IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO. 116 OF 2015

BETWEEN

INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....APPELLANT

AND

WILSON K.C. SHOLLEI.....RESPONDENT

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

Court at Nairobi (Maureen Onyango, J) dated 18th November, 2014

in

Industrial Cause No. 1663 of 2014)

****

JUDGMENT OF THE COURT

This appeal by the Independent Electoral and Boundaries Commission challenges a decision of the Employment and Labour

Relations' Court (Maureen Onyango, J.) wherein orders were made;

> ***"1. That the Termination of the Claimant is declared null and void.***
>
> ***2. That the Status quo before the termination of the employment to prevail pending the conclusion of Anti-corruption case no. 16 of 2013.***
>
> ***3. That the prayer to restrain the respondent from interviewing, sourcing or employing any other persons to undertake the duties of the offices held by the claimant is dismissed.***
>
> ***4. That there will be no order as to costs."***

The grounds on which that challenge is made appear in the memorandum of appeal charging that the

learned Judge erred in some eighteen respects but, as expressed in the written submissions filed on the appellant's behalf by its learned advocates Mohammed & Muigai, they come down to two issues for determination namely;

> ***(i) Whether the learned Judge was correct in making a final determination in an interlocutory application;***
>
> ***(ii) Whether the learned Judge misapprehended the import of section 62(4) of the Anti-Corruption and Economic Crimes Act.***

For reasons that will become apparent shortly, we think that the first issue is dispositive of this appeal which essentially invites us to interfere with the learned Judge's exercise of discretion in granting the orders she did. The principles upon which we can interfere with a Judge's discretionary decision are well settled. In the oft-cited decision of the predecessor of this Court in ***MBOGO vs. SHAH*** **[1968] EA 93**, Sir Charles Newbold P; put it thus (at p96);

> ***"We come now to the second matter which arises on this appeal, and that is the circumstances in which this court should upset the exercise of a discretion of a trial judge where his discretion, as in this case, was completely unfettered. There are different ways of enunciating the principles which have been followed in this court, although I think they all more or less arrive at the same ultimate result. For myself I like to put it in the words that, a Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision; or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and as a result there has been misjustice."***

See also ***UNITED INDIA INSURANCE CO. LTD vs. EAST AFRICAN UNDERWRITERS (KENYA) LTD*** **[1985] KLR 898.**

In order to determine whether a basis does exist or has been demonstrated for our interference, we must naturally advert to the principles applicable to the determination of interlocutory applications with a mind to decide whether the learned Judge was true to them, in which case we would not interfere or, as claimed by the appellant, ignored or violated them in error leading to misjustice thus rendering our interference inevitable. Ever since ***GIELLA vs. CASSMAN BROWN & CO. LTD*** **[1973] EA 358**, it has been the law that to obtain an injunction an applicant must show a *prima facie* case with a probability of access; an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury and, when the court is in doubt, it will decide the application based on a balance of convenience. It has been held that each of these steps must be addressed and satisfied sequentially and independently before an injunction can issue. See ***NGURUMAN LTD vs. JOHN BUNDE NIELSON & 2 OTHERS*** **C.A. 77 OF 2012**.

Even though the record is clear that the **GIELLA** (supra) case was cited before the learned Judge by **Mr. Mogere** for the appellant, which submissions she quoted in her ruling by way of the arguments made before her, a striking feature of the impugned ruling in that no attempt whatsoever is made to address the case within the context of the law on injunctions as indubitably enunciated in the said case as the appellant rightly complains. Indeed, the learned Judge makes no mention of those controlling principles. To our mind, this amounts to a non-direction on the part of the learned Judge and a failure to consider relevant factors in arriving at her decision which is an error in principle inviting our interference with her exercise of discretion. We bear in mind that judicial discretion must at all times be exercised judicially and judiciously and not in a capricious or whimsical manner as exemplified by a failure to be guided by applicable and time-tested principles.

We do not think, with respect, that the case before the learned Judge was one in which, as appears to be urged by the respondent in his submissions and grounds for affirming the decision, there was a blatant flouting of the law on the part of the appellant of such a character that there was a compulsion for an injunction to issue in aid of the law and as a rebuke to a contumacious law breaker, whether or not

damages would be an adequate remedy. Madan J.A in ***AIKMAN vs. MUCHOKI*** **[1984] KLR 353** at 359 described such a situation thus;

> ***"The conditions spelled out above for the grant of an interlocutory injunction were rightly understood but wrongly applied as follows: first, the appellants being lawfully in possession of the estates under the authority of the debentures executed by Mbo and Loresho, and the defendants having unlawfully seized and continuing in possession of the estates, the appellants had shown a clear and overwhelming prima facie probability of success; the court ought never to condone and allow to continue a flouting of the law. Those who flout the law by infringing the rightful title of others, and brazenly admit it, ought to be restrained by injunction. If I am adding a new dimension for the grant of an interlocutory injunction, be it so. Equity will not assist law-breakers. This disposes of the second ground for affirming the decision. It was, therefore a limited approach by the learned judge to say that the injury which the plaintiffs may have suffered as a result of the defendants' trespass or acts were capable of compensation by an award of damages. I will not subscribe to the theory that a wrongdoer can keep what he has taken because he can pay for it. The real injury arose from the unlawful seizure of the estates by the defendants in defiance of the law. As in the circumstances the plaintiffs could not fail to succeed the status quo first had to be restored. This disposes of third ground for affirming the decision."***

If anything, at issue here was a question of construction, application and interplay between various provisions of the **Anti-Corruption and Economic Crimes Act**, on which we prudently cannot express any view at this stage as they are still pending determination before the court below.

This brings us to the appellant's main complaint that the learned Judge prematurely and impermissibly made final findings at interlocutory stage on the case that was yet to be heard. There is no dispute that the case pending before the court below challenges the legality of the respondent's dismissal with the central issue being the alleged unfairness of the appellant's termination of his employment. The prayers in the statement of claim include *certiorari* to quash both the notice of intention to terminate the respondents employment dated 14th August, 2014 and the letter of termination of employment dated 2nd September, 2014. He also seeks declaration of violation of rights and that the reasons for termination are non-existent in law and therefore void, hence the prayer for reinstatement, among others.

The basis for the appellant's complaint that the learned Judge made conclusive findings on these very contentious issues is easily discernible from the manner in which she expressed herself. After stating that the respondent "*was not taken through the provisions of sections 41 of the Employment Act*" which she set out, the learned Judge delivered herself thus at page 16 and 18 of her judgment;

> ***"384. This being the case, the termination of the claimant's employment was unfair within the provisions of section 43 and 45 of the Employment Act as no valid reason was given for the termination of his employment, in addition to failure to adhere to the principles set out in section 41 on the procedure adopted in terminating his employment.***
>
> ***The foregoing notwithstanding, it is my opinion that the termination of the claimant's employment was also supposed to comply with the provisions of the Anti-corruption and Economic Crimes Act which provides for termination of employment only after conviction as provided in section 63 of the Act. This is because this was the law under which the respondent elected to handle this case.***
>
> ***...***
>
> ***The termination of the claimant's employment by the respondent in the manner it did has the effect of denying the claimant the right to the lifting of the suspension should the case which is still pending before the Anti-corruption Court be withdrawn or should he be acquitted either in that case or in an appeal arising from the decision in the case. The upshot is that the termination of the claimant's employment is null and void for failure to comply with the provisions of section***

62 and 63 of the Anti-Corruption and Economic Crimes Act and section 41, 43 and 45 of the Employment Act."

With great respect to the learned Judge, these very issues on which she made such firm and categorical findings and pronouncements are the very ones that are pending determination when the respondent's claim gets to be listed for hearing and evidence taken. Such pronouncements at such an early stage serve only to embarrass the fair and proper adjudication of disputes. We think that no matter how strongly a judge may feel about a matter, it is always worth bearing in mind that at interlocutory stage the full picture is yet to emerge and the matters in contention are yet to be fully interrogated and the various rival claims tested for veracity in cross-examination. Caution and circumspection is indispensable and it advises measured language and a deliberate eschewing of premature conclusions. Suffice for us to reiterate what this Court stated in ***AGIP (K) LTD vs. VORA*** **[2000] EA 285;**

"With reference to ground 19 of the appeal it is as well as remember that the Commissioner had before him an application, which by law required him to consider whether on all the facts in support or in opposition, a prima facie case with a probability of success had been made out to justify the grant of an injunction. In our view, the commissioner was not entitled to delve into substantive issues 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."

(Our emphasis)

Given that the learned Judge both failed to follow and apply the principles laid down in **GIELLA** (supra) and further impermissibly made firm and conclusive findings at interlocutory stage, it seems quite clear that she exercised her discretion improperly and in a manner that calls for reversal. We accordingly allow this appeal. We set aside the orders of the learned Judge and substitute them with an order that the motion dated 24th September, 2012 be dismissed with costs. The appellant shall have the costs of this appeal. We direct that the respondent's statement of claim do proceed to hearing expeditiously before a Judge of that court other than M.Onyango, J.

Dated and delivered at Nairobi this 16th day of February, 2018.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR