



Okedi & 2 others v National Construction Authority (Cause E154 of 2024) [2024] KEELRC 1233 (KLR) (7 May 2024) (Ruling)

Neutral citation: [2024] KEELRC 1233 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E154 OF 2024
NZIOKI WA MAKAU, J
MAY 7, 2024**

**BETWEEN
DOUGLAS ESROM OKEDI & 2 OTHERS CLAIMANT
AND
NATIONAL CONSTRUCTION AUTHORITY RESPONDENT**

RULING

1. The Claimants/Applicants filed a Notice of Motion Application dated 26th February 2024 seeking for Orders that the Honourable Court be pleased to grant them a temporary Order by way of injunction directed against the Respondent Corporation, restraining it from filling the Claimants' job positions of Compliance Officers pending the hearing and determination of both the Application and the suit. In addition, that the costs of this Application be provided for. Subsequently, the Application was certified urgent and a temporary injunction granted to the Claimants pending the hearing and determination of the Application as prayed.
2. The Application was supported by the Affidavits of the three Claimants/Applicants in the suit and based on the grounds that the Claimants/Applicants have been in the lawful employment of the Respondent Corporation for periods ranging six (6) and seven (7) years. That through letters dated 26th January 2024, the Respondent unlawfully terminated the Claimants' employment contrary to their rights to fair labour practices and lawful expectation. The Claimants/Applicants thus seek to be reinstated to their former positions as Compliance Officers in the Respondent Corporation and assert that it is in interest of justice that an injunctive Order be issued to preserve their former positions pending the hearing and determination of the suit.
3. In response, the Respondent opposed the Claimants' Motion Application dated 26th February 2024 through Grounds of Opposition dated 26th March 2024, on grounds that the Claimants have pending appeals against the termination of their employment before the Respondent and therefore this court's jurisdiction has been prematurely invoked. The Respondent asserted that the orders sought require



the Court to interfere with the Respondent's internal human resource functions which is a power that ought to be used sparingly. The Respondent submits that the Claimants have not demonstrated sufficient grounds for invoking of the court's discretionary power in this regard and granting the orders as sought will amount to interfering with an employer's management prerogative of managing affairs and operations at the workplace. The Respondent asserted the prayer as sought is not anchored on a similar corresponding prayer made in the main suit since under Rule 17(5) of the Employment and Labour Relations Court Rules, this Court can only grant an interlocutory injunction if the Applicant had prayed for an injunction in the main suit. The Respondent called in aid the case of Abdi Mohammed Daib v Kenya Ports Authority [2015] eKLR where the court held that, "In this case, the applicant has not made any prayer for injunction in the main suit. It means therefore that under rule 16 (3) of the ICPRs. The Respondent asserts that the the Court is barred from granting interlocutory injunction as prayed in the present motion and that there is thus no jurisdiction to grant the orders sought. It was argued that even if the court has jurisdiction, and it does not, the Claimant has not met the test for the grant of interlocutory injunctions sought as set out in Giella v Cassman Brown [1973] EA 358 in that the Claimant has not established a prima facie case with probability of success. The Respondent asserts the termination of the Claimants' employment was substantively and procedurally fair and that an award of damages would be an adequate remedy as provided for in section 49(1) of the Employment Act. It was fronted that if in doubt, the balance tilts in favour of the Respondent whose prerogative as an employer should not be interfered with there being no valid reason to do so. The Respondent asserts the application is otherwise frivolous and without merit. It should be dismissed with costs.

4. Claimants/Applicants' Submissions

The Claimants/Applicants submitted that the Respondent has not filed any Replying Affidavit challenging the averments in their Affidavits and that it had only filed the Statement of Response. That in the premises and given the time set for filing the submissions, they took liberty to file their submissions to enable this Court consider and determine the Motion Application. It was the Claimants/Applicants' submission that the law gives this Honourable Court the prerequisite mandate and power to grant the prayers sought. That in any event, preservation of the positions the Applicants held is not prejudicial to the Respondent but will hasten the hearing of this matter. The Applicants relied on the case of Wafula v Board of Management, Masimba High School & another (Cause E066 of 2023) [2023] KEELRC 2590 (KLR) (25 October 2023) (Ruling); that of Wamukota v Kenya Electricity Transmission Company Limited & 2 others (Petition E213 of 2023) [2023] KEELRC 3068 (KLR) (30 November 2023) (Ruling); and the case of Florence A. Odhiambo v Wananchi Telcom Limited & another [2017] eKLR, in which the Court issued injunctive Orders in favour of the applicants, to preserve the substratum of the cases.

5. Respondent's Submissions

According to the Respondent, the issues for determination before this Court are whether the Court has jurisdiction to grant the Claimants' Application and whether the Claimants have met the test for grant of a temporary injunction. The Respondent submitted that whereas the Claimants admit to have lodged their Appeals dated 5th February 2024 to the Respondent's Board against their dismissal as per clause 15.4 (i) of the Respondent's HR Manual, they however did not wait for the Board to give a decision on their appeals. That it is common ground that the Respondent is a state corporation which means its Board does not sit continuously but rather convenes for scheduled meetings as per the annual calendar and work plan. That therefore considering the Respondent's Board had not yet convened at the time when the Claimants lodged their appeals or indeed filed this suit, their appeals still pend consideration and resolution. The Respondent fronted that the Claimants/Applicants have



failed to exhaust the available remedies before seeking recourse in court, therefore divesting the Court of jurisdiction and making their Application a non-starter and in breach of the doctrine of exhaustion. That the principle of exhaustion of available remedies was reiterated in Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR in which the Court of Appeal held that where a dispute resolution mechanism exists outside courts, the same should be exhausted before the jurisdiction of the courts is invoked and that Courts ought to be the fora of last resort and not the first port of call. That the principle was also affirmed by the Supreme Court in the case of Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) [2019] eKLR as follows:

“...Even where superior courts had jurisdiction to determine profound questions of law, first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute.”

6. The Respondent submitted that further, the Claimants/Applicants' prayer for an order of temporary injunction is not within the Court's jurisdiction to grant for the further reason that the Claimants have not sought an injunction within the main suit. That this principle was well captured in the case of Abdi Mobammed Daib v Kenya Ports Authority (supra) wherein the Court found that it had no jurisdiction to order interlocutory injunction in a suit where the applicant has not prayed for injunction in the main suit. The Respondent concluded that therefore on this front, this Court has no jurisdiction to determine the Claimants' Application dated 26th February 2024 and should down its tools at this juncture in line with the renowned case of Owners of the Motor Vessel "Lilian S" v Caltex Kenya Limited (1989) KLR 1.
7. As to whether the Claimants have met the test for grant of a temporary injunction, the Respondent submitted that without prejudice to its foregoing submissions on jurisdiction, the Claimants are not deserving to be granted a temporary injunction. That the test for grant of temporary injunctions was laid down in the locus classicus case of Giella v Cassman Brown Ltd [1973] EA 358, with three mandatory principles to be met being that an applicant must show a *prima facie* case with a probability of success, show that they might suffer irreparable injury that would not adequately be compensated by an award of damages, and if the Court is in doubt, it will decide the application on the balance of convenience. The Respondent submitted that the Claimants were dismissed on grounds that are serious in nature touching on integrity issues and whose veracity can only be determined at trial. That in the circumstances, the Claimants cannot be considered to have shown a *prima facie* case with a probability of success. Secondly, that the Claimants have not demonstrated that they would suffer "irreparable injury" which cannot be compensated by an award of damages under section 49(1) of the Employment Act. It noted that in the case of Jane Kaimuri David v Co-operative Bank Savings and Credit Society Limited [2021] eKLR, the Court observed that reinstatement is obviously not granted unless there is proof that damages would not be an adequate remedy for the applicant. Thirdly, that the balance of convenience tilts in favour of the Respondent because it is trite law that courts should avoid interfering with an employer's rightful managerial prerogative per the case of Alfred Nyungu Kimungui v Bomas of Kenya [2013] eKLR. The Respondent argued that recruitment is part of the managerial prerogative that ought not to be interfered with lightly, as it is crucial for any employer to maintain an adequate workforce to carry out its business. That stopping the filling of those positions before determining the propriety of the termination of employment is tantamount to interfering with the Respondent's management prerogative. That in any case, the Court in the case of Jane Kaimuri David Co-operative Bank Savings and Credit Society Limited (supra) stated that merely



hiring a new person to an employee's previous position does not in any way limit the court from ordering reinstatement. It was the Respondent's further submission that the main suit is almost ready for hearing since all parties have filed all their necessary pleadings. That this Court will subsequently have the opportunity to hear the matter expeditiously and make the final determination on whether the Claimants were terminated unfairly or are deserving of reinstatement. The Respondent maintained that therefore even on the standard of balance of convenience, the Claimants are not entitled to the injunction sought and their Application should be dismissed with costs.

8. It is imperative to point out from the onset that a court such as the Employment & Labour Relations Court has the mandate under section 12 of the *Employment and Labour Relations Court Act* 2011 to issue the following orders – in parre materia:-

- (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)...
- (2) An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.
- (3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders
 - (i) interim preservation orders including injunctions in cases of urgency; (ii) a prohibitory order;
 - (iii) an order for specific performance;
 - (iv) a declaratory order;
 - (v) an award of compensation in any circumstances contemplated under this Act or any written law;
 - (vi) an award of damages in any circumstances contemplated under this Act or any written law;
 - (vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or
 - (viii) any other appropriate relief as the Court may deem fit to grant.
- (4) In proceedings under this Act, the Court may, subject to the rules, make such orders as to costs as the Court considers just.
- (5) ...

[Emphasis supplied]



9. This power of the Court does not depend on the Civil Procedure Rules provisions cited in aid by the Respondent. This application is not an injunction sought in a suit over land. The Court has its own Rules which are the Employment & Labour Relations Court (Procedure) Rules 2016. Those are the Rules applicable here. That said, it is imperative to consider whether the Claimants are entitled to the orders they seek, which are injunctive in nature in terms of section 12. The Claimants have sought to bar the Respondent from filing their positions. Their terminations took place on 26th January 2024 and they moved court in haste by 26th February 2024. The Respondent asserts that there are pending appeals against the dismissal. These appeals are admittedly before a Board that sits when and however it deems it fit. As of the date of filing submissions, there was no indication the Respondent's Board would sit in the near future to determine the germane questions on the appeals raised. Under the Fair Administrative Actions Act, any party that is aggrieved is entitled to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The ad hoc board sittings do not fall within the category of expeditious, efficient, reasonable and procedurally fair. In the case of *Giella v Cassman Brown Ltd* (supra) it was stated that the principles to be met by an applicant is that they must show a *prima facie* case with a probability of success, demonstrate that they might suffer irreparable injury that would not adequately be compensated by an award of damages, and if the Court is in doubt, it will decide the application on the balance of convenience. The Claimants have a *prima facie* case. Whether it will succeed is a matter for trial by the court. On the second limb, the loss that they may suffer may not adequately be staunched by an award of damages as they seek a slew of reliefs. In the final limb, the balance tilts in their favour. As such, the Claimants had a right to seek legal recourse in courts of law. Their claims to securing the position in place is merited though in the scheme of things it is possible to order a reinstatement in the event they are successful in their suit. They are also entitled to compensation if successful and an award of damages. Having considered the rival interests of the parties before me, the Court is minded to issue injunctive relief as follows:-

- a. The positions the Claimants held at the Respondent should not be substantively filled pending the hearing and determination of this suit.
- b. The case be fast tracked for hearing to determine whether there is any merit in the suit.
- c. Costs of the motion to abide the outcome in the suit now pending before this Court.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MAY 2024

NZIOKI WA MAKAU

JUDGE

