IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & MAKHANDIA, JJ.A)

CIVIL APPEAL NO. 56 OF 2018

BETWEEN

BARCLAYS BANK OF KENYA LTD .....APPELLANT

AND

BANKING, INSURANCE & FINANCE UNION (KENYA) .....RESPONDENT

(An appeal against the Ruling of the Employment and Labour Relations Court of Kenya at Nairobi (H. Wasilwa, J) dated 15th November, 2017

in

ELR Cause No. 790 of 2017)

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JUDGMENT OF THE COURT

This is a short interlocutory appeal. On 28th April, 2017, the Employment and Labour Relations Court **(ELRC) (Wasilwa, J.)** issued the following *ex parte* interim orders in an application for injunction filed by the Banking, Insurance & Finance Union (Kenya) who are the respondents before us:

> ***"1. THAT the application be and is hereby certified urgent.***
>
> ***2. THAT same be served on the respondent for interpartes hearing on 11th May, 2017 before any Judge.***
>
> ***3. THAT interim exparte orders are hereby issued restraining the respondents from unfairly, unprocedurally and unlawfully terminating the services of any unionisable employees some of whom have gone or are due to go through disciplinary and capability hearings due to misconduct, poor performance, performance management and performance improvement plans without representation as required by the parties recognition agreement and the law until this application is heard and determined inter parties.***
>
> ***4. THAT an order is hereby issued compelling the respondents to stop putting unionisable employees through disciplinary processes without union representation and any such hearings which were conducted without representation are declared null and void until this application is***

disposed of".

The orders were confirmed on 25th November, 2017 after *inter partes* hearing, and issued on 27th February, 2018 with an extra order stating as follows:

> ***"1. THAT the claimant's members be and are hereby allowed representation by their Union to avoid any undue unfairness than to deny the representation and occasion a worse injustice".***

The only issue before us for determination is whether the trial court exercised its discretion judiciously in issuing those orders.

The appellant bank is the employer of several members of the respondent. It is common ground that the respondent and the Kenya Bankers Association **(KBA),** in which the appellant is a member, signed a Recognition Agreement **(RA)** on 3rd August, 2000 and negotiated a two year revisable Collective Bargaining Agreement **(CBA)** on behalf of the appellant, the last of which was signed on 19th August, 2013.

There are provisions in those documents governing the disciplinary machinery for the unionizable employees of the appellant.

The respondent and the appellant have had running court battles since 2014; several involved individual employees whose cases have been dealt with separately. The one relevant to this appeal, however, was against the appellant and KBA, involving some management tools which the appellant introduced in 2008 for the management of its business. They were known as Performance Development Plan **(PDP)** and Performance Improvement Plan **(PIP),** which were to be applied in rating the performance of employees to determine their performance, capacity and compatibility. Members of the respondent working with the bank were involved in the process of setting up the tools through the Joint Workers' Council and for several years they accepted them as good internal management tools. But in 2014, they rose against the tools and asserted that their implementation was opaque and that they were being used as disciplinary tools for terminating the services of employees who did not meet the targets set by the employer. In that case, they contended, the respondent should not only have been involved in the set up of the management tools, but also be involved in all internal meetings for evaluating the employees, in accordance with the CBA and RA. They filed **ELRC Cause No. 95 of 2014** seeking orders to that effect. The appellant resisted the claims asserting that the PDP and PIP on 29th were not only consonant with the CBA and the RA, but also compliant with ***section 41*** of the **Employment Act, 2007**. As such members of the respondent who were not employees of the appellant could not be involved in the development and implementation of processes internal to the appellant.

Upon hearing the parties, **Mbaru, J.** found that the PDP and PIP were management tools which were the prerogative of the employer and the respondent could not be involved in their development or in the capability hearings/meetings which are internal management prerogatives. However, where the process results in disciplinary action, the Respondent having addressed the administrative part, the RA and the CBA between the parties require that the respondent must participate in such proceedings as this is their role to represent their members. The suit was dismissed August, 2016. See ***Banking Insurance & Finance Union (Kenya) vs Barclays Bank of Kenya Ltd & Another*** *[2016] eKLR.* **(the Mbaru judgment).**

The respondent subsequently applied on 24th February, 2017 to the same court for clarification of various portions of the judgment and the final order issued. In her Ruling dated 21st April, 2017, Mbaru, J. declined the application after reiterating what the earlier judgment held. See ***Banking, Insurance and Finance Union vs Barclays Bank of Kenya Ltd & Another*** *[2017] eKLR.* **(the Mbaru ruling).**

Instead of appealing the Mbaru judgment and the Mbaru ruling, the respondent proceeded to file a fresh suit six days later on 27th April, 2017 - **ELRC Cause No. 790 of 2017 -** raising the same issue of the respondent not being allowed to represent its members during the capability and disciplinary hearings.

The respondent's officials had attended a disciplinary appeal hearing for one of the employees on 31st March, 2017 but they were turned back, hence the suit. The claim was pegged on a provision of the CBA which the respondent contended allowed them to attend *'any meeting involving a grievance to assist the employer and employee representatives'*. It also relied on its own interpretation of the Mbaru judgment as having stated that *'the representation of unionisable employees by BIFU was mandatory'*. The suit sought a declaratory order that the respondent's officials are authorized to represent union members during capability/disciplinary hearings; a declaration that all capability/disciplinary hearings which have been conducted by the appellant are null and void; an order that BBK desist from bad labour practices and adhere to the CBA, RA, and the Employment Act.

The Claim is still pending before the ELRC for hearing.

Meanwhile, contemporaneously with the filing of the suit, the respondent took out a motion on notice seeking the orders listed at the opening of this judgment. As stated earlier, the orders were granted *ex parte* on the same day, 27th April, 2017 and were confirmed by Wasilwa, J. seven months later, thus provoking this appeal.

Seven grounds of appeal have been raised in the memorandum. They may be summarized as there were no written submissions filed on behalf of the appellant. The learned Judge is faulted for:-

(i) confirming interim orders which in themselves had disposed of the entire suit.

(ii) failing to consider evidence on record that the appellant had complied with the provisions of Section 41 of the Employment Act, giving the right of representation to the employee, and not the respondent.

(iii) failing to consider Clause 7(a) and (c) of the Recognition Agreement protecting the appellant from interference with its internal management functions.

(iv) failing to consider the entire provisions of Clause 18 which distinguishes two different processes-grievance and disciplinary proceedings.

(v) confirming the interim orders which were ambiguous and onerous on the Bank.

(vi) ignoring the principles set by the Court of Appeal in Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] eKLR.

(vii)considering extraneous facts and circumstances.

Learned counsel for the appellant **Ms. Grace Kanyiri** instructed by Lorraine Oyombe, Advocate, made oral submissions covering the grounds of appeal globally. She submitted, firstly, that the orders issued by the trial court determined the main

suit, and it was no wonder that the respondents were not in a hurry to set the main suit down for hearing. The orders were also in the nature of mandatory orders as they sought to undo what the appellant had already done in determining proceedings before it. Counsel further submitted that the appellant had complied with ***section 41*** of the Employment Act which gives the prerogative of representation to the employee, not the Union. Letters were in evidence that the appellant had written to the employees drawing their attention to their right to representation at disciplinary hearings. Indeed, she observed, there was no complaint from any of the employees about the procedure adopted in the disciplinary proceedings. Turning to ***clause 18*** of the CBA, counsel submitted that it reserved the right of appearance of the respondent at the apex level of Union disputes between it and KBA, not the shop level of the appellant. In her view, the clause covered grievance proceedings, not disciplinary process, and the two processes were mutually exclusive.

In response, learned counsel for the respondent **Ms. Judith Guserwa** filed written submissions which she

orally highlighted. She also filed a list of authorities. Counsel emphasized that the respondent was legally mandated to deal with the appellant on the rights, terms and working conditions of unionizable employees of the respondent. They are all governed by the CBA signed between them. Counsel contended that the respondent was informed about the refusal by the appellant to

allow representation of employees in their disciplinary hearings and appeals which was contrary to the ***section 41*** of the **Employment Act** and ***section 56*** of the **Labour Relations Act.**

Turning to ***clause 18*** of the CBA, counsel submitted that the respondent's officials were authorized to assist an employee in grievance proceedings. In her view, grievance proceedings were the same matters as covered under ***section 41*** of the Employment Act which provides for representation of the employee by another employee of his choice or a Union official. She supported the reasoning of the trial court and urged us not to interfere with the discretionary power. For those submissions, she relied on the cases of ***Martin Chiponda & 4 Others vs Bandari Investment Company Limited & 5 Others [2018] eKLR***; ***David Kamau Gakuru vs National Industrial Credit Bank Ltd [2002] eKLR***; and the ***Mrao case*** (supra).

We have considered the appeal fully. We are alive to the fact that what is before us is an interlocutory appeal and that the hearing of the substantive Claim is still pending before the ELRC. We cannot therefore express conclusive views on any issues that may need to be canvassed and determined in the pending trial. See ***David Kamau Gakuru vs National Industrial Credit Bank Ltd [2002] eKLR***. The main issue, as stated in the opening paragraph of this judgment, is whether, in exercising its discretion to issue injunctive relief, the trial court acted judiciously. For we may

not interfere with such discretion unless, as summarized by **Madan, JA** in the case of ***United India Insurance Co. Ltd vs East African Underwriters (Kenya) Ltd [1985] KLR 898***, we are satisfied that the court misdirected itself in law; misapprehended the facts; took account of considerations of which he should not have taken account; failed to take account of considerations of which it should have taken account; or its decision, albeit a discretionary one, is plainly wrong.

The motion before the trial court invoked ***sections 12*** of the **Employment and Labour Relations Court Act** and ***section 74*** of the **Labour Relations Act**. Those provisions grant jurisdiction and power to issue, amongst others, orders of injunction. But the power is not exercisable on whim or caprice. It must follow well trodden principles which we now examine before we consider their application in this matter.

The *locus classicus* is ***Giella vs Cassman Brown & Company Ltd (1973) EA 358*** which was restated by this Court in ***Nguruman Limited vs Jan Bonde Nielsen & 2 Others [2014] eKLR*** 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) allay 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. See Kenya Commercial Finance Co. Ltd vs 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 damages 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."

What amounts to a *prima facie* case was explained in ***Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] eKLR*** as follows:

"A** prima facie* **case is more than an arguable case. It is not sufficient to raise issues. 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."

In the case of ***Habib Bank Ag Zurich vs Eugene Marion Yakub, C. A. No. 43 of 1982 (unreported)***, *'probability of success'* was taken to mean that *'the court is only to gauge the strength of the Plaintiff's case and not to adjudge the main suit at the stage since proof is only required at the hearing stage'.*

Next in sequence, even where a *prima facie* case is established, is the question of damages. In the ***Nguruman Limited case (supra),*** the principle was dealt with as follows:

"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 face, 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 and 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 their 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." [Emphasis added].

And finally, the balance of convenience which is applied to allay any doubts as to whether or not damages are an adequate remedy.

It was incumbent on the trial court to go through those motions to demonstrate that its discretion was exercised on principle. So, what did the court do here?

It laid out the respective contentions of the parties in their affidavits before holding as follows:

"25. I have examined the evidence presented before me through the affidavits and submissions filed by the parties. The issues for determination are as follows:-

'Whether the Applicant has established a prima facie case with a probability of success to warrant issuance of orders sought'.

26. In determining this issue, I rely on Clause 18(d) of the Parties recognition agreement, which deals with grievance procedure. The clause states as follows:

'It shall be in order for not more than two officials each of the Association and the Union to attend any meeting involving a grievance to assist the employer and the employee representatives respectively'.

27. The contention between the Applicant and Respondent is that grievances are different from disciplinary issues. I am unable to perceive the differences from the Memorandum of Agreement because the scope was not defined.

28. However taking a broader view of the issues herein, and on a balance of convenience it would be better to have the Claimant members allowed representation by their Union to avoid

any undue unfairness than to deny the representation and occasion a worse injustice. Given that there are interim orders in force, I confirm the said orders which will remain in force until the final determination of this claim".

Plainly, the trial court did not consider the second limb in the principles laid out above. It simply leap-frogged from *prima facie* case to balance of convenience. More importantly, two of the *ex parte* orders issued by the trial court amounted to mandatory injunctions but the court did not consider the applicable principles. One was the order declaring as null and void all disciplinary processes finalized by the appellant without the respondents' presence. The other was the compulsion to allow officials of the respondent into the appellant's internal process of assessing the

performance of its employees. It was also a substantial part of the appellant's case that the trial court issued, at an interlocutory stage, the final orders sought in the main suit, so that the hearing of the suit is rendered unnecessary. We think there is substance in these observations which leads us to the conclusion that the exercise of discretion by the trial court was not judicious and must be interfered with.

First, on mandatory injunctions, this Court has stated times without number, that at the interlocutory stage a mandatory injunction will only be granted in clear cases or where special circumstances exist. The rationale as stated by **Meggary, J.** in the case of ***Shephered Homes Ltd vs Shandahu (1971)1 Ch. D. 34,*** is that:

"...a mandatory injunction is likely, other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will, of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation."

In the case of ***Locabail International Finance Ltd. vs Agroexport and Others [1986] 1 ALL ER 901 at pg. 901*** the Court stated thus:

"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction."

See also ***Kenya Breweries Limited & Another vs Washington O. Okeyo [2002] eKLR.***

The main suit, as pleaded, is not a paragon of clarity. It seems to relate to only one unionizable employee named as **Ms. Mercy Wambui Kanyi.** But it seeks an order effectively undoing all other decisions made by the appellant on other employees, and another order applying to all future unspecified internal proceedings of the appellant. In our view, those prayers are stretched beyond the scope of the Claim. We find that the mandatory injunctions were issued in an unclear case, which has no special circumstances, and one that has no high degree of assurance that at the trial it would appear that the interlocutory mandatory injunction had been rightly granted.

In addition, it is our view that the orders granted were final in nature as they effectively determined the main suit without the benefit of a trial. In the case of ***Agip (K) Ltd. vs Vora [2000] 2 EA 285*** this Court stated:

"In our view, the Commissioner was not entitled to delve into substantive issue*s* ***and make finally concluded views of the dispute.***

He was not at that interlocutory stage of the matter, to condemn one of the parties before hearing oral evidence that party being condemned had in opposition to the claims in the suit." [Emphasis added].

So too in the ***Nguruman Limited*** ***case (supra):***

> ***"We reiterate that in 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. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case."*** [Emphasis added].

In our view, the final decision made by the trial court that 'grievance proceedings' and 'disciplinary proceedings' were the same, ought to have awaited further evidence because that is the crux of the dispute between the parties. The appellant contends that in the process of rating the performance of its employees in accordance with tools which are internal to it, there should be no strangers involved. In their view, the respondent can only be involved if a decision has been made to terminate the services of the employee in which case disciplinary proceedings are held and ***section 41*** of the **Employment Act, 2007** kicks in. The respondent on the other hand seeks to be involved at all levels. Indeed Mbaru, J., whose judgment appears to be given different interpretations by the parties, seems to have grappled with the same issue and it remains one that can only be clarified at the hearing. Whether or not it can be re-litigated is also an issue.

Are damages an adequate remedy? As stated earlier, there was no consideration of that factor and we do not know what the trial court would have

found if it had considered it. But the onus was on the respondent to show that at the point of assessment of the capability of the employees, the failure to be represented by Union officials who were not employees of the appellant, would cause irreparable damage. ***Section 41*** of the Employment Act, 2007 enures to the benefit of employees to guarantee fair hearing at the pain of high compensatory damages in the event of wrongful or unfair terminations of employment. The eventuality of losing employment is not therefore irreparable, though it can be painful. The section applies when an employer is considering termination of the employment.

In the case of ***David Gichana Omuya vs Mombasa Maize Millers Limited*** ***[2014] eKLR,*** the court stated as follows:-

> ***"Section 41 of the Employment Act requires an employer to notify and explain to an employee in a language the employee understands of the reasons it is considering for terminating the services of the employee. The employer is also under an obligation to hear and consider any representation which the employee may make before taking the decision to terminate an employee. During the process the employee is entitled to have a fellow employee present and if a union member, a shop floor union representative. The requirements of section 41 of the Act have long pedigree in administrative/public law and are usually referred to as the rule of natural justice. In employment law and practice, it is called procedural fairness."***

Section 49 (1) (c) of the Act then provides a raft of remedies in the event of breach of ***section 41***. Quite clearly, the second limb of the ***Giella*** ***case*** principles was available in this matter, but was not considered.

From the totality of our reasoning, we have come to the conclusion that this appeal is meritorious. We allow it with the result that the orders given by the trial court on 27th April, 2017 and issued on 28th April, 2017, as well as the orders given on15th November, 2017 and issued on 27th February, 2018, are hereby set aside. We substitute therefor an order dismissing the notice of motion dated 27th April, 2017. We direct that the parties proceed with expedition to have the main Claim heard and disposed of on merits. There shall be no order as to costs. We so order.

Dated and delivered at Nairobi this 19th day of July, 2019.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

ASIKE MAKHANDIA

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original**.**

DEPUTY REGISTRAR