



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI**

CIVIL CASE NO 620 OF 2004

SAMMY MUHIA 1ST PLAINTIFF

HENRY NGANGA 2ND PLAINTIFF

ANTHONY KINYUA 3RD PLAINTIFF

VERSUS

KENYA POWER & LIGHTING COMPANY LTD.....DEFENDANT

RULING

The plaintiffs filed the plaint in this suit on 11th June, 2004. The 3 plaintiffs, Sammy Muhia, Henry Ng'ang'a and Anthony Kinyua are casual employees of the defendant Company, the Kenya Power and Lighting Company Limited and sought judgment for:-

- a) A declaration that the practice of giving short term contracts renewable indefinitely is wrongful and contrary to Law.
- b) A declaration that the plaintiffs are entitled to long term contracts of employment similar to those enjoyed by other employees of the defendant on permanent and pensionable terms with effect from their original letters of appointment.
- c) An Order restraining the defendant Company by itself, its directors, officers servants or any of them or otherwise howsoever be restrained from terminating or otherwise interfering with the plaintiffs' employment contracts save on terms similar to those under permanent and pensionable terms.
- d) Damages
- e) Costs
- f) Interest on (c) and (d) above.
- g) Any such orders, writs and/or directions considered appropriate for the purpose of enforcing or securing the enforcement of the fundamental rights breached in relation to the plaintiffs.

The plaint was filed on 11th June, 2004 and on the same day the Chamber Summons dated 9th June, 2004. In the plaint, the 3 plaintiffs contend that they instituted the proceedings on their own behalf and in addition seek leave of the court to represent all other casual employees who have been employed by defendant on diverse dates. In the said application the plaintiffs claim that this suit will affect at least 1000 employees of the Kenya Power and Lighting Company Limited who have been serving on temporary employment contracts for periods ranging from 12 years to 1 month.

The said application sought the following prayers:-

1. The plaintiffs be granted leave to sue on behalf of all casual employees of the defendant
2. Notice of the Institution of the suit be advertised in at least one of the daily newspapers with a national circulation
3. The defendant, Kenya Power & Lighting Company Limited by itself directors, officers, servants or agents or any of them or otherwise howsoever BE RESTRAINED FROM terminating otherwise interfering with the plaintiffs' employment contracts, pending the determination of this suit or further orders.
4. Costs of this application.

The court subsequently granted the first 2 prayers and left prayer 3 for an injunction to be heard inter partes. However, before the injunction application was heard on its merits, the plaintiffs filed a Notice of Motion on 7th July, 2004 under inter alia, the provision of section 84 of the Constitution of Kenya and Rules 10(a) and (b) of the Constitution of Kenya (Fundamental Rights and Freedoms of the Individuals) Practice and Procedure Rules, 2001. The said Notice of Motion seeks inter alia, an order that the said motion and Chamber Summons referred to earlier be heard together, numerous declaratory orders, damages etc under the provisions of the Constitution. In other words the Notice of Motion is a constitutional application or reference alleging the infringement of the plaintiffs' Fundamental Rights and Freedoms under the Constitution by the defendant.

It is essential to enumerate and set out the said prayers in full:-

1. The Chamber Summons dated 10th June, 2004 be consolidated with and be heard together with this Notice of Motion
2. A declaration that the defendant's practice of giving the plaintiffs' short term contracts renewable to uncertain dates has occasioned the breach of the plaintiffs' fundamental right to life guaranteed by section 70(a) and 71 of the Constitution of Kenya
3. A declaration that the plaintiffs' entitlement to contractual terms on permanent and pensionable terms provided for in the Employment Act and other laws relating to employment and conditions of employment has been violated and accordingly the plaintiffs' fundamental rights to the due protection of law guaranteed by section 70(a) of the Constitution has been breached in relation to the plaintiffs
4. A declaration that the failure by the defendant to grant the plaintiffs employment contracts similar to those of employees on permanent and pensionable terms amount to discriminatory treatment of the plaintiffs in breach of section 82 of the Constitution
5. A declaration that the refusal failure and/or neglect of the defendant to offer the plaintiffs contracts of employment similar to those enjoyed by employees on permanent and pensionable terms amount to discriminatory treatment of the plaintiffs in breach of section 82 of the Constitution
6. A declaration that the keeping of the plaintiffs' on short term contracts without attendant benefits available to other employees of the defendant has resulted in the breach of the plaintiffs' fundamental rights guaranteed under section 73 of the Constitution not to be held in servitude
7. A declaration tht the keeping of the plaintiffs on short term contracts without attendant benefits such as annual leave, leave allowance, maternity leave with respect to female employees, medical cover, house allowance, contribution to Provident Fund, the right to join a union and the co-operative society and accident compensation available to other employees of the defendant has resulted in the breach of the plaintiffs' fundamental rights or degrading treatment guaranteed under section 74 of the Constitution 8. Damages for breach of the aforesaid Constitutional rights

9. Costs

10. interests on 7 and 8

11. Any such further orders, writs and/or directions considered appropriate for the purpose of enforcing or securing the enforcement of the fundamental rights breached in relation to the plaintiffs The constitutional application and the Chamber Summons for injunction were placed before me on 14th July, 2004 for hearing. Counsel for the parties had agreed that the question of the court's jurisdiction be dealt at the commencement. The matter was placed before me and was to be heard by me on priority basis because the last temporary contracts of employments of the 3 plaintiffs was to expire on 16th July, 2004 or upon one day's notice being given before the said date. I perused the 3 letters of employment pertaining to the plaintiffs and I was satisfied that indeed their employments if not terminated earlier would expire on 16th July, 2004.

Before commencement of the hearing before me, and upon consideration of the matters before me I made the following orders:-

1. An order of stay of proceedings in the suit to investigate and determine the questions raised by the application and which are of a constitutional nature. This order was made under the provisions of Rule 10 (b) of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules.
2. An order of consolidation of the Notice of Motion under section 84 of the Constitution and the Chamber Summons for injunction
3. An order permitting the immediate hearing of the aforesaid Chamber Summons due to the urgency thereof albeit the stay proceedings, due to the urgency and nature of the application.

I heard the Chamber Summons within the consolidated applications between 11 a.m. and 2.30 pm on 14th July, 2004. I reserved my Ruling and ordered that I would deliver it on 16th July, 2004 at 2.30 pm, the day on which the 3 plaintiffs' employment contracts were due to expire. Due to the very short time I had, my busy schedule as I continued to her other matters and the complexity of the issues raised and the importance of the application and possible implications either way, I found that I was unable to do justice to the parties and the issues by giving a considered and reasoned decision within the given time. As a result I deferred my Ruling and reserved it to a date to be given on Notice in the new term which was to commence on 15th September, 2004.

For reasons given fully in my Interim Ruling on 16th July, 2004, I granted a temporary Injunction order in terms of prayer 4 of the summons for a limited period until 30th October, 2004 or upto the date the court would deliver its ruling or whichever is the earlier.

The said Ruling was not ready by 29th October, 2004 which was a Friday. As 30th October 2004 fell on a Saturday, I extended the said order to 10th November, 2004 and subsequently to 12th November, 2004.

In opposition to the application for Injunction, the defendant filed grounds of opposition dated 5th June, 2004 which contained 4 grounds, namely, that:-

1. The court had no jurisdiction to issue the orders sought.
2. Order 39 Rule 2 of the Civil Procedure Rules does not avail to the applicants the relief sought.
3. The court cannot rewrite contracts between the applicants and the respondent.
4. The applicants' remedy is in damages.

The defendant also filed a Replying Affidavit sworn by its senior Human Resources Manager – Employee

Relations, Mr Sigilai Kirui and sworn on 7th July, 2004.

The application for Injunction was brought under Order 39, Rule 2 (as amended) of the Civil Procedure Rules and section 3A of the Civil Procedure Act. Rule 2 reads as follows:-

“2. In any suit for restraining the defendant from committing a breach of contract or other injury of any kind in whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant, from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.”

From a simple reading and interpretation of the aforesaid rule, it would appear that this court has the power and jurisdiction to entertain an application for a temporary injunction to restrain a defendant from committing a breach of contract. It is my view that since there is no restriction or qualification of the type of contract, then this would include and contemplate contracts of employment and/or personnel service.

The Chamber Summons for injunction has been consolidated with the constitutional application and they are now part and parcel of each other.

They are to be treated as one application or at the very least the injunction application must be considered within the context and existence of the constitutional application. It is my view therefore that the injunction application must also be considered under the provisions of section 84 of the Constitution under which the constitutional application was brought and has now been consolidated with the former.

The question which would then arise is whether this court can grant injunctive Orders or an injunction under the provisions of section 84 of the Constitution. I am guided by the decision in RASHID ODHIAMBO ALLOGOH & 24 OTHERS v HACO INDUSTRIES LIMITED, Civil Appeal No 110 of 2001 in which the Court of Appeal in a unanimous judgment (Omolo, Tunoi & O’Kubasu, JJA) said in a similar case like the one before me:-

“The appellants came to the constitutional court under section 84 (1) and (6) of the Constitution. Section 84(1) provides as follows:-

“Subject to subsection (6) if a person alleges that any of the provisions of section 70 and 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if another person alleges a contravention in relation to the detained person), then without prejudice to any other action with respect to the same matter which is lawfully available, tht person (or that other person) may apply to the High Court for redress.” So there it is in the plainest language possible, the availability of other lawful causes of action is no bar to a party who alleges a contravention of his rights under the Constitution.

With regard to the remedies and/or orders that the court hearing constitutional application could grant or give, the Court of Appeal said as follows:-

“... If the court were to find that the proved or agreed facts do not amount to or constitute a contravention of those sections, then once again, the matter would end there and the appellants’ originating summons can only be dismissed. But if the court were to find that the proved or admitted facts amount to or constitute a contravention of any of the constitutional provisions relied on by the appellants, then in that event the court would move to the last stage, namely, the remedy or remedies to which the appellants would be entitled to, and the best guide on the types of remedies available are to be found in section 84(2) of the Constitution where the High Court is authorized to:-

“ make such orders, issue such writs and give such directions as it may consider appropriate for the purposes of enforcing or securing the enforcement of any of the provisions of section 70 to 83 (inclusive).”

I therefore, hold that section 84(2) of the Constitution gives this court a wide discretion and powers to issue appropriate orders for the enforcement and securing the enforcement of the provisions of sections 70 to 83 of the Constitution. It is my view that that such orders would include injunctions.

As a result, the plaintiffs herein are entitled to apply for a temporary injunction restraining the termination of their contracts of employment pending the hearing and determination of the applications herein and the court upon hearing, if it finds that a case has been properly made out for the grant of such injunctive orders would grant the same.

In the case of *JORSINGH v ATTORNEY GENERAL* (1997) 3 LRC, 33 at 338, a case from Trinidad and Tobago, De La Bastide CJ stated as follows when discussing their s 14(2) of their Constitution which is exactly like on section 84(2):-

“The discretion given to the court by this provision is very wide one indeed. It empowers the court to make any order without limitation which the court considers appropriate for the purpose of enforcing any enshrined in the Constitution.

Given the breadth of this power it is not readily apparent to me why in making an order for payment of damages as a consequence of a breach of a constitutional right, the court should be either: (a) Limited to providing compensation for the injured party or

(b) bound necessarily by the rules which govern the assessment of damages (including exemplary damages) at common law.”

I am persuaded by the aforesaid statements. When considering an applications for temporary injunctions under Order 39 of the civil Procedure Rules, our courts have been guided by the three principles set out and established in the case of *GIELLA vs CASSMAN BROWN LIMITED* 1973 EA 358. First the applicant must make out a prima facie case with probability of success at the trial. Secondly, that normally an injunction will not be granted unless it can be shown that the applicant is likely to suffer irreparable injury which cannot be adequately be compensated in damages and thirdly, that if the court is in doubt it should decide on a balance of convenience. These are necessary ingredients for the grant of an interlocutory injunction whether it is of a restraining nature or compulsive or mandatory in nature.

In the present case, the chamber summons which was initially filed under Order 39, Rule 2 of the Civil Procedure Rules has merged into the constitutional application under s 84 of the Constitution as a result of the consolidation order. The Injunction application must therefore as a matter of essence be substantially considered as an order sought under s 84 (2) which is paramount vis-à-vis Order 39, or the Civil Procedure Rules.

The discretion granted in s 84 (2) of the Constitution to make orders for the enforcement of the protective provisions would seem to go beyond the normal principles applicable to the grant of temporary injunctive orders.

To borrow words from the *Jorsingh* case above, the constitutional provision which makes enforcement of the guaranteed rights the object of the relief which the court is empowered to grant has the effect of releasing the court from constraints of common law rules or principles established for the grant of temporary injunctions.

With the foregoing in mind, the court is in a position to delve into the merits of the application for injunction and consider whether from the facts presented and all circumstances, the plaintiffs have made out a case for the grant of the temporary injunction sought. However, before going into the said merits, it is pertinent and important that the court looks at and considers the exact type and nature of the temporary injunction applied for in this application.

The plaintiffs as employees have respective temporary employment contracts. These are contracts for personal services. If the court grants the temporary injunction sought herein it would in effect compel the

defendant to retain the services of the plaintiffs pending the hearing of the constitutional application. Although it is couched in a language suggesting that the orders sought are of restraining effect or nature, the enforcement of the said order would be compulsive and mandatory in nature. I do hold that the temporary injunction applied for by the plaintiffs is in law a Mandatory Injunction which would require compulsion and the carrying out of positive actions i.e. continuing the employment contracts, assigning duties to the plaintiffs with all the attendant mutual obligations, payment of salaries and other emoluments etc.

We have seen that the court has the power and discretion to grant any kind of orders in the enforcement of the protective provisions of the Constitution. The defendant's counsel referred to the English case of *PAGE ONE RECORDS LIMITED & ANOTHER v BRITTON AND OTHER* (trading as "Troggs") *AND ANOTHER* (1967) 3 All ER 822 which involved an application to restrain an employer from breaching a contract for personal services. The court held that the grant of the Interlocutory Injunction would compel in effect the employer to continue to employ the first plaintiff and thus would amount to enforcing the performance by the said employer of a contract for personal services. The court equated the injunction to an order of specific performance of the employment contract. In the said case, the principle of mutuality of the right of enforcement of the contract was applied. Stamp J, at p 826 observed:-

"For the purposes of consideration of equitable relief I must, I think, look at the totality of the arrangements, and the negative stipulations on which the plaintiffs rely, are in my judgment, no more or less than the stipulations designed to tie the parties together in a relationship of mutual confidence, mutual endeavour and reciprocal obligations. These considerations in the view of *KNIGHT BRUCE LJ* in *John v Shrewsbury and Birnigharm Ry Company* (1853) ... I quote from the judgment of *Knight Bruce LJ*:

"It is clear in the present case that had the defendants been minded to compel the plaintiffs to perform their duties against their will, it could not have done. Mutuality therefore is out of the question, and according to the rules generally supposed to exist in courts of equity, that might have been held sufficient to dispose of the matter; cases however have existed where though the defendant could not have been compelled to do all he had undertaken to do by contract, yet as he had contracted to abstain from doing a certain thing the court has interfered reasonably enough."

The aforesaid exceptions at the end related to contracts containing restrictive or negative covenants i.e. contracts of restraint of trade. In the present case, such restrictive covenants are not an issue. Would the defendant if the situation had arisen been able to enforce performance of the contracts on the part of the plaintiffs by a mandatory injunction? The answer is NO. It follows, therefore, there is lack of mutuality of the right of enforcement of respective obligations in these agreements. In a normal action, an injunction being an equitable relief and there being no mutuality; the plaintiffs would have had an up-hill task during trial to sustain a permanent mandatory injunction. On this ground alone, they may not have been held to have disclosed a prima facie case with a probability of success at the interlocutory stage. However, this is not a normal action but a constitutional application where strictly common principles and possibly principles of equity would not apply.

Be that as it may, I am of the view that the enforcement of rights and freedoms under the Constitution must in essence embrace principles of equity. The Constitution applies principles of fairness and equality in the application of the protective provisions. It is my view that an Injunction even under the Constitution amounts to an equitable relief and a constitutional court must be hesitant and cautious that the grant of an order to enforce an individual's rights does not have the effect or possible effect of violating the rights of another which are protected and enshrined in the very Constitution. There must be mutuality of the protection and enjoyment of constitutional rights and freedoms. The plaintiffs have pleaded in their application that the conduct of the defendant in keeping the plaintiffs on short term contracts available to other employees of the defendant has resulted in the breach of the plaintiffs' fundamental rights guaranteed under section 73 of the Constitution not to be held in servitude.

In the case of *FREDERICK PHILIP OMONDI v KENYA COMMERCIAL BANK LTD*, HCCC No 520 of 2003 (Milimani), I held that:-

“The plaintiff’s duties are personal and of a sensitive nature to perform and in whom the defendant, for reasons, good, bad, indifferent or even malicious, have lost confidence and who may, for all this court knows, fail in his duties (see Warner Brothers Pictures Inc v Nelson – (1936) 3 All ER 160 at p 165). The court does not enforce contracts of servitude, whoever is the complainant. It is against public policy.”

Section 70 of the constitution of Kenya lays down the extent to which Fundamental rights and freedoms of the individual can be enjoyed. It reads as follows:-

“70 Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or creed or sex, but subject to the rights and freedoms of others and for the public interest, to each and all of the following, namely:- (a) Life, liberty, security of the person and the protection of the law

(b) Freedom of conscience, of expression and of assembly and Association; and

(c) Protection for the privacy of his home – and other property and from deprivation of property without compensation,

The provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interests.” (emphasis mine)

This means that the Constitution itself has placed a limitation on the enjoyment of the fundamental rights and freedom to the said extent.

Does the defendant which is a corporation or limited liability company fall among the “others” whose rights must be protected. Does a corporation have constitutional rights? In my view the corporate body corporation or limited liability company is a legal person or entity. Once an inanimate body acquires corporate personality and is capable of suing or being sued in its name then it acquires rights and is burdened with obligations and duties. A commercial corporation for instance has property rights protected by section 75 of the Constitution. It may be true that there are some fundamental rights which cannot be enjoyed by or apply to a corporate legal person e. g the protections of right to life and freedom of conscience. However, I do not see why it should not be protected and enjoy those rights that can be enjoyed by a non-human legal entity like protection from deprivation of property, freedom of expression, etc.

The plaintiffs have sought protection of this court against being held in servitude in breach of their fundamental rights as guaranteed by s 73 of the Constitution. Servitude is the condition of being a servant or slave to another (see Black’s law Dictionary 8th Edition). Being an involuntary condition, this includes the condition of one forced to labour – for pay or not for another by coercion or imprisonment. If the Constitution protects the Plaintiffs’ against such condition then the enforcement of such right which to me is automatic must ensure that equally the rights of the defendant are not prejudiced.

The Defendant is a Corporate Commercial enterprise and has the right of choice to employ its employees or staff on any contractual terms permissible by Law. The applicable law which has been relied upon in this case by both parties is the Employment Act Cap chapter 226. The said Act acknowledges and provides for the concepts of “Casual employment” and “short term contracts”:

Section 5(2) of the Employment Act inter alia provides:-

“5(2) Subject to subsection (1), the time times when wages shall be deemed to be due shall be as follows:-

(a) In the case of a casual employee, at the end of the day;

(d) In case of an employee employed for a period of more than one day but not exceeding one month, at

the end of that period..... etc.”

It will be an issue at the hearing of the main application whether these provisions are inconsistent with the provisions of the Constitution and whether the circumstances of the Plaintiff’s situation and relationship with the Defendant and the longevity of the said relationship, would make the Defendant’s conduct to be in violation of the Plaintiff’s fundamental rights.

For the moment, the effect of any temporary mandatory injunction herein would amount to specific performance of the employment contract of the Plaintiffs. However, the difference is that the said contract is no longer in force save for the interim orders herein. The period of temporary employment has expired. Can such a contract be sustained by a mandatory injunction pending the hearing of the Constitutional Reference? With much respect, I hold that such a contract is not likely to be sustained by this Court applying the GIELLA principles since I would have held that the Plaintiffs’ prayer for specific performance of the contract by way of an injunction does not disclose a prima facie case with a probability of success. However, applying the court’s inherent powers as a Constitutional Court enforcing section 84 of the constitution and in the light of the wide discretion and powers to grant almost any kind of relief or remedy, I would still be disinclined against granting the temporary mandatory injunction. This is on the ground of lack of mutuality of the right of enforcement of the same constitutional rights and in this case, the employment contract.

It is my view in this application that to grant the said orders in the circumstances of this case would amount to holding the Defendant in “servitude” to the extent that it will be compelled to retain the personal services of the plaintiffs, provide them with a work and duties, pay them salaries and other allowances, allow them entry into its premises, give access to information and documents etc. The injunction will force the Plaintiffs and the Defendant together against the Defendant’s will. This would be legal coercion and bondage.

The law would not countenance such a situation and it is definitely not in the public interest or public policy either. If the Defendant was the state, or a State corporation or public body, there is a possibility subject to all relevant laws and circumstances that the equation would have been different.

In the private enterprise and sector, its in the interest of the market economy that contractual relations are regulated by the contracts which brought them into existence or relevant statutes. It is not the place for coercive mandatory injunctions like the one sought in this case.

This court is conscious that fundamental rights are Constitutional guarantees given to the people of Kenya and are not merely paper hopes, or fleeting promises and so long as they find a place in the Constitution, they should not be allowed to be emasculated. The courts should be anxious to enlarge the scope and width of the Fundamental Rights by bringing within their sweep every person, whether individual or corporate and expanding the horizon of remedies. However, in discharging its duties and enforcing fundamental rights of an applicant the court must ensure that in the process the rights of others are not attenuated.

In conclusion, I do hereby hold that this is not an appropriate case in which the court would grant a temporary injunction to restrain the Defendant from terminating the Plaintiff’s temporary employment contracts pending the full hearing of their Constitutional application. At this stage, I would agree with the Defendant’s Counsel that the Plaintiffs’ remedy, if successful, would lie in damages.

I therefore, do hereby dismiss the Plaintiffs’ application with costs to the Defendant. The interim Orders are hereby discharged

DATED and delivered at Nairobi this 12th day of November, 2004.

M. K. IBRAHIM

JUDGE