



REPUBLIC OF KENYA



**Sabisia v Higher Education Loans Board (Miscellaneous Application E731 of 2023) [2024] KEHC 7871 (KLR) (Civ) (27 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7871 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**MISCELLANEOUS APPLICATION E731 OF 2023**

**JN MULWA, J**

**JUNE 27, 2024**

**BETWEEN**

**RAJIV SHEM SABISIA ..... APPLICANT**

**AND**

**HIGHER EDUCATION LOANS BOARD ..... RESPONDENT**

**RULING**

1. The Applicant Rajiv Shem Sabisia, by his Application dated 30/8/2023 premised upon provisions of Sections 1A, 1B and 3A of the Civil Procedure Act, and Articles 23, 47, 50, 165 of the Constitution of Kenya, 2010 seeks Orders-
  - a. Spent
  - b. Spent
  - c. That an order of certiorari does issue stopping the Respondent from deducting from the Applicant's salary Kshs. 2585/= pending hearing and determination of this suit.
  - d. That this Honourable Court be pleased to quash the interests and all the penalties and interests that were unlawful, unprocedural imposed by the Respondent.
2. The grounds for the application are stated on its face and replicated in his supporting affidavit sworn on an even date 30/8/2023.
3. The application is opposed by grounds of Opposition dated 24th October 2023 and a Replying Affidavit sworn by Fritz Achola, the Head of Debt Management of the Respondent.



It is grounded upon the suit filed by a plaintiff dated 9/11/2023. A close consideration of the suit as filed shows that it was filed after the instant Notice of Motion had already been filed. Notwithstanding the anomaly, I have considered the same, considering that the Plaintiff/Applicant is a layperson.

4. The Applicant was granted a loan in the year 2019 by the Higher Education Loans Board, (HELB) in the sum of Kshs. 80,000/= at an interest rate of 12% per annum with a penalty of Kshs. 5,000/= per month for non-payment, to finance his education at Mount Kenya University. It is his case that upon completion of his degree course, and upon securing a job, the respondent started deducting from his salary in repayment of the loan without his consent, Kshs. 2585/= per month, which he says is too high and has affected his livelihood, proposing a deduction of Kshs. 1500/= per month.
5. The applicant has also admitted having filed a case at the Employment and Labour Relations Court, which is yet to be heard and determined. No details of the case have been shared with this court.

The main grievance by the applicant is the terms of the HELB loan that imposes penalties and the application of Section 44A of the *Banking Act*. The applicant therefore seeks that Section 15 (2) thereof be declared unconstitutional for contravention of the Duplum rules under the *Banking Act*.

6. The Application is opposed by a Replying Affidavit sworn on 30/10/2023 by Fritz Achola, head of the respondent's Debt Department therein, and grounds of opposition dated 24/10/2023 in which she states that the application is frivolous and vexatious as the applicant has defaulted in the loan repayment thus raising no issue for trial, and only made to avoid his contractual obligations with the respondent. The Respondent has therefore urged for the dismissal of the application with costs.
7. The Applicant alleges that he was denied his right to access information contrary to Article 35(2) of the *Constitution* as he was not consulted before the decision to deduct his salary towards repayment of the loan.

Article 35 of the *Constitution* provides for the right to access to information in the following terms:

“35.

- (1) every citizen has the right of access to-
  - a. Information held by the state; and
  - b. Information held by another person and required for the exercise or protection of any right or fundamental freedom.
- (2) Every person has the right to the correction or deletion of untrue or Misleading information that affects the person.
- (3) The state shall publish and publicize any important information affecting the nation.”

8. Section 4 of the *Access to Information Act*, No. 31 of 2016 which was enacted to give effect to the rights under Article 35 of the *Constitution* provides for the right of access to information held by the State and information held by another person.
9. The *Access to Information Act* defines ‘public body’ as “any public office, as defined in Article 260 of the *Constitution*; or (b) any entity performing a function within a commission, office, agency or other body established under the *Constitution*.”

In the instant case, we are concerned about the information held by -HELB- which is a state body established by an Act of Parliament – Cap 213A of 1995 mandated to provide loans, bursaries and scholarships to Kenyans pursuing higher education.



10. In *Rev. Timothy Njoya v Attorney General & another* [2014] eKLR the learned judge stated as follows:

“While it is crystal clear to me that one would enforce the provisions of Article 35(1) (b) where such information is required for the exercise or protection of a fundamental right and freedom, in the present Petition, the Petitioner has not stated what fundamental right or freedom he intends to protect or exercise where he is to be given the information he is seeking.”

11. The Applicant seeks that the Honourable court to issue a certiorari order quashing the penalties and interests imposed on the loan advanced to him by the Respondent. The prerogative writs of “*Certiorari*” derives from the Latin word “*Certiorari*” which means to be certified, informed, appraised or shown. This court has powers under Sections 8 and 9 of the *Law Reform Act*, Cap. 26 of the Laws of Kenya to issue the prerogative writ of Certiorari, which brings into this court to quash a decision which is *ultra vires*.

12. In *Kenya National Examinations Council v Republic Ex Parte Geoffrey Gathenji Njoroge & Others* Civil Appeal No. 266 of 1996 eKLR, it was held that an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.

One of the principles of natural justice is *audi alteram partem* which means that no one should be condemned unheard. Right to notice is a requirement in audi alteram partem, which embraces a knowledge of circumstances that ought to induce suspicion or belief, as well as direct information of the fact.

13. Notice embodies rule of fairness and must proceed in an adverse order. It should be clear and precise so as to give the party adequate information of the case he has to meet. Denial of notice and opportunity to respond make the administrative decision completely vitiated. In the instant case, the Applicant states that he was not informed by the Respondent when it made the decision to deduct Kshs. 2,585/= (Two Thousand, Five Hundred and Eighty Five Kenya Shillings) from his salary. Whether or not this allegation is valid, full interrogation of such material facts will be made during the hearing of the suit, not at this interlocutory stage as it calls for evidence to be adduced in proof of the allegation as is stated at Sections 107-109 of the *Evidence Act*, Act Cap 80 Laws of Kenya.

14. The Respondent in opposition to the Applicant’s application alleges that the instant application contravenes Section 19 of the *Civil Procedure Act* and Order 3 rule 1 of the *Civil Procedure Rules* 2010.

Section 19 of the *Civil Procedure Act* provides as follows:

Every suit shall be instituted in such manner as may be prescribed by rules.

Order 3 rule 1 of the *Civil Procedure Rules* 2010 provides that

1. Every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed.

15. The court in *Martin Lemaiyan Mokoosio & another v Reshma Praful Chandra Vadera & 3 others* [2021] eKLR Petition No. 13 of 2020 where the suit was initiated as an ordinary suit was framed as a constitutional petition. The court held that a constitutional court should be liberal in the manner it went round dispensing justice and held that it should look at the substance rather than the technicality. It should not be seen to slavishly follow technicalities as to impede the cause of justice. As long as a party was aware of the case he was to meet and no prejudice was to be caused to him by failure to cite



the appropriate section of the law underpinning the application, the application ought to proceed to substantive hearing.

16. In response to the allegation that the Respondent had contravened the duplum rule, the Respondent state that the Applicant borrowed a sum of Kshs. 80,000.00/= while the Applicant's current debt is Kshs. 123,471/= as at 26<sup>th</sup> September 2023. Thus, the interest and penalties have not exceeded the principal amount of Kshs. 80,000/=. The Respondent also states that the Applicant is guilty of material non-disclosure as he did not disclose to the court that the loan facility fell due upon disbursement and that he failed to notify the Respondent of his change of employment thus it failed to deduct the instalments as and when they became due.

17. The *HELB Act* under Section 15(1) provides as follows:

A loanee shall be required, subject to and in accordance with this Act or any regulations made thereunder, within one year of completion of his studies or within such a period as the Board decides to recall its loan whichever is earlier:-

- i. Inform the Board of his contact address
- ii. To begin repayment of his loan together with any interest accrued thereon;
- iii. If he is in formal employment, to authorize his employer to deduct the loan repayment and to remit it to the Board in such manner as the Board may direct.

18. Section 15 (2) of the Act stipulates that a loanee, who fails or neglects to satisfy the requirements of subsection (1) within the stipulated time shall, in addition to any other action that the Board may take against him, be guilty of an offence and liable to a fine if not less than five thousand shillings in respect of each loan deduction that remains unpaid in accordance with provisions of subsection (1) and such fine shall be payable to the Board.

19. In this case, the Respondent states that the Applicant maliciously failed to notify the Respondent on his new place of employment so as to evade his contractual obligation hence became liable to a fine not less than five thousand shillings in respect of the loan deduction that remained unpaid. The loan repayment period was within 48 months which lapsed. The Respondent ought to have recalled the full loan amount but instead gave regard to the current economic conditions and was lenient by allowing the Applicant to repay the loan in instalments of Kshs. 2,585.00/=.

20. I agree with the Respondent's submissions above and without the temptation to delve into the merits or otherwise of the main suit, I find the application to be without merits. In the circumstances I find it prudent that the Applicant continues to pay the HELB loan in the instalments already in place being Kshs. 2,585/= monthly which I find to be fair and just pending the hearing and determination of the suit.

In conclusion, I find and hold that the application dated 30/8/2023 is devoid of merit, and proceed to dismiss it with an order that each party bears own cost of the Application.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JUNE 2024.**

**JANET MULWA**

**JUDGE**

