

KENYA / JUDGMENT

Makau v I & M Bank Limited

[2026] KEELRC 1085 (KLR)

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COURT

Employment and Labour Relations Court

CASE / FILE NUMBER

Employment and Labour Relations Cause E575 of
2020

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REPUBLIC OF KENYA IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
ELRC CAUSE NO. E575 OF 2020 ELIAS MAUNDU MAKAU.....CLAIMANT
VERSUS I & M BANK LIMITED.....RESPONDE NT

RULING

Background

1. The Claimant has filed the application dated 16th March 2026 seeking a conservatory order to maintain the concessionary interest rates on the mortgage loan facility he has with the Respondent pending the hearing and disposal of his appeal. He also prays for directions on the costs of the application. 2. The application is filed pursuant to sections 12 and 20 of the Employment and Labour Relations Court Act and Order 42 rules 6 and 7 of the Civil Procedure Rules. It is supported by the grounds which appear on the face thereof and the supporting and supplementary affidavits by the Claimant. 3. The Claimant avers that he is dissatisfied with the judgment which was delivered in the cause on 25th February 2026 dismissing his claim and has thus instituted an appeal to the Court of Appeal by filing a Notice of Appeal. He contends ELRC CAUSE NO. E575 OF 2020 1 that the proposed appeal is merited and has high chances of success. 4. The Claimant avers that he took a staff loan during the currency of his employment with the Respondent which he is servicing at staff interest rates. He avers that he fears that the Respondent may convert the concessionary interest rate to prevailing commercial interest rates before the appeal is determined. 5. The Claimant contends that the question of the concessionary interest rates is intertwined with the employment dispute between the parties. As such, he asserts that the aforesaid rates ought to be maintained pending resolution of the proposed appeal. 6. The Respondent has opposed the application. It has filed a replying affidavit dated 24th March 2026 to anchor its opposition to the motion. 7. The Respondent avers that the terms of the loan agreement between the parties stipulated that the Claimant would only enjoy staff interest rates during the currency of his employment. It contends that the agreement was clear that these rates

would cease if the employment relationship between the parties was terminated for whatever reason and in howsoever manner. 8. The Respondent avers that the Respondent voluntarily signed the loan agreement. As such, it asserts that he is bound by the terms of the agreement, including those which sanctioned changes to the applicable interest rate. ELRC CAUSE NO. E575 OF 2020 2 9. The Respondent avers that the Claimant voluntarily resigned from employment thus terminating the application of the concessionary interest rates to his facility. It contends that once the Claimant resigned, the interest rates applicable to his facility reverted to the prevailing commercial interest rates.

10. The Respondent contends that the impugned court judgment has affirmed the fact that the Claimant voluntarily resigned from employment. As such, it contends that there is no employer-employee relationship between the parties to warrant the Claimant's continued enjoyment of the staff interest rates.
11. The Respondent contends that once the court rendered its aforesaid judgment, it became functus officio. As such, it cannot be called upon to issue the conservatory orders sought in the application.
12. The Respondent asserts that once the court declared the employment relationship between the parties as lawfully terminated, only the Court of Appeal can reverse that position. As such, it contends that only the Court of Appeal and not this court can reinstate the concessionary benefits to the Claimant if and when it reverses the judgment of 25th February 2025. 13. In his supplementary affidavit, the Claimant contests the assertion that the court is functus officio. It is his view that the court is still seized of the requisite jurisdiction to grant the conservatory orders he seeks in the application. ELRC CAUSE NO. E575 OF 2020 3
14. The Claimant asserts that he is not asking the court to re- write the finance contract between the parties. He asserts that all that he is requesting is maintenance of the concessionary interest rates in the agreement between the parties pending resolution of the proposed appeal.

Analysis

15. It is not in doubt that this court has power to grant conservatory orders in an appropriate case. This power is donated to the court by section 12 of the Employment and Labour Relations Court Act.
16. That said, the power to grant the aforesaid remedy is only exercisable in instances where the matter in which the conservatory orders are sought is still pending determination before the court. It is doubtful that the court can exercise this jurisdiction in a matter which is already concluded and is the subject of an appeal before the Court of Appeal. The basis for this conclusion will become clearer later in this decision.

17. To begin with, it is perhaps important to state that there is a conceptual difference between a conservatory order and an injunction. Whilst the two may be applied for to preserve the status quo in a dispute pending resolution of the matter, the circumstances of their application are distinct. ELRC CAUSE NO. E575 OF 2020 4 18. Injunctions are often invoked in private law disputes. On the other hand, conservatory orders apply in public law disputes. As such, it appears inappropriate for a litigant who has a private law dispute to seek conservatory as opposed to injunction orders to maintain the status quo in the dispute.
19. This reality was alluded to in the case of *Munya v Kithinji & 2 others* [2014] KESC 30 (KLR) when the Supreme Court observed as follows:- “..... The domain of interlocutory orders is somewhat ruffled, being characterized by injunctions, orders of stay, conservatory orders and yet others. Injunctions, in a proper sense, belong to the sphere of civil claims, and are issued essentially on the basis of [on] convenience as between the parties, and of balances of probabilities. The concept of “stay orders” is more general, and merely denotes that no party nor interested individual or entity is to take action until the Court has given the green light. Conservatory orders bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s [applicant’s] case for ELRC CAUSE NO. E575 OF 2020 5 orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”
20. Once a court adjudicates on a matter, it becomes *functus officio*. As such, it is not entitled to consider further disputes in the case except as authorized by law. Some of the supplemental proceedings which a court may entertain in a closed case without offending the *functus officio* rule include applications for review and stay of execution pending appeal. 21. In the instant case, once this court rendered its judgment on the dispute between the parties on 25th February 2026, it became *functus officio*. As such, the only jurisdiction it retains in respect of the matter is limited to applications for review and stay of execution pending appeal.
22. The power of the court to entertain an application for stay of execution pending appeal to the Court of Appeal is donated by Order 42 of the Civil Procedure Rules. This power is triggered once a Notice of Appeal is been lodged. This reality is affirmed by Order 42 rule 4 which provides as follows:- “For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.” ELRC CAUSE NO. E575 OF 2020 6 23. It is noteworthy that the only powers which Order 42 aforesaid grants this court in respect of a matter which is before the Court of Appeal is limited to issuing the following orders:-

- a) An order of stay of execution of the decision appealed from pending resolution of the appeal (see Order 42 rules 1 & 2).
 - b) An order of interim injunction pending resolution of appeal (see Order 42 rule 6).
24. The Order (Order 42 of the Civil Procedure Rules), which is the only avenue through which this court may issue orders in respect of a matter which is pending before the Court of Appeal, does not empower it (the court) to grant conservatory orders. It only empowers the court to issue either an order for stay of execution of the decree or order which is the subject of appeal or an order of interim injunction, which as indicated earlier, is conceptually different from a conservatory order.
25. As noted earlier, although this court has power to issue conservatory orders under section 12 of the Employment and Labour Relations Court Act, this can only be done in a matter which is pending resolution before it. Further, such matter must be of public interest and not one which is purely anchored on private law. Importantly, the court cannot invoke the aforesaid provision in the Employment and Labour Relations Court Act to grant conservatory orders under Order 42 of the Civil Procedure Rules because the ELRC CAUSE NO. E575 OF 2020 7 latter provision (Order 42) does not empower it (the court) to issue conservatory orders in a matter which is pending appeal to the Court of Appeal. 26. In the application before court, the Claimant prays for a conservatory order pending appeal. The application does not seek either stay of execution of the court's judgment or an order of injunction pending appeal.
27. As noted earlier, the court is bereft of jurisdiction to grant a conservatory order pending appeal as such relief is not provided for under Order 42 of the Civil Procedure Rules. That being the case, the instant application is unmerited. 28. I agree with the Respondent's contention that to grant a conservatory order under section 12 of the Employment and Labour Relations Court Act will be tantamount to re-opening a closed matter in order to re-configure the order of the trial court. This will offend the functus officio doctrine.

Determination

29. The upshot is that the court finds that the instant application is not merited.
30. As such, it is declined.
31. Each party to bear own costs of the application. Dated, signed and delivered on the 27th day of April, 2026 B. O. M. MANANI JUDGE In the presence of: ELRC CAUSE NO. E575 OF 2020 8for the Claimantfor the Respondent ORDER In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court. B. O. M MANANI ELRC CAUSE NO. E575 OF 2020 9

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