



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO 17 OF 2012**

**NANCY WAIYEGO IRUNGU.....APPLICANT**

**VS**

**OLD MUTUAL LIFE ASSURANCE CO LTD.....RESPONDENT**

**RULING**

**Background**

1. The Applicant was employed by the Respondent in 1994 initially as a Switchboard Operator and subsequently as a Cashier and later as a Mail Room Administrator. The Applicant worked for the Respondent until December 2009, when she was retired on medical grounds. The actual circumstances leading to her retirement are the subject of a Petition which is pending in court.
2. According to the Applicant, she was coerced by the Respondent to write a letter opting for early retirement. She therefore filed a Petition on 25th November 2011 in the High Court at Nairobi seeking reinstatement to her employment as well as damages for loss of employment. The matter was transferred to the Industrial Court in 2012.
3. In the course of her employment, the Applicant obtained successive loans from the Respondent which were secured by a legal charge over her property known as Muguga/Gitaru/1359. The last loan was not fully repaid by the time the Applicant left the Respondent's employment. It is the Applicant's case that after her leaving the Respondent's employment, she was unable to service the loan. The outstanding balance stood at Kshs. 2,775,159.20 inclusive of interest.
4. The Applicant therefore filed a Notice of Motion on 24th June 2013 under Certificate of Urgency seeking a temporary order of injunction to restrain the Respondent from exercising its statutory power of sale under Section 90(1) of the Land Act, 2012.
5. When the matter came before me on 25th June 2013, I certified it urgent and directed the Applicant to serve the Respondent. The matter was heard *inter partes* on 11th July 2013.

**The Applicant's Submissions**

6. Mr. Mungao for the Applicant submitted that the agreed monthly loan installment was Kshs. 32,000 inclusive of interest and that the last payment which was made on 12th November 2010 amounted to Kshs. 15,000. Counsel told the Court that as a result of the termination of the Applicant's employment, which was the subject of the Petition herein, she was unable to service

her loan and had therefore fallen into arrears. Since leaving employment, the Applicant had paid Kshs. 100,000 towards the loan.

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

7. In opposing the Applicant's application, the Respondent filed a Replying Affidavit sworn by the Head of Human Resource, William Muchangi Wambugu on 2nd July 2013. Wambugu deponed that the Applicant worked with the Respondent from 1994 until 10th December 2009 when she voluntarily retired.

8. Wambugu further deponed that the Applicant had in the course of her employment obtained various loans from the Respondent and charged her property known as Muguga/Gitaru/1359 to secure the loans advanced to her. The Applicant was yet to repay the sum of Kshs. 2,775,159.20. Owing to the Applicant's persistent default in repaying her loan, the Respondent's Advocate had, on 26th March 2013, issued the Applicant with a Statutory Notice of Sale.

9. Mr. Okwiri for the Respondent submitted that the Applicant's application was defective, the same having been brought under the Civil Procedure Rules which do not apply in the Industrial Court. Further, the application did not seek any prayer at the *inter partes* stage and the *ex parte* order having been declined, the application was spent.

10. In the Replying Affidavit sworn by Wambugu, the Respondent took the view that the issues in the Applicant's application related to land and were therefore outside the jurisdiction of the Industrial Court.

### **Jurisdiction of the Industrial Court**

11. I will first dispense with the issue of jurisdiction of this Court to entertain the Applicant's application which touches on land.

12. The jurisdiction of the Industrial 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; an***

***(b) the environment and the use and occupation of, and title, to land.***

13. Pursuant to this constitutional provision, Section 12 (1) (a) the Industrial Court Act, 2011 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) .....***

14. The question to determine is what constitutes a dispute relating to or arising out of employment between an employer and an employee. Is it confined to issues that are ordinarily

found in employment contracts or does it extend to all matters emanating from the employment relationship? The Respondent took the view that since the subject matter of the Applicant's application is land, this Court has no jurisdiction to deal with the application.

15. In the case of **Abraham Nyambane Asiago Vs Barclays Bank of Kenya Limited [2013] eKLR** this Court stated that:

***“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.”***

16. In the case before me, it is not in contest that the Applicant was granted successive loans by the Respondent in the course of her employment with the Respondent. The Applicant states that the reason she has fallen in arrears in repaying the current loan has to do with her leaving the Respondent's employment and the cessation of her employment is the subject of the Petition herein. There is therefore a legal nexus between the Applicant's application and the cessation of her employment with the Respondent. Consequently, I find the Applicant's Notice of Motion dated 24th June 2013 to be properly before this Court and will now proceed to deal with it on its merit.

### **Application on Merit**

17. The Applicant seeks 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 the case of **Giella Vs Cassman Brown & Co Ltd** 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.

18. In her Petition, the Applicant states that she was coerced into writing a letter for early retirement because she feared losing her terminal benefits. The Respondent on the other hand maintains that the Applicant voluntarily retired from employment and was duly paid all her terminal benefits. These are matters to be canvassed at the hearing of the Petition herein.

19. Both parties submitted that they would suffer irreparable harm if the Court does not rule in their favour. The Applicant will lose her land and the Respondent will carry the burden of a non performing loan. In the four years since leaving employment, the Applicant has paid only Kshs. 100,000 towards liquidating her loan with the Respondent. No evidence of further effort on her part was placed before the Court.

20. In granting an injunction, the Court must be satisfied that the party seeking the order is making effort towards ameliorating the situation. The Court did not see any such effort from the Applicant and the order for injunction is therefore declined.

I make no order for costs.

**DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 29TH DAY OF JULY 2013**

**LINNET NDOLO**

**JUDGE**

**In the Presence of:**

.....**Claimant**

.....**Respondent**