**Mwondi v St Damiano Mission Hospital (Employment and Labour Relations Claim E016 of 2024) [2025] KEELRC 248 (KLR) (28 January 2025) (Ruling)**

Neutral citation: [2025] KEELRC 248 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA**

**EMPLOYMENT AND LABOUR RELATIONS CLAIM E016 OF 2024**

**DN NDERITU, J**

**JANUARY 28, 2025**

**BETWEEN**

**DENNIS MBITI MWONDI ..... CLAIMANT**

**AND**

**ST DAMIANO MISSION HOSPITAL ..... RESPONDENT**

**RULING**

## I. Introduction

1. In a statement of claim dated 30th October, 2024 filed in court on even date through Austine Arnold & Associates Advocates, the claimant is seeking for the following reliefs –

    a. A declaration that the Notice of Declaration of Redundancy was unfair, irregular, unlawful and unprocedural and constituted unfair labour practices and contrary to the provisions of the *Employment Act*.

    b. Compensation for unfair labour practices.

    c. Interests on the above sums from the date of filing this suit at court rates until payment in full.

    d. Any other relief that this Honourable court may deem just, mete, and fit.

2. Contemporaneously, the claimant filed a notice of motion of even date (the application) under certificate of urgency seeking for the following orders –

    1. Spent

    2. That pending the hearing and determination of this application and suit, the respondent by themselves, representatives, servants, agents, and or otherwise howsoever be and are hereby restrained by way of an injunction from unlawfully terminating the employment of the claimant through the unlawful Notice of redundancy dated 24th October, 2024.

3. That the Honourable court be pleased to issue any such further orders it may deem fit and convenient in the circumstances of this case.

4. That costs of this application be provided for in the cause.

3. The application is expressed to be premised on Sections 1A, 1B & 3A of the *Civil Procedure Act* & Order 40 Rule 1 of the Civil Procedure Rules. It is based on the grounds on the face of it.

4. The application is supported with the affidavit sworn by the claimant on even date with several annexures thereto.

5. On 31st October, 2024 the court issued interim orders restraining the respondent from terminating the claimant except in strict accord and compliance with the law.

6. In opposition to the application, the respondent on 4th November, 2024 filed a replying affidavit sworn by Dominic Ng'eno, the human resource manager, on 2nd November, 2024. The affidavit was accompanied with annexures thereto.

7. On 5th November, 2024 when the matter came up in court for directions, with the consent of counsel for the parties, the court directed that the application be canvassed by way of written submissions. The interim orders in place were extended pending determination of the application.

8. Counsel for the claimant, Mr. Omondi, filed his written submissions on 21st November, 2024 accompanied with the claimant's supplementary affidavit sworn on 8th November, 2024. The Respondent's Counsel, Mr. Wamalwa, filed his written submissions on 25th November, 2024.

**II. Evidence**

9. In the supporting affidavit and supplementary affidavit by the claimant, it is deposed that the claimant is a medical officer employed by the respondent on a three-year contract from 1st July, 2023 to 1st July, 2026 (see DMM 1).

10. It is deposed that the respondent on 25th October, 2024 issued a notice of redundancy (see DMM 2) declaring the claimant's position redundant effective from 31st October, 2024.

11. It is deposed that the redundancy was based on various parameters such as knowledge and skills, years of service, experience, quality of work, types and number of procedures undertaken, and client satisfaction, which parameters the claimant asserts were not explained to him.

12. It is deposed further that despite demand from the claimant's advocates on the particulars of the redundancy, the respondent ignored the request.

13. It is deposed that the claimant has worked diligently for the respondent earning promotion to a medical superintendent and even joined the respondent hospital's board.

14. It is deposed that the purported declaration of redundancy is malicious and irregular as the same was only issued to the claimant alone. It is further deposed that preceding the declaration of redundancy, the respondent had withheld crucial and material communication affecting the claimant's performance of his duty as a medical superintendent.

15. It is deposed further that the respondent disseminated false and misleading information about the claimant's work attendance in official meetings, failed to consult him on key clinical and administrative decisions including hiring of staff, performance evaluations, disciplinary action, and staff complaints,

and excluded him from strategic and statutory meetings not withstanding that he was in the board of management.

16. It is deposed further that the respondent's malice and ill-will are evident in the refusal to supply the claimant with particulars of the purported redundancy, and in any case, the claimant is entitled to due process. It is deposed that in the absence of an appropriate order to restrain the respondent, the claimant's employment and labour rights shall be violated.

17. It is deposed further that there was a clear division of roles between the claimant and the other medical officer, with the claimant focusing on clinical areas while his colleague dealt with surgical cases and hence his position and role is not redundant.

18. It is further deposed that no evidence has been availed on the alleged financial constraint on the respondent and in the absence of audited financial reports or statements that allegation is termed a blatant lie.

19. It is deposed that despite the assertion that he held no other position with the respondent other than a medical officer, the claimant was a medical superintendent for over two years (see DMM 2), a clinical, therapeutic, and quality improvement committee member, and a member of the respondent's management and disciplinary committees.

20. It is deposed that the respondent's assertion that it does not require a second medical officer is a sham as the respondent included a new medical officer, one Dr. Nyongesa, to cover his duties. It is deposed that this in itself is evidence that the alleged redundancy was against the claimant as an individual and not the position he held.

21. In the replying affidavit, the respondent affirmed that the claimant was on a three years' contract which allegedly terminated upon the claimant being declared redundant.

22. It is deposed that indeed, the parameters on knowledge and skills, years of work experience, quality of work, types and number of procedures undertaken, and client satisfaction were used to declare the claimant's position redundant. It is deposed further that the process was procedural, fair, and lawful based on human resources policy and procedure, and owing to financial difficulties experienced by the respondent.

23. It is deposed further that the claimant has never held any other position other than that of a medical officer and that the respondent has the mandate and discretion to manage its human resources. It is deposed that all applicable and relevant parameters were considered in declaring the claimant redundant based on the current financial status and human resources needs of the respondent.

**III. Submissions By Counsel**

24. On the one hand, counsel for the claimant identified the single issue for determination in this application to be – Whether the applicant has met the threshold as to be granted the orders sought for temporary injunction.

25. Citing Giella Versus Cassman Brown Company Limited (1973) EA 358, it is submitted that for a grant of temporary injunction to stand, an applicant must show that they have a strong and arguable case; show that they face irreparable harm without an alternative remedy; and the balance of convenience favours the grant of the injunction.

26. Further, citing the Court of Appeal in Nguruman Limited versus Bonde Nielsen & 2 others (2014) eKLR, counsel submits that the conditions set out in Giella(supra) ought to be applied as separate,

distinct, and logical hurdles which an applicant is expected to prove sequentially, in that if a prima facie case is not established, then irreparable injury and a balance of convenience need not be considered.

27. The court is urged to be guided by the holdings in Mrao Limited versus First America Bank of Kenya Limited (2003) eKLR and Nguruman Limited(supra) and conclude that the claimant has a prima facie case which on the face of it the court can discern a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained. It is submitted that the invaded right is material and substantive, and there is an urgent necessity to prevent the irreparable damage that may result from the invasion.

28. The court is urged to find that the redundancy process is substantively and procedurally unfair to the effect that there exists a right that has been infringed.

29. It is submitted that the court in issuing an injunction must consider where there is demonstrated an injury that is irreparable and or continuous. Relying on the Halsbury's laws of England and the reasoning in Pius Kipchirchir Kogo versus Francis Kimeli Tenai (2018) eKLR, the court is urged to consider the definition of an irreparable harm as being an injury that is substantial and cannot be remedied by damages and not an injury that cannot possibly be repaired. That the fact that a claimant may have a right to receive damages is not an objection to the court's exercise of jurisdiction to grant an injunction if the rights cannot be adequately protected by award of damages.

30. The court is urged to find that the claimant will suffer irreparable harm if dismissed unlawfully, as he is still servicing loans and if terminated he will be left exposed.

31. On the balance of convenience, citing Pius Kipchirchir Kogo versus Francis Kimeli Tenai (supra), it is submitted that the claimant having demonstrated that his cause is arguable with a probability of success, the balance of convenience tilts in his favour against the respondent for grant of an injunction.

32. On the other hand, counsel for the respondent identified the single issue for determination in this application to be – Whether the applicant is entitled to the prayer sought.

33. Citing Giella v Cassman Brown & Company Limited (1973) EA 358 where the conditions for grant of interlocutory injunction were laid down, it is submitted that an applicant must first establish a prima facie case with a probability of success; second that an applicant shall suffer irreparable injury which cannot adequately be compensated by an award of damages, and, thirdly, if the court is in doubt it should decide the application on a balance of convenience.

34. The court is urged to be guided by the reasoning in American Cyanamid Co. versus Ethicon Limited (1975) AER 504 where the court set out the elements to consider in granting an interlocutory injunction as there must exist a serious/fair issue to be tried; damages are not an adequate remedy; and the balance of convenience lies in favour of granting or refusing the application. It is submitted that while the claimant was the respondent's employee, his position was declared redundant among many others, and the lawful parameters required to declare the position redundant were followed. It is submitted that the declaration of the redundancy was necessitated by the respondent's financial difficulties.

35. It is further submitted that the respondent duly adhered to its human resources policy and the appraisal report. It is submitted that the respondent enjoys the prerogative to declare redundancies and the claimant was thus not entitled to give any input. It is submitted that the respondent duly considered all the applicable parameters before declaring the claimant redundant and there was no ill will or malice in the making of that decision.

36. It is submitted that the claimant, through the notice of declaration of redundancy dated 24th October, 2024, was duly informed of the benefits he is entitled to, upon redundancy. Citing Nguruman Limited versus Bonde Nielsen & 2 others(supra) the court is urged to find that the claimant has not established a prima facie case for the grant of interlocutory injunction orders as damages are an adequate remedy available to the claimant in case the court finally finds in his favour.

37. The court is urged to dismiss the application with costs.

**IV. Analysis And Determination**

38. The court has carefully read the application, the affidavit in support, the affidavit in response, and the written submissions by counsel for both parties, alongside all the cited authorities. The following issues commend themselves to the court for determination – Whether the claimant has made out a case for granting of an interlocutory injunction restraining the respondent from unlawfully terminating the claimant's employment through the notice of redundancy dated 24th October, 2024; and, Who should meet the costs of the application.

39. To qualify for grant of an interlocutory injunctive relief, the claimant's application needs to satisfy the conditions set out in Giella vs Cassman Brown & Co. Ltd [1973] EA 358 where the court held that –

> "The conditions for the grant of an interlocutory injunction are now well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt it will decide the case on the balance of convenience."

40. The claimant herein seeks an order suspending the decision of the respondent to terminate his employment on redundancy vide a letter dated 24th October, 2024 asserting that the redundancy was procedurally and substantially unfair.

41. The respondent opposed the application on the basis that the respondent reserves the right to declare the claimant redundant bearing in mind its financial difficulties and other relevant and applicable circumstances.

42. The employment relationship between the claimant and respondent terminated upon the lapse of the notice issued by the respondent to the claimant. Indeed, the notice declaring the claimant redundant lapsed on 31st October, 2024 and in staying the said termination the court would in essence be enforcing a non-existent contract and effectively reinstating the claimant. The question then is whether this relief is available to the claimant at this juncture.

43. The prima facie evidence by the respondent is that the claimant was in employment for a term of three years from 1st July, 2023 to 1st July, 2026. The evidence on record is that the claimant's position was declared redundant as stated above. In the circumstances, Section 40 of the *Employment Act*, 2007 (the Act) ought to have been applied to him as he is entitled to the procedural guarantees set out therein which he now claims to have been infringed. However, even if the procedural guarantees under Section 40 of the Act were not met in the redundancy process, it shall be premature for the court to take a position on whether the respondent had substantive justification in terminating the claimant on redundancy and whether this was done in accordance with the law. The law on termination requires the employer to demonstrate valid reason(s) and fairness of procedure. If the court was to consider the two aspects, at this stage, it would be delving into the merits of the claim at an interlocutory stage.

44. In Joab Mehta Oudia v Coffee Development Board of Trustees [2014] eKLR it was held that a court should not stay the termination of an employee at an interlocutory stage as that would amount to the court unduly interfering with a decision already made by an employer within its discretion in human resources management docket without considering the entire cause on merits.

45. In my considered view, once termination has occurred there is nothing left to stay and as such an injunctive or conservatory order shall amount to setting aside the decision to terminate at an interlocutory stage. Further, in reversing termination at an interlocutory stage the court shall in the effect be conclusively determining the case without according both parties an opportunity to ventilate their respective positions.

46. On the question of whether the claimant will suffer irreparable harm if the injunction is not granted, the court notes that the claimant was on a fixed-term contract running from 1st July, 2023 to 1st July, 2026. It follows therefore that if the court were to find that the termination was unlawful, an award for damages or compensation should be adequate. Suffice it to say that by dint of Section 12(3) of the *Employment and Labour Relations Court Act* the claimant shall not be without remedy if his claim succeeds.

47. Finally, in determining where the balance of convenience falls, the court takes the view that interfering with the decision already made by the respondent within its discretion and hence stopping the termination at an interlocutory stage shall amount to prejudging the cause at an interlocutory stage.

48. Therefore, the court finds the application devoid of merits and the same is hereby denied.

**V. Costs**

49. There is no order as to costs.

**VI. Orders**

50. The court has said enough in demonstrating that the claimant has failed to satisfy the conditions upon which the orders sought may issue. The application is hereby dismissed with no order as to costs.

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT BUNGOMA THIS 28TH DAY OF JANUARY, 2025.**

**DAVID NDERITU**

**JUDGE**