



**REPUBLIC OF KENYA**

**Industrial Court at Nairobi**

**Cause 149 of 2013**

**ABRAHAM NYAMBANE ASIAGO.....CLAIMANT**

**VS**

**BARCLAYS BANK OF KENYA LIMITED.....RESPONDENT**

**RULING**

**Background**

1. On 25th June 2012, the Respondent terminated the Claimant's employment. The Claimant appealed against the termination on 26th June 2012 and on 12th October 2012, the Respondent upheld the termination. The Claimant then filed a Memorandum of Claim on 4th February 2013 through vide which he sued the Respondent for unlawful termination of employment. The Respondent filed a Memorandum of Defence on 11th March 2013 to which the Claimant filed a Reply on 2nd April 2013. The dispute is pending in Court.

2. In the meantime, the Respondent through Miller & Company Advocates, wrote to the Claimant on 22nd April 2013 recalling the sum of Kshs. 5,560,356.80 being outstanding balance on account of a staff housing loan facility advanced to the Claimant on 27th June 2010. The facility was secured by a first legal charge on the Claimant's property known as L.R. No. Ngong/Ngong/10891 situate at Gataka Area in Ngong. The Claimant has been repaying the loan in monthly installments of Kshs. 34,755 each inclusive of interest.

**The Claimant's Notice of Motion**

3. The loan recall letter prompted the Claimant to come to Court under Certificate of Urgency seeking the following orders:

- a) That pending the hearing and determination of the Claimant's claim, an injunction do issue restraining the Respondent herein, and/or their agents and/or their servants from alienating, selling, transferring and/or attempting to sell by way of auction or otherwise or in any way whatsoever dealing with the Claimant's property known as L.R. No. Ngong/Ngong/10891 situate at Gataka Area in Ngong;
- b) That pending the hearing and determination of the Claimant's claim, the Claimant does continue paying the same rate of monthly installment inclusive of interest being, Kshs. 34,755.

4. The matter first came before me on 8th May 2013 when I was the Duty Judge. Upon hearing Counsel for the Claimant *ex parte* I certified the matter urgent and directed the Claimant to serve the Respondent to facilitate an *inter partes* hearing on 21st May 2013.

**The Claimant's Submissions**

5. At the *inter partes* hearing Mr. Ongicho, Counsel for the Claimant submitted that while the Claimant was an employee of the Respondent, he was granted a staff housing loan under an agreement. The term of the loan was to be 366 months with a monthly repayment rate of Kshs. 34,754 inclusive of interest. The Claimant had kept to the repayment schedule. It was therefore fair and just that an injunctive order be granted and the agreement between the Claimant and the Respondent be allowed to subsist pending determination of the main claim.

6. Counsel further submitted that the loan recall by the Respondent was premature and was intended to intimidate the Claimant before hearing of the main suit. On the issue of jurisdiction, Mr. Ongicho submitted that the cause of action was related to employment. He cited Section 87 (1) and (2) of the Employment Act, 2007 which vests jurisdiction to determine disputes between employers and employees on the Industrial Court. Any matter stemming from employment, including matters touching on property fell within the jurisdiction of the Industrial Court. This position is affirmed by Section 12(1) (a) of the Industrial Court Act, 2011.

7. Mr. Ongicho further submitted that the Court has a duty under Article 40 of the Constitution to protect the right to property and if the orders sought were not granted, the Respondent was likely to dispose of the property under charge and no amount of compensation would be adequate. He added that the Claimant's main claim had a high chance of success.

### **The Respondent's Grounds of Opposition**

8. The Respondent filed Grounds of Opposition on 14th May 2013, whose gist was as follows:

- a) That there was no legal nexus between the Claimant's claim for termination of employment and realisation of the security under charge namely; L.R. No. Ngong/Ngong/10891 situate at Gataka Area in Ngong;
- b) That the Industrial Court has no jurisdiction over proceedings relating to title, lease or charge under the Land Act, 2012 (Cap 6) whose Section 2 defines "Court" as the Environment and Land Court established under the Environment and Land Court Act, 2011, No. 19 of 2011;
- c) That the Claimant has not established an arguable case as set out in **Giella Vs Cassman Brown & Company Limited[1973] EA 358** neither has he filed an undertaking for payment of damages in the event that at the culmination of the main suit the interlocutory orders sought are found to have been improper;
- d) That the proceedings before the Court will not be rendered nugatory if the Respondent realises the security under charge before determination of the matter before the Court;
- e) That the loan agreement between the Claimant and the Respondent was a different contract separate from the employment contract and the Court therefore lacks jurisdiction to entertain the Claimant's application.

### **The Respondent's Submissions**

9. In her submissions, Ms. Gladwell Mumia for the Respondent reiterated that the Industrial Court has no jurisdiction to entertain the Claimant's Notice of Motion since the subject matter being land, has no bearing on the main claim on employment. The proper court to deal with the matter was therefore the Environment and Land Court.

10. The Respondent's position was that the interest rates applicable to the loan advanced to the Claimant had converted to commercial rates upon termination of his employment. The Claimant did not appeal on this point but had unilaterally chosen to continue repaying the loan at the staff rates, putting himself in arrears. The staff loan agreement anticipated that an employee may leave employment before expiry of the loan period in which case the loan would become repayable in full.

11. Counsel further submitted that the Claimant's claim in the main cause would not address the issue of restructuring of the loan. Determination of the case would only deal with the issue whether or not the Claimant's termination was lawful. Moreover, the Claimant had not given any undertaking to pay damages to the Respondent in the event that the orders sought were granted in error.

12. Making reference to the case of **Giella Vs Cassman Brown & Company Limited** Ms. Mumia told the Court that if the orders sought were not granted any loss suffered by the Claimant would not be irreparable and the Respondent was able and willing to make compensation in damages. At any rate, the Claimant did not have a *prima facie* case as his termination was lawful.

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

13. The first issue for determination is whether this Court has jurisdiction to entertain the Claimant's application which touches on land.

14. 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 and***

***(b).....***

15. 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) disputes relating to or arising out of employment between an Employer and an employee;***

***(c) .....***

16. The question then 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? Counsel for the Respondent asked the Court to down its tools in this matter because the subject matter is land and not employment. With much respect to the learned Counsel, that is a very narrow interpretation of what constitutes an employment and labour matter and the consequential jurisdiction of the Industrial Court.

17. 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.

18. In this regard I am persuaded by the decision of my brother, Justice Rika in the case of **Banking Insurance & Finance Union (Kenya) Vs Consolidated Bank of Kenya Limited (Industrial Court Cause No 900 of 2012)** where he held that:

**“ The loan agreement in the context of this dispute flowed from an employment relationship. The dispute over the charge created to secure the staff loan, is a matter of employment. The Environment and Land Court is not entirely divested of jurisdiction, but would in the view of this Court not be the appropriate forum.....to determine the final issues that may arise out of this dispute.”**

19. In the case before me, it is not in contest that the Claimant was granted a staff housing loan because he was an employee of the Respondent. It is also factual that the reason why the Respondent has recalled the loan is that the Claimant's employment has been terminated, which termination is contested by the Claimant. It cannot therefore be that the employment and labour court has no jurisdiction to adjudicate on a matter arising from the staff housing loan. Consequently, I find that the Claimant's Notice of Motion is properly before this Court and will now proceed to deal with it on its merit.

### **Application on Merit**

20. The Claimant seeks injunctive orders against the Respondent. The conditions upon which an interlocutory injunctive order may be granted are well articulated 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.

21. I have no doubt in my mind that an employer who grants an employee a loan facility on special terms is entitled to vary the terms of the facility or even recall it altogether once the employment relationship ceases to exist. However, there is a basic assumption in all such cases, that the employment relationship terminates within the law. If there is a whiff of unlawfulness in the termination of employment, then the employer's right to withdraw the special loan facility advanced to the employee is withheld.

22. In his Memorandum of Claim, the Claimant has raised significant issues regarding the manner of termination of his employment, upon which he stakes a claim for unfair termination. On its part, the Respondent pleads justification for the termination. Both the claim and the defence raise many points of law and fact which are controverted between the parties and can only be determined at the main trial.

23. As stated by the Court of Appeal in the case of **Syner-Med Pharmaceuticals Ltd Vs Glaxo Group Limited [2010] eKLR** :

**“an arguable point does not in any way connote a point that will succeed if and when it is fully ventilated.”**

24. Applying this standard, I find that the Claimant has raised substantive points of law and fact and he therefore has an arguable case.

25. Counsel for the Respondent submitted that the injury the Claimant would suffer in case the property under charge is realised can be remedied by an award in damages. I do not agree. Property that an employee buys through a staff loan scheme is very dear to the employee. In most cases it is also their home and is the only asset they may ever own. For such an employee, this sort of asset not only accounts for their time in employment but also defines them. Loss of such an asset cannot therefore be adequately compensated by an award of damages.

26. In the circumstances, I am persuaded to grant an interlocutory injunction in the following terms:

- a) That pending the hearing and determination of the Claimant's claim, an injunction do issue restraining the Respondent herein, and/or their agents and/or their servants from alienating, selling, transferring and/or attempting to sell by way of auction or otherwise or in any way whatsoever dealing with the Claimant's property known as L.R. No. Ngong/Ngong/10891 situate at Gataka Area in Ngong;
- b) That pending the hearing and determination of the Claimant's claim, he shall continue paying the same rate of monthly installment inclusive of interest being, Kshs. 34,755.

The costs of this application will be in the cause.

Orders accordingly.

**DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 1TH DAY OF JUNE  
2013**

**LINNET NDOLO  
JUDGE**

**In the Presence of:**

.....**Claimant**

.....**Respondent**