Yaseen v Judicial Service Commission (Civil Appeal 39 of 2018)
[2019] KECA 805 (KLR) (8 March 2019) (Judgment)

Naim Bilal Yaseen v Judicial Service Commission [2019] eKLR

Neutral citation: [2019] KECA 805 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 39 OF 2018

ARM VISRAM, RN NAMBUYE & J MOHAMMED, JJA

MARCH 8, 2019

BETWEEN

NAIM BILAL YASEEN ..... APPELLANT

AND

JUDICIAL SERVICE COMMISSION ..... RESPONDENT

(Appeal from the Ruling and Order of the Employment and Labour Relations Court at Nairobi (M. Mbaru, J.) Dated 7th November, 2017 in Employment and Labour Relations Court Cause No. 1318 of 2017)

JUDGMENT

1. This is an interlocutory appeal arising from the ruling of the Employment and Labour Relations Court (ELRC), (M. Mbaru, J.) dated the 7th November, 2017.

2. The background to the appeal is that the appellant was employed at the Ministry of the East African Community on permanent and pensionable terms with effect from 6th December, 2009. On 4th October, 2011, the respondent advertised for the position of Director of Public Affairs and Communication in the Judiciary. The Appellant successfully applied for the position. By a letter dated 30th May, 2012, the Ministry of State for Public Service approved the appellant's secondment to the Judiciary. By a letter dated 4th June, 2012, the Ministry of State for Immigration and Registration of Persons approved the Appellant's secondment to the Judiciary for a period of three (3) years with effect from 1st June, 2012 to 31st May, 2015. By an internal memo dated 5th June, 2012, the former Chief Registrar of the Judiciary Gladys Boss Shollei, notified the respondent that the Appellant had reported to her on 31st May, 2012 for deployment. By a personal data form signed and dated by the Appellant on 6th June, 2012, he confirmed and specified that he was serving in the Judiciary on secondment. By a letter dated 15th January, 2013, the Ministry of Information and Communications informed the

Appellant that the Authorized Officer of the office of the Prime Minister had approved his secondment to the Judiciary for a period of three (3) years with effect from 1st June, 2012.

3. By a letter dated 9th June, 2015, the Ministry of Interior and Coordination of National Government (Directorate of Immigration and Registration of Persons) informed the Appellant that his secondment to the Judiciary had lapsed with effect from 31st May, 2015. He was therefore required to report back to the Directorate of Immigration and Registration of Persons to assume his duties as Deputy Director Public Communications with immediate effect. The Respondent only became aware of the letter dated 9th June, 2015 on 16th February, 2017, when the Chairperson of the Public Service Commission forwarded it to the Respondent. By a letter dated 7th July, 2017, the respondent informed the Appellant of its resolution passed in its meeting held on 3rd July, 2017 releasing him back to the parent Ministry with immediate effect as his secondment to the Judiciary had lapsed on 31st May, 2015.

4. The appellant was aggrieved and he filed a statement of claim against the respondent, dated the 12th July, 2017 seeking various reliefs. Simultaneously with the filing of the statement of claim, the appellant filed a notice of motion premised on Article 23 of the *Constitution*, section 3(1) and (2) of the *Industrial Court Act*, 2011 and Rule 16 of the *Industrial Court Rules* 2010, and sections 4, 6, 7&8 of the Administrative Actions Act No. 4 of 2015, seeking a conservatory order to issue, restraining the respondent whether by themselves, their agents and or servants from recruiting and or employing any person in the position of Director Public Affairs and Communication, or removing the name of the appellant from the payroll or denying him any allowance, benefit or privileges that he enjoyed by virtue of his employment; and second, to stay the decision contained in or the execution of the contents of the letter dated 7th July, 2017 addressed to the appellant by the respondent, pending the hearing and determination of the application in the first instance and the cause in the second instance.

5. The application was supported by the grounds in its body, supporting affidavits and annextures thereto. It was placed before the trial Judge on the 13th July, 2017 who issued interim conservatory orders in terms of the substantive prayers sought therein. The application was subsequently opposed by a replying affidavit deposed by Anne A. Amadi, on the 20th July, 2017 on behalf of the respondent together with annextures thereto.

6. On the 28th day of August, 2017, the respondent filed a notice of motion dated 25th July, 2017 premised on Article 172(1) of the Constitution, section 3(c) and 4(f) of the Judicial Service Act, section 12(3) (vii) of the Employment and Labour Relations Court Act, Rules 17(1), (2), (3),(7) &(8) of the Employment and Labour Relations Court Rules, and all other enabling provisions of the law, substantively, seeking to discharge the exparte interim orders issued on the 13th July, 2017 in favour of the appellant; and second, that the two applications be set down and heard together. It was based on the grounds in its body and a supporting affidavit together with annextures thereto; and opposed by a replying affidavit deposed by the appellant on 5th September, 2017 together with annextures thereto.

7. The applications were canvassed by way of written submissions at the conclusion of which the trial Judge discharged the exparte interim orders issued on the 13th July, 2017 in favour of the appellant.

8. The appellant was aggrieved by that decision, and is now before this Court on a first interlocutory appeal raising eight (8) grounds of appeal subsequently condensed into three as follows:-

   That the learned Judge erred both in law and in fact when:

   (1) She failed to properly appreciate and assess the facts of the case as a whole.

   (2) She made definitive findings on the matter at an interlocutory stage.

(3) She failed to exercise her judicial discretion properly and therefore arrived at a wrong conclusion on the matter.

9. The appeal was canvassed by way of written submission adopted and orally highlighted by counsel for the parties. Learned counsel, Mr. Wandati George, holding brief for Mr. Eric Mutua, appeared for the appellant, while learned Counsel Mr. Mansur M. Issa, appeared for the respondent.

10. Supporting the appeal Mr. Wandati, faulted the learned Judge for acknowledging the presence on the record of the appellants' further affidavit but which the learned Judge failed to properly evaluate and appreciate and therefore arrived at a wrong conclusion that the appellant's employment with the Judiciary was on secondment.

11. Secondly, Counsel highlighted the following excerpts from the impugned ruling, namely:

> " the appellant's employment, thus remain with the Ministry and not the respondent; that at all material times the appellant remained a permanent and pensionable employee of the Ministry; that the appellant now with knowledge and information letter directing him to report back to his employer on the lapse of his secondment must abide; and also that for the time the appellant had been in the service of the respondent, and up and until the Court issued the interim orders which had remained in force, the appellant had offered services for which he ought to receive his due payment, allowances and benefit.";

12. and faulted the Judge for making definitive and final conclusions of issues at an interlocutory stage without the advantage of hearing the parties' respective witnesses on the same.

13. Thirdly, counsel faulted the Judge for the failure to properly appraise and appreciate the appellant's pay slip, membership to the respondent's superannuation scheme; the respondent's letter to Kenya Commercial Bank Limited (KCB) dated 5th September 2012; a statement from the respondent's superannuation (Defined Benefit) scheme, and therefore erroneously arrived at the wrong conclusion that the respondent's termination of the appellant's employment with them did not amount to an unfair labour practice.

14. Fourthly, the learned Judge was also faulted for arriving at the conclusion that the appellant's claim had good basis, and yet failed to exercise her discretion judiciously to confirm the interim injunction in favour of the appellant pending the hearing and determination of the cause.

15. Counsel cited Article 41, 47 and 236 of the Constitution, section 10(5) of the Employment Act and 4(3) of the Fair Administrative Action Act; the case of Mohinder Singh Gill versus Chief Election Commissioner AIR 1978 S.C. 851, a decision of the Supreme Court of India, the case of Mbaki & others versus Macharia [2005] 2EA 206; and Judicial Service Commission versus Gladys Boss Shollei & another [2014] eKLR, and faulted the respondent's failure to accord the appellant the right to be heard before making a decision to terminate his employment with them. The case of Kenfreight (EA) Limited versus Benson K. Nguli [2016] eKLR; to demonstrate that the appellant's case was one of unfair termination; and also the case of Vivo Energy Kenya Limited versus Malobe Petrol Station Limited & 3 others [2015] eKLR; for faulting the learned Judge for making several definitive and final conclusions on the matter without the advantage of hearing the respective parties witnesses on the matter.

16. Opposing the appeal, Mr. Mansur relied on the case of Mbogo versus Shah [1968] EA 93, Mrao Limited versus First American Bank Limited [2003] KLR 125, and submitted that the learned Judge's reasons for discharging the interim injunction were well founded both in law and on the facts on the

record; the case of David Barasa versus British Peace Support Team & Another [2016] eKLR; and Mary Nyongesi Ratemo & 9 others versus Kenya Police Staff Sacco Limited & another [2013] eKLR, for the submission that the trial Judge properly appreciated the contents of the letters on the appellant's personal data, pay slips and the letter to Kenya Commercial Bank and the respondents action of including the appellant in their staff defined benefits scheme, and correctly arrived at the conclusion that these did not change the appellant's employment status with the respondent which remained at the status of a seconded employee to the respondent; the case of Lawrence Adiyo versus Kenya Revenue Authority [2018] eKLR, to buttress the submission that the appellant was never offered any new terms of employment with the respondent and that the terms of employment that governed his secondment to the respondent were those contained in the contract executed between him and the parent Ministry; the case of Murang'a County Public Service Board versus Grace N. Makori and 178 others [2015] eKLR and Fred A. Odhiambo versus Attorney General & another [2013] eKLR, for the submission that the respondent had no policy in its establishment that could have mandated it to convert the appellant's secondment into a permanent employment with the Judiciary.

17. Lastly, counsel submitted that both applications were canvassed by way of written submissions. That counsel for the appellant in his written submission referred extensively to the appellant's supplementary affidavit and annextures thereto. These were subsequently extensively analyzed, assessed and taken into consideration by the trial Judge in the determination of the two applications. There was therefore no basis for the appellant's complaint that the content of the said supplementary affidavit had neither been assessed nor properly appreciated.

18. This being an interlocutory appeal, we must refrain from making any concluded view on the issues in controversy in the main suit, to avoid prejudging or prejudicing the pending suit. In Niazsons (K) Ltd Versus China Road & Bridge Corporation Kenya [2001] KLR 12 the Court held inter alia that:

> " As a Court sitting in its appellate jurisdiction on an interlocutory matter, the Court of Appeal could not properly express any concluded view on any of the issues touching on the merits of the suit and the application as doing so would infringe on the jurisdiction of the trial court and may inhibit it in exercising its discretion in the matter."

19. A further caution is that, we should also be slow to interfere with the exercise of discretion by the trial Court, even if we would have come to a different conclusion had we been seized of the matter in the first instance. See United India Insurance Co. Ltd

20. versus East African Underwriters (Kenya) Ltd [1985] E.A. 896, in which Madan, JA(as he was then) articulated the principle as follows:-

> " The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance would or might have given difference weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere of one or more of the following matters are established: first that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of consideration of which he should not have taken account of; fourthly, that he failed to take account of consideration of which he should have taken account; or fifthly, that his decision, albeit a discretionary one is plainly wrong."

21. We have considered the record in light of the above restrictive mandate, the parties' rival submissions and the case law. The issue that falls for our determination from the three condensed grounds of appeal is deciding whether the trial Judge exercised her discretion judiciously when she discharged the interim orders granted on 13th July, 2017 in favour of the appellant.

22. The Judge's observation upon analyzing and assessing the rival submissions on the determination of the two applications, were that, the appellant had failed to disclose in the supporting documents when applying for the said interim relief, that his employment with the respondent was on secondment for three (3) years which had lapsed and that he had been recalled back by the letter dated 9th June, 2015; that upon being offered an employment opportunity with the respondent, it is the appellant who applied for secondment which was approved by both his parent Ministry and the respondent, evidenced by the letter of secondment of 15th January, 2013; that, the appellant's reason for resisting the respondent's action of releasing him back to his parent Ministry at the lapse of his period of secondment with the respondent, was based on the contents of the pay slip issued to him by the Respondent , his inclusion in the respondent staff benefits scheme, and the letter to KCB specifying that the appellant was on permanent and pensionable terms, all of which in the learned Judge's view were simply meant to anchor his employment as an officer attached to the Judiciary and did not in any way alter the terms of the contract executed between him and his parent Ministry.

23. The learned Judge distinguished the circumstances prevailing in the appellant's case with those prevailing in the case of Mary Nyangasi Ratemo & 9 others versus Kenya Police Staff Sacco Ltd & another [2013] eKLR; and ruled that with the letter requiring him to report back to his parent Ministry of 9th June, 2015, there was nothing that the respondent could have done to keep that demand in abeyance hence the justification for the respondent's letter of 7th July, 2017 releasing him to go back to his parent Ministry, save that he was entitled to payment for services rendered to the respondent during the period of the duration of the interim orders. That issue as regards the implication of the respondent's inclusion of the appellant in its staff benefits scheme was a matter to be dealt with during the merit hearing of the cause. The learned Judge also added that the appellant should not be victimized for taking out the cause against the respondent; and that any dues that remain to be paid to the appellant and if so by whom, could always be worked out with sufficient notice to the affected parties.

24. The approach we take when determining whether the learned Judge exercised her discretion judiciously when she discharged the interim orders for injunction issued on 13th July, 2017 is that already crystalized by the case of United India Insurance Co. Ltd versus Africa Under Writers (Kenya) Ltd (supra). See also Nguruman Limited versus Jan Bond Nielson & 2 others Civil Appeal No. 77 of 2012, in which the Court reiterated that this Court will not interfere with the exercise of discretion by the Courts below unless satisfied that the decision of the Judge is clearly wrong because of some misdirection, or because of a failure to take into consideration a 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 in the exercise of his discretion.

25. We also wish to reiterate that in considering this appeal, we shall steer clear of making any definitive pronouncements on the definitive findings made by the learned Judge as highlighted above by the appellant in his submission; as in our view, these go to the merits of the pending cause. Our role will therefore be limited to the determination whether the Judge properly appreciated the facts and applied the law correctly to those facts. In light of the ingredients for granting an injunction as set by the case of Giella versus Cassman Brown [1973] EA 358; namely, demonstration of existence of a prima facie case with a probability of success; second, that if the injunction sought is not granted, the applicant will suffer irreparable harm; and thirdly, that where the Court is in doubt as regards the applicability of ingredient (i) & (ii) above, then the matter should be decided on a balance of convenience.

26. As to the applicable threshold, we associate ourselves with the observation made by the Court in Kenya Commercial Finance Company Limited versus Afraha Education Society [2001] Vol. E.A. 86. At page 89 paragraph c-e, the Court had this to say:-

d. "The sequence of granting an interlocutory injunction is firstly, that an Applicant must show a prima facie case with a probability of success if this discretionary remedy will endure(sic) in his favour; secondly, that such an injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury; and thirdly, when the court is in doubt, it will decide the application on the balance of convenience – see Giella –versus- Cassman Brown and Co. Ltd [1973] EA 358 at 360 letter E. These conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed".

27. In the Nguruman Limited case (Supra), the Court went further and added the following:-

"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to:-

(a) Establish his case only at a prima facie level,

(b) Demonstrate irreparable injury if a temporary injunction is not granted, and

(c) Allay any doubts as to (b) by showing that the balance of convenience is in his favour;

These are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separable, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Company Limited versus Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the Court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damage recoverable in law is an adequate remedy, and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit 'leap-frogging' by the applicant to injunction directly without crossing the other hurdles in- between. It is where there is doubt as to adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it's granted.

On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate 'prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave or irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which that amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount will never be adequate remedy".

28. Starting with the 1st pillar, a prima facie case was defined in Mrao Ltd versus First American Bank of Kenya Ltd & 2 others (supra)as follows:-

> " In civil cases, a prima facie case is a case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party, to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable one. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case"

29. The Court went further to make the following observations on that definition:-

> "We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion We reiterate that on considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation. Position of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed.
>
> How do all these principles, conditions and guidelines relate to this appeal? A temporary injunction would issue under Order XXXIX of the repealed Civil Procedure Rules in the following instances:- If it is proved that while a suit is pending determination, any property in dispute in the suit is in danger of being wasted, damaged, alienated or wrongfully sold in execution of a decree by any party to the suit, or the other party intends to remove or dispose of his property to avoid execution; or where the other party threatens to commit a breach of contract or other injury arising out the contract or related to a property or right".

30. Applying the above threshold to the rival submissions on the 1st pillar, of establishing a prima facie case with a probability of success, it is our view that, what the learned Judge was enjoined to do when confronted with the rival submissions as to whether the interim orders granted on the 13th July, 2017 should be sustained pending

31. hearing and the determination of the cause or otherwise was to weigh all the supporting evidentiary documents and depositions in support of sustaining the said orders as put forth by the appellant as against those put forth by the respondent for seeking to have the said exparte orders discharged.

32. Without delving into an in-depth analysis of the above set of depositions and evidentiary documentary exhibits annexed thereto, it is sufficient for us to state that the major reason for the appellant's move to seek the confirmation of the interlocutory exparte injunction orders pending determination of the cause he had filed against the respondent was his contention that he was a permanent and pensionable employee of the respondent and that he should not be released back to his former parent Ministry. As

already observed above, the appellant relied on the pay slip issued by the respondent which indicated that he was on permanent and pensionable terms with the respondent; his inclusion in the Judiciary staff benefits scheme and a letter to KCB by the Judiciary stating that he was employed on permanent and pensionable terms.

33. In contrast, the respondent's contention was that the appellant's position was that of a seconded officer; that the period of secondment had lapsed long before the events precipitating the litigation; that the appellant had withheld this fact from the respondent; that the respondent only stumbled on that information much later and that in reaction thereto, the respondent took action as it was constitutionally and statutorily mandated, namely, to release the appellant to report back to his parent Ministry for deployment.

34. It is evident from the above set of facts that issue as to whether the appellant was taken on by the respondent as a permanent and pensionable employee of the respondent; or as an officer seconded to the respondent by his parent Ministry is highly contentious. There is therefore need for it to be interrogated further before any conclusion thereon can be reached. It is not therefore possible to state categorically

35. that on the face of the record, the appellant's cause against the respondent is one that falls into the category of matters that can be said to be plain, obvious and clear. Nor one that is easily discernible from the surrounding circumstances without much in-depth analysis or interrogation of the supporting evidence relied upon by the parties.

36. Although the trial Judge had her own style of expressing the above position, hence at times arriving at conclusions the appellant has termed definitive in nature, it is sufficient for us to state that the above position is not supportive of the existence of a prima facie case with a probability of success in favour of the appellant.

37. In light of the above guiding principles, the moment the appellant's application failed to satisfy the threshold on the first pillar, there is no obligation for us to proceed on and interrogate as to whether the threshold for the remaining two pillars has been established.

38. There is no merit in this appeal and the same is dismissed. The costs of the appeal to abide the disposal of the cause.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH, 2019.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

R.N. NAMBUYE

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.