



REPUBLIC OF KENYA



**Muturi v Havi & 21 others (Civil Application E435 of 2021)
[2022] KECA 938 (KLR) (19 August 2022) (Judgment)**

Neutral citation: [2022] KECA 938 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E435 OF 2021
HM OKWENGU, F SICHALE & KI LAIBUTA, JJA
AUGUST 19, 2022**

BETWEEN

FLORENCE WAIRIMU MUTURI APPLICANT

AND

NELSON ANDAYI HAVI 1ST RESPONDENT
CAROLINE KAMENDE DAUDI 2ND RESPONDENT
HERINE KABITA 3RD RESPONDENT
ESTHER ANG'AWA 4TH RESPONDENT
DR. MAXWELL MIYAWA 5TH RESPONDENT
JANE ODIYA 6TH RESPONDENT
GEORGE KAMAU 7TH RESPONDENT
EMMANUEL KYOBICA 8TH RESPONDENT
JAMLICK MURIITHI 9TH RESPONDENT
LEVI MUNYERI 10TH RESPONDENT
BONBEGI GESICHO 11TH RESPONDENT
CLARISE MMBONE 12TH RESPONDENT
COUNCIL OF THE LAW SOCIETY OF KENYA 13TH RESPONDENT
MERCY KALONDU WAMBUA 14TH RESPONDENT
GEORGE OMWANSA 15TH RESPONDENT
CAROLYNE MUTHEU 16TH RESPONDENT
FAITH ODHIAMBO 17TH RESPONDENT



ALUSO INGATI	18 TH RESPONDENT
NDINDA KINYILI	19 TH RESPONDENT
BERNARD NGETICH	20 TH RESPONDENT
BETH MICHOMA	21 ST RESPONDENT
RIZIKI EMUKULE	22 ND RESPONDENT

(Being an appeal against the Ruling and Order of the Employment and Labour Relations Court (Nzioki wa Makau, J.) issued on 29th July, 2021 in ELRC Petition No. 116 of 2021)

JUDGMENT

1. The Law Society of Kenya (the LSK), is a corporate body established under section 3 of the *Law Society of Kenya Act*. The appellant Florence Wairimu Muturi, who has been the Deputy Secretary and Director of the Compliance and Ethics Directorate of the LSK was on 12th July, 2021 served with a letter dated 9th July, 2021 signed by the then President of the LSK Nelson Andayi Havi (the 1st respondent), purporting to summarily dismiss her from her employment.
2. Consequently, the appellant filed a petition in the Employment and Labour Relations Court (the ELRC) against the 1st respondent as President of the LSK, the 2nd respondent as the Vice President of the LSK, the 3rd and 4th respondents as members of the Council of the LSK, and the 5th to 12th respondents as members of the Caretaker Council of the LSK. She also included as interested parties, the Governing Council of the LSK (the 13th respondent), the LSK Secretary and CEO (the 14th respondent), and several Council members of the LSK (the 15th to 22nd respondents).
3. The appellant's petition was anchored on alleged violation of her constitutional rights under Articles 41, 47(1) & (2) and 50(1) of *the Constitution*, as read with sections 41 & 44 of the *Employment Act*, and the provisions of the *Fair Administrative Actions Act*, including section 4. She maintained that her purported removal as the Deputy Secretary and Director of Compliance and Ethics Directorate of the LSK was in breach of her fundamental rights under *the Constitution*, Rules of natural justice, and the disciplinary procedure provided under the Human Resource Manual of the LSK.
4. In her petition, the appellant sought declaratory orders: that her fundamental rights and freedoms have been violated; that the Caretaker Council composed of the 5th to 12th respondents is an illegal and alien entity in the structure of the LSK; that the 5th to 12th respondents have no privity with her employment contract and that they could neither issue instructions to her collectively or individually, nor terminate her employment; and that the 1st to 4th respondents can only issue directives and orders to her through the Secretary/CEO of the LSK.
5. The appellant also sought orders of certiorari quashing the entire decision of the respondents, signed by the 1st respondent, summarily dismissing her from employment; and quashing the notice appearing in the Daily Nation Newspaper of 13th July 2021 inviting applications for the position of Director of Compliance and Ethics.
6. In addition, the appellant sought a permanent injunction restraining the 1st to 12th respondents from illegally interfering with her employment with the LSK or attempting to determine her employment without following due process; an order restoring the status quo ante in the event that the 1st to 12th respondents' actions adversely affect her employment as Deputy Secretary Compliance and Ethics.



Finally, the appellant sought compensation for the violation of her fundamental rights and freedoms, payable personally by the 1st to 12th respondents.

7. Filed contemporaneously with the appellant's petition, was a notice of motion dated 19th July, 2021 brought under Article 23 (3) of *the Constitution* and Rule 23(1) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice & Procedure Rules 2013, in which the appellant sought orders that we reproduce herein verbatim.
 - i. Spent..
 - ii. that pending the inter-partes hearing and determination of the application herein, there be a conservatory order staying the respondents' decision,
signed by the 1st respondent summarily dismissing the petitioner as a Deputy Secretary and Director of the Compliance and Ethics Directorate at the Law Society of Kenya;
 - iii. that Pending the inter-partes hearing and determination of the application herein, there be a conservatory order staying the 1st respondent's decision published in the Daily Nation Newspaper of 13th July, 2021 inviting applications for the position of Director of the Compliance and Ethics at the Law Society of Kenya;
 - iv. that pending the inter-partes hearing and determination of the application herein, the respondents and especially the 1st and 2nd respondents be restrained from interfering with her role as the Deputy Secretary, continue harassing, bullying and intimidating her or forcibly remove her from her work station, fail to pay her salary and benefits as senior LSK Secretariat staff, or replace her entirely (sic), replacing the petitioner from her current position as a Deputy Secretary and Director of the Compliance and Ethics directorate at the Law Society of Kenya or from withholding her salary or withdrawing any privileges, rights or benefits accruing to the petitioner in that position;
 - v. that pending the hearing and determination of the petition herein, there be a conservatory order staying the respondents' decision signed by the 1st respondent summarily dismissing the petitioner as a Deputy Secretary and Director of the Compliance and Ethics directorate at the Law Society of Kenya;
 - vi. that pending the hearing and determination of the petition herein, there be a conservatory order staying the respondents' decision published in the Daily Nation Newspaper of 12th July, 2021 inviting applications for the position of Director of the Compliance and Ethics directorate at the Law Society of Kenya;
 - vii. that pending the hearing and determination of the petition herein, the respondent and especially the 1st and 2nd respondents be restrained from replacing the petitioner from her current position as a Deputy Secretary and Director of the Compliance and Ethics directorate at the Law Society of Kenya or from withholding her salary or withdrawing any privileges, rights or benefits accruing to the petitioner in that position.
8. The motion was supported by the grounds stated on the face of the motion, and a lengthy 90 paragraph affidavit sworn by the appellant, in which she deposed to the circumstances leading to the issuance of the letter dated 9th July, 2021 to her. In a nutshell, she reiterated that the respondents have breached her constitutional fundamental rights and freedoms and acted contrary to the law, that she was a victim of the toxic environment created by the wrangles within the leadership of the LSK, and that the LSK had confirmed that she was still holding her position as the Deputy Secretary and Director of the



Compliance and Ethics directorate at the LSK. She urged the Court to issue the orders sought to prevent the respondents from unlawfully interfering with her employment.

9. On the same day, that is 19th July 2021, the motion was placed before Onyango, J., who certified it as urgent and issued an interim conservatory order staying the respondents' decision published in the Daily Nation Newspaper of 13th July, 2021 inviting applications for the position of Director of Compliance and Ethics at the LSK pending the inter parte hearing of the motion.
10. The 1st to 12th respondents opposed the appellant's motion through an equally lengthy 62 paragraph replying affidavit, sworn by the 2nd respondent. In brief, the 2nd respondent deponed that the decisions that were taken on 9th July, 2021 and 13th July, 2021 are decisions of the LSK, and not personal decisions of the 1st to 12th respondents; that the failure by the appellant to sue the LSK as a corporate body rendered her claim incompetent, and that the notice of motion anchored on that claim could not be sustained; that the appellant's terms of service provided for summary dismissal and this is in accordance with section 44 of the Employment Act, which provides for summary dismissal for gross misconduct; and that the appellant was summarily dismissed for gross misconduct as she refused and or failed to comply with lawful instructions.
11. The 2nd respondent further stated that the LSK advertised for a replacement for the appellant's position, and shortlisted four candidates; that, on 23rd July 2021, the four candidates were interviewed and one Juliette Akoth Jakaimba has since been recruited as Director, Compliance and Ethics; that the appellant has not established a prima facie case with a high probability of success warranting the grant of an injunction, or a conservatory order; that should she prove that her dismissal was unfair and or unlawful, the appellant can only claim damages; that she has not pleaded that damages would not be an adequate remedy; and that granting the orders sought in the motion would amount to reinstating the appellant to office and this would perpetuate the insubordination of staff at the Secretariat at the behest of 13th to 22nd respondents.
12. Upon hearing the notice of motion dated 19th July, 2021 inter partes, the ELRC (Nzioki wa Makau, J) delivered a Ruling dated 29th July, 2021 in which it dismissed the motion. The following excerpt of the Ruling provides the reasons for the dismissal:

“The Petitioner was required to establish a prima facie case though that alone is not sufficient basis to grant an interlocutory injunction. The court must further be satisfied that the injury the applicant will suffer, in the event the injunction is not granted, will be irreparable.....

I am satisfied that a prima facie case has been established and I come to this conclusion because without going into the merits of the impugned action, the Petitioner has indicated that she was not heard while the Replying Affidavit of the 2nd Respondent seems to suggest that there may have been a misstep in the process. That therefore leaves the issue of irreparable injury. The injury suffered by the Petitioner from her pleadings ranges from infringement of her right and termination. In respect of the infringement of her rights and even her termination, there is provision for payment of damages under the rubric of Constitutional remedies for violation of rights while the Employment Act under Section 49 provides remedy which in my considered view would be sufficient for the alleged infringement of the Petitioner's rights. The Court is therefore not convinced that damages would not be an adequate remedy. As to the balance of convenience, there is indication that a recruitment took place for a replacement of the Petitioner. The merits or otherwise of such a move notwithstanding means that the balance of convenience heavily tilts against the grant of the relief the Petitioner seeks. In the final analysis, I find that the motion by the



Petitioner has not surmounted the 3-tier test in *Giella v Cassman Brown* and reiterated in the *Nguruman* case. The inevitable conclusion is that there is no basis for the grant of the motion and I accordingly dismiss the Petitioner's motion albeit with no order as to costs"

13. The appellant, who was dissatisfied with the Ruling, filed a notice of appeal against the Ruling, together with a notice of motion dated 3rd August, 2021 in which she moved this Court for, inter alia, an injunction staying the decision summarily dismissing her from her employment, pending the hearing of her intended appeal; a conservatory order restraining the respondents from facilitating the recruitment or occupation of the position of Deputy Secretary and Director of Compliance and Ethics Directorate of the LSK; and an order restraining the 1st and 2nd respondents from interfering with her role as Deputy Secretary.
14. When the motion dated 3rd August, 2021 (Civil Application No E274 of 2021) was placed before us for inter parte hearing, it transpired that the appellant had already filed and served a record of appeal. The Court having heard the parties on whether the hearing of the appeal should be fast-tracked, gave directions that the appeal that is Civil Appeal No 435 of 2021, be fast-tracked, heard, and disposed, of instead of the motion. This was because, in the Court's view, the hearing of the appeal which was an interlocutory appeal, would achieve the objective of facilitating the just and expeditious disposal of the matter, as it would in effect determine both the motion dated 3rd August, 2021 and the interlocutory appeal, and pave way for the hearing of the substantive petition that was still pending in the ELRC. This then is the judgment of this Court in regard to the interlocutory appeal arising from the Ruling delivered by the ELRC on 29th July 2021
15. The appellant was represented by learned counsel Mr Ndiritu, who made oral submissions in support of the 21 grounds of appeal raised in her memorandum of appeal. The highlight of Mr Ndiritu's submissions was that the grounds of appeal gravitate around the learned Judge misapprehending the appellant's entire petition and construing it as one for reinstatement to office, when the claim was not for unfair or unlawful dismissal, but purported dismissal and violation of constitutional rights. Counsel further faulted the learned judge for relying on the principles of injunction as set out in *Giella vs. Cassman Brown & Co. LTD* [1973] EA 358, and for ignoring the appellant's submissions, which were centred on the principles for granting conservatory orders.
16. Mr. Ndiritu drew the Court's attention to its decision in the *Obuya Bagaka vs. Kenya School of Government* [2019] eKLR, for the proposition that a conservatory order can be issued in employment matters, and that, in determining such an application, the Court should go beyond the principles set out in *Giella vs. Cassman Brown* (supra). As regards the holding by the learned Judge that the orders sought cannot be granted as another person has already been recruited to replace the appellant, counsel faulted the learned Judge for ignoring the fact that the purported replacement was done in violation of a court order. He argued that the Ruling of the learned Judge was prejudicial to the appellant as the ELRC having ruled in the interlocutory application that damages would be sufficient, it was unlikely to change its position even in the petition that was yet to be heard.
17. Mr Onyango, learned counsel, appearing for 14th respondent and holding brief for Mr. Wakwaya for the 13th respondent, aligned himself to the submissions made by Mr. Ndiritu, and added that damages would not be a sufficient remedy in light of the public interest involved in the matter.
18. Ms Ndirangu, learned counsel who appeared for 15th to 22nd respondent also supported the appeal urging that the appellant is a victim of the wrangling that has been going on in the LSK.
19. Mr. Havi, learned counsel, appeared in person as well as for the 2nd to 4th respondents. He opposed the appeal through oral submissions. He summarized the main issues in the appeal as twofold. First,



whether in refusing to grant the injunction/conservatory order, the learned Judge erroneously applied the *Giella vs. Cassman Brown* (supra) principles, instead of the principles espoused in the Supreme Court decision in *Gatirau Peter Munya vs. Dickon Mwenda Kithinji & 2 Others* [2014] eKLR (the Munya decision). Secondly, whether the finding by the learned Judge that damages will be an adequate remedy was arrived at in error and in disregard to the public interest.

20. Mr. Havi maintained that the applicant had not surmounted the first hurdle in *Giella vs. Cassman Brown* (supra), and that the Court could not leap frog to the other requirements. He urged that the appellant's complaint can be remedied in damages, and that the balance of convenience was not in her favour as it would not be prudent for the court to sustain the appellant in office when someone else has already taken up her position. He urged the Court to dismiss the appeal.

21. We have considered the record of appeal, the submissions made before us, and the authorities cited. From the prayers to the motion dated 19th July, 2021 that we have reproduced at paragraph 7 above, it is apparent that the prayers subject of the Ruling of the ELRC were prayers (v), (vi), and (vii) of the motion. Prayer (v) and (vi) specifically sought conservatory orders pending the determination of the appellant's petition. Prayer (vii) was in the nature of a restraining order, which can also be construed as a conservatory order, as it sought to have the 1st and 2nd respondents restrained from replacing the appellant from her current position, effectively preserving or maintaining the status quo with regard to the appellant's position.

22. In *Njuguna S. Ndungu vs. Ethics & Anti-Corruption Commission & 3 Others* [2015] eKLR, this Court stated:

“A proper reading of this Court's decision in *Equity Bank Limited vs West Link MBO Limited* (supra) shows that the Court has never been antipathetic towards the grant of what may be called conservatory orders in proper cases, the aim being to preserve the substratum of the appeal, to maintain the status quo and to avoid a scenario where parties exercising their undoubted right of appeal are embarrassed by harm having been visited on them pending the appeal.”

23. In our view, given the prayers sought by the appellant, what was before the learned Judge was whether the appellant had made a case for the issuance of the conservatory orders to preserve her position as the Deputy Secretary and Director of the Compliance and Ethics Directorate at the LSK. In the Munya decision, the Supreme Court in considering whether it should issue a conservatory order pending an appeal, described conservatory orders as follows:

““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 applicant's case for 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 magnitude and priority levels attributable to the relevant causes.” (emphasis added).

24. In addition, this Court stated in *Obuya Bagaka vs. Kenya School of Government* (supra):

“There is, however, more to consider beyond the criteria in *Giella v Cassman Brown* when considering an application for conservatory orders. Applying the principles set by the



Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* (supra), considerations such as public interest should therefore be borne in mind by the court when considering whether to grant relief in the form of a conservatory order, whether at an interlocutory stage of the proceedings or upon full hearing.” (Emphasis added).

25. It is evident that the orders sought by the appellant were conservatory orders to preserve her position as the Deputy Secretary and Director of the Compliance and Ethics Directorate at the LSK. In order for the appellant to lay a proper basis for the issuance of conservatory orders, she had to first meet the threshold set in *Giella vs. Cassman Brown*, that is the three sequential requirements of first establishing a prima facie case with a probability of success; secondly, showing that damages would not be an adequate remedy; and, thirdly, demonstrating that the balance of convenience tilts in her favour. Thereafter, she had to go further and meet the further threshold set in the Munya decision by showing that the public interest element was also in her favour.
26. The learned Judge was satisfied, and we have no reason to fault him, that the appellant had established a prima facie case with regard to her alleged violations. The issue as to whether the appellant’s services had been terminated and, if so, whether due procedure was followed, is one to be determined in the main petition in the ELRC. The legality of the appointment purportedly made by the 1st to 12th respondents of the appellant’s replacement is also one to be determined at the hearing of the main petition. Therefore, the appellant had demonstrated a prima facie case with a probability of success by placing information before the court upon which a tribunal properly directing its mind could conclude that her rights may have been infringed, such as to call for an explanation from the respondents. (see *Mrao Limited vs. First American Bank of Kenya Ltd & 2 others* [2003] KLR 125)
27. On the second requirement, the learned Judge held that the injury the appellant is likely to suffer is not irreparable, as she could be adequately compensated by an award of damages. As already stated, the appellant’s main concern was the preservation of her position as the Deputy Secretary and Director of the Compliance and Ethics Directorate at the LSK. She did not demonstrate that the loss of that position, or the violations of her alleged constitutional rights, could not be compensated by an award of damages.
28. The learned Judge did not go beyond *Giella vs. Cassman Brown* as he found that the appellant had not established that damages would not be an adequate remedy. As the requirements of *Giella vs. Cassman Brown* are sequential, we cannot fault the learned Judge as it is evident that the threshold was not met. The finding made by the learned Judge was a preliminary finding made on the basis of the limited information that was before the court at that interlocutory stage. It does not bar that court from departing from that finding should further information leading to a contrary view be placed before it at the hearing of the petition.
29. As the appellant failed to meet the sequential test set in *Giella vs. Cassman Brown*, the learned Judge did not have to consider the public interest element that was underscored by the Supreme Court in the Munya decision. Moreover, the appellant had alleged violation of her constitutional rights, but did not demonstrate any element of public interest that was involved in such violation, and the learned Judge would not have come to a different conclusion even if he was to consider the public interest element.
30. In addition, it was not disputed that, as at the time the Ruling was made, the appellant was the beneficiary of an order of injunction issued by the Milimani Court in a separate suit. Pursuant to that order, she was still being paid her salary and, to that extent, her interest was protected, and the conservatory orders were not necessary. Furthermore, the decision not to grant a conservatory order



was a discretionary decision of the ELRC. As reiterated by this Court in Nguruman limited vs. Jan Bonde Nielsen & 2 others [2014] eKLR:

“This Court will not interfere with the exercise of discretion by the Judge in the court below unless satisfied that the decision of the Judge is clearly wrong because of some misdirection, or because of failure to take into consideration relevant matter or because the Judge considered irrelevant matters and as a result arrived at a wrong conclusion, or where there is a clear abuse by the Judge of his discretion. Whenever a court exercises a discretion, there is always a presumption of correctness of decision which is reversible only upon showing of a clear abuse of discretion.”

31. From our analysis, we have not discerned any error, misdirection or abuse of discretion committed by the learned judge such as to justify our interference with the exercise of his discretion in refusing to grant the conservatory order. Nor can the learned Judge be faulted for failing to issue the conservatory orders, as the appellant failed to establish the factors upon which such orders could be granted.
32. The upshot of the above is that we uphold the order made by the learned Judge and dismiss the interlocutory appeal. Consequently, the notice of motion dated 3rd August 2021 is spent. Given the circumstances of this case we do not find it appropriate to award any costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF AUGUST, 2022.

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

