IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: E. M. GITHINJI, HANNAH OKWENGU, J.

MOHAMMED, JJ.A)

CIVIL APPEAL NO 128 OF 2017

BETWEEN

OBUYA BAGAKA .....APPELLANT

AND

KENYA SCHOOL OF GOVERNMENT.....RESPONDENT

(An appeal from the ruling and order of the Employment and Labour Relations Court

at Nairobi (Ndolo, J) dated 21st April 2017

in

Petition No 135 of 2016)

****

JUDGMENT OF THE COURT

Background

[1] This is an interlocutory appeal. **Obuya Bagaka, (the appellant)** is aggrieved by the ruling and order of the Employment and Labour Relations Court (E&LRC), **(Ndolo, J)** dated 21st April, 2017 in which the learned judge dismissed the appellant's application to stay his termination from the employment of the **Kenya School of Government**, (the respondent) and his eviction from the residence he occupied which had been allocated to him by the respondent.

[2] The background of the appeal is that the appellant was employed by the respondent as a Senior Principal Lecturer. On 8th November, 2016, the appellant filed a petition contemporaneously with a Notice of Motion before the E&LRC challenging the respondent's decision to interdict him. The appellant also sought orders compelling the respondent to expunge the appellant's decision to interdict him contained in the respondent's letter dated 11th March 2016.

[3] It was the appellant's claim that the interdiction was unprocedural as the appellant was interdicted for a period of over eight months which was in excess of the two month period provided in the respondent's Terms and Conditions of Service Manual and that a *"show-cause letter"* was not issued to the respondent prior to his interdiction. It was the appellant's claim that the main aim of the interdiction was to intimidate, harass him and silence him from highlighting the acts of maladministration at the respondent institution; that he was under threat of termination of employment and forceful eviction from the residence he occupied at the respondent's staff premises; that due to the fact that he had continually been denied information on the disciplinary process facing him, it was clear that he would not be accorded a fair, just and impartial hearing by the respondent; and that the actions of the respondent were unreasonable, illogical, arbitrary and a violation of the Constitution. The appellant sought conservatory orders to prevent the respondent from terminating his employment or evicting him from his staff accommodation which action the appellant claimed would cause trauma, agony and suffering to him and his young family.

[4] The application was opposed by the respondent, who in a replying affidavit sworn by its Human Resource Manager **Mr. Nicholas Iko**, set out in detail the steps in the disciplinary process that had been undertaken by the respondent leading to the appellant's dismissal. **Mr Iko** deponed that the respondent in its meeting of 14th October, 2016 indicated that the appellant was interdicted on 11th March 2016 for various infractions, *inter alia*, publicly alleging that the respondent was in dire financial straits, and doing so without seeking official clearance from

the Director General to discuss official matters of the respondent; making unbecoming and derogatory statements about the respondent's staff on social media platforms, participating as a Lead Consultant while in full time employment without obtaining clearance from the Director General; and submitting a report to the Public Service Commission containing a false statement that the respondent had incurred a deficit of Kshs 34 million.

[5] The respondent further averred that the appellant had been given an opportunity to respond to the letter of interdiction, and thereafter, was invited to attend a disciplinary hearing on 9th May 2016; that after this hearing, the appellant was found culpable an the grounds of misconduct and a recommendation was made to the respondent's Council for final deliberation; that the Council made a decision on 14th October 2016 and resolved to dismiss the appellant.

[6] The respondent conceded that the interdiction procedure took longer than the two month period stipulated in its manual, but argued that the manual indicated that the **"interdiction period shall not normally exceed two (2) months"** but the circumstances of this case justified the interdiction period exceeding two (2) months. This arose from the fact that the appellant made a complaint directly to the respondent's Council which necessitated exhaustive investigation by Council and Management before a decision could be made on the appellant's interdiction. The respondent argued that the prayers for conservatory orders had been overtaken by events as a decision on the disciplinary process relating to the appellant had already been concluded in light of the Council's decision taken on 14th October, 2016. Counsel further argued that the appellant had been accorded a fair hearing in accordance with the Constitution and the guidelines provided in the respondent's Terms and Conditions of Service Manual.

[7] The application was heard *ex parte*, in the first instance when it was certified urgent and interim restraining orders were issued against the respondent. On 25th January, 2017 when the matter came up for *inter party* hearing, parties agreed to proceed by way of written submissions. Thereafter the trial court dismissed the application.

[8] The trial court rendered itself in part as follows:

> ***"… from the replying affidavit and supporting documents filed by the respondent, it would appear that by the time the petitioner came to Court the decision to dismiss him from employment had already been made by the Kenya School of Government Council. There was therefore no decision to stay, meaning that any violations could only be remedied pursuant to full hearing of the Petition. Consequently, the Petitioner's Notice of Motion dated 8th November 2016 fails and is dismissed with costs in the Petition. The interim orders granted on 8th November 2016 are vacated."***

[9] Aggrieved by the dismissal of his Notice of Motion, the appellant lodged an appeal to this Court. The memorandum of appeal raises several grounds of appeal which include that the learned judge erred in law: by failing to grant conservatory orders despite the overwhelming evidence on record pointing to a serious violation of the appellant's fundamental rights; in holding that the respondent had already dismissed the appellant from employment whereas there was no valid evidence to support that conclusion; in failing to give a reasoned decision; and in failing to appreciate the principles of law applicable to an application for the grant of conservatory orders.

[10] The appellant seeks the following orders:-

> **"(a) The appeal be allowed.**
>
> **(b) The Ruling and Order of the Superior Court issued by Lady Justice Linnet Ndolo on 21st April, 2017 be set aside.**
>
> **(c) The Notice of Motion filed by the Appellant in the Superior Court be allowed.**
>
> **(d) The Appellant be granted cost of this Appeal and costs of the application in the Superior**
>
> **Court."**

Submissions

[11] Counsel for the parties relied on written submissions which they orally highlighted. The respondent did not object to the appellant's application seeking to have additional evidence adduced under rule 29 of the Court of Appeal Rules and the same was allowed. The additional evidence was a dismissal letter dated 16th October, 2016 written by the respondent to the appellant, and the appellant's bank statements for the period 1st January, to 1st May, 2017.

[12] Learned counsel, **Mr Okweh Achando** represented the appellant. He submitted that there was overwhelming evidence confirming a serious violation of the appellant's fundamental rights; that the period of interdiction of eight (8) months exceeded the tow (2) months period stipulated in the respondent's Human Resource Manual; that despite this issue being placed before the E&LRC, it was not addressed; that instead, the trial court relied on unsigned minutes and accepted that the respondent had already terminated the services of the appellant; that it was arguable whether or not the appellant had been dismissed as there was no dismissal letter served on the appellant; that the appellant received a salary from the respondent until April, 2017 and that this was evidenced by the bank statements produced by the appellant.

[13] In addition the appellant's counsel submitted that the trial court did not appreciate the principles of law applicable when considering an application for conservatory orders; that the trial court did not give a reasoned decision to justify the appellant's dismissal; that the appellant demonstrated a *prima facie* case with a high probability of success by demonstrating that the decision to dismiss him was reached unprocedurally, and that he stood to suffer breach of his constitutional rights. For these reasons, counsel urged us to set aside the ruling and orders of the trial court and allow the appeal as prayed.

[14] Learned counsel **Mr Emmanuel Soita** and **Ms Lovine Shitubi** represented the respondent and opposed the appeal. **Mr. Soita** submitted that the appellant sought orders of injunction and not conservatory orders in the trial court. On the appellant's dismissal, counsel submitted that the procedure for dismissal was followed as explained by **Mr Nocholas Iko**, the Human Resource Manager; that the appellant moved to court once he became aware of his impending dismissal; that although the appellant had not been served with the dismissal letter, a decision had been made to dismiss him; and that he was given a fair hearing and an opportunity to respond to every ground of misconduct levelled against him. Counsel urged us to dismiss the appeal for lack of merit.

Determination

[15] The power to grant interlocutory conservative orders by a trial court is a discretionary power. The principles upon which an appellate court can interfere with the exercise of such judicial discretion have crystallized in a long line of cases.

As stated by this Court in ***Kenya Hotel Properties Limited v Willesden Investments Limited & Kenya Revenue Authority [2018] eKLR (Civil Appeal No. 184 of 2013)***

> ***"31. …. The circumstances in which this Court can interfere with the exercise of discretion by the lower court are circumscribed. This Court may interfere with the exercise of such discretion when, in the words of the predecessor of this Court in Mbogo and Another vs. Shah [1968] EA 93 it is satisfied that the decision of the lower court is clearly wrong:***
>
> *"…because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."*
>
> ***32. To succeed in this appeal therefore, the appellant must demonstrate that the learned Judge took into account matters that he should not have or that he failed to take into account matters that he should have or that his decision is clearly wrong."***

[16] Therefore, to succeed in this appeal the appellant must demonstrate that the learned Judge took into account irrelevant or extraneous matters or that she failed to take into account relevant matters or that her decision is clearly wrong. Based on the grounds of appeal raised in the memorandum of appeal as amplified in the submissions there is essentially one issue for our consideration:

> *Whether the High Court correctly dismissed the appellant's application for orders of injunction. Closely linked with that issue is the question whether the learned Judge erred in holding that the appellant had already been dismissed from the respondent's employed.*

[17] The respondent contends that in this appeal, the appellant had sought injunctive orders and not conservatory orders. In ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR (Application No. 5 of 2014)*** the Supreme Court delineated the difference between conservatory orders and orders of injunctions in the following manner:

> *"**[85] These are issues to be resolved on the basis of recognizable concept. The domain of interlocutory orders is somewhat ruffled, being characterized by* injunctions, orders of stay, conservatory orders *and yet others. Injunctions, in a proper sense, belong to the sphere of civil claims, and are issued essentially on the basis of convenience as between the parties, and of balances of probabilities. The concept of "stay orders" is more general, and merely denotes that no party nor interested individual or entity is to take action until the Court has given the green light.***
>
> ***[86] "Conservatory orders"** bear a more decided* public-law *connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the* public interest. *Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's (sic) 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 magnitudes, and priority levels attributable to the relevant causes.*"*[Emphasis added]

[18] The jurisdiction of this Court to issue conservatory orders was reiterated in the case of ***Njuguna S. Ndung'u v Ethics & Anti Corruption Commission & 3 others [2015] eKLR (Civil Application No. Nai. 304 OF 2014 (UR 227/2014))*** where we held that:-

> ***"A proper reading of this Court's decision in EQUITY BANK LTD Vs. WEST LINK MBO LTD (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. It is accepted that other than flowing expressly from the Rules, the power to order a stay of execution is inherent in the Court and it may, in appropriate cases, invoke and deploy the same ex-debito justiae."***

[19] This was the position taken in ***Alfred N. Mutua v Ethics & Anti-Corruption Commission (EACC) & 4 others [2016] eKLR (Civil Application No. Nai. 31 of 2016 (UR 22/2016))*** wherein this Court, guided by the sentiments of the Supreme Court stated that ***"this Court has jurisdiction to hear, determine and grant interlocutory injunctive orders and or conservatory reliefs and or stay of proceedings."***

[20] From the foregoing, we find that although an injunctive and conservatory orders are different, the memorandum of appeal before us relates to conservatory orders which the court has jurisdiction to grant and as such we shall proceed to address the same.

[21] On the question whether the appellant had satisfied the threshold for the grant of conservatory orders, the appellant's complaint is that the learned Judge erred in failing to find that there was overwhelming evidence on record pointing to serious violation of the appellant's fundamental rights and that the learned Judge failed to appreciate the principles of law applicable for grant of conservatory or interlocutory orders.

[22] The learned judge stated as follows;-

> ***"…it would appear that by the time the Petitioner came to Court the decision to dismiss him from employment had already been made by the Kenya School of Government Council. There was therefore no decision to stay, meaning that any violations could only be remedied pursuant to full hearing of the Petition."***

[23] The threshold for the grant of interlocutory injunctions was set by the *locus classicus* case of **Giella V Cassman Brown Ltd [1973] EA 358.** In **Nguruman Limited V Jan Bonde Nielsen & 2 Others [2014] eKLR** this Court stated as follows;-

> ***"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) ally any doubts as to (b) by showing that the balance of convenience is in his favour. These are the three pillars on which rests 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 separate, distinct and logical hurdles which the applicant is expected to surmount sequentially."***

[24] 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.

[25] From the record, we note that the decision to dismiss the appellant was made by the respondent's Council on 14th October, 2016 and that the appellant filed the Petition and Notice of Motion on 8th November, 2016. Accordingly, the learned Judge did not err in finding as she did that by the time the appellant filed the Petition and the Notice of Motion, the decision to dismiss him had already been made by the appellant's Council. There was therefore no decision to stay and any violations could be remedied pursuant to full hearing of the Petition.

[26] In the result and for the aforegoing reasons, we have no reason to disturb the finding of the learned Judge. Accordingly this appeal is without merit and it is hereby dismissed with costs to the respondent.

It is so ordered.

Dated and Delivered at Nairobi this 5th day of April, 2019

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR