's submissions that the pleadings had not closed has no legal or factual foundation. The Court had on 30 July 2014 ordered the Respondent to file a Response and other documents before 21 August 2014. Had the Respondent filed its Response by the set date, the Claimant would have a further 7 days to Reply to the Response. Because a Response was not filed within the time limited by Court, pleadings closed on 21 August 2014 and the Respondent was and is under an obligation to seek leave supported with sufficient reasons to file and serve a Response out of time.
15. Similarly, the Claimant was under an obligation to seek leave of Court to file an Amended Memorandum of Claim or request the Court to deem the Amended Memorandum of Claim as duly filed.
16. To realize the principle objective of the Industrial Court Act, and because no injustice would be occasioned to the Respondent, the Court would admit the Amended Memorandum of Claim and order that it should be served upon the Respondent who in turn is ordered to file and serve a Response within 14 days of service.
17. There will be no order as to costs on the motion which has been struck out.

Delivered, dated and signed in open Court in Nakuru on this 17th day of October 2014.

Radido Stephen

Judge

Appearances

For Claimant

Mr. Mwangi instructed by Mwangi Mwaura & Partners, Advocates

For Respondent

Mr. Murimi instructed by Murimi, Ndumia, Mbago & Muchela Advocates