



**Banking Insurance & Finance Union (K) v National Bank of Kenya Ltd (Employment and Labour Relations Cause E991 of 2018) [2024] KEELRC 177 (KLR) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 177 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E991 OF 2018**

**BOM MANANI, J  
FEBRUARY 8, 2024**

**BETWEEN  
BANKING INSURANCE & FINANCE UNION (K) ..... CLAIMANT  
AND  
NATIONAL BANK OF KENYA LTD ..... RESPONDENT**

**RULING**

**Background**

1. The Claimant is a registered Trade Union that represents unionizable employees in the banking, insurance and finance sectors in the Republic of Kenya. It has filed these proceedings on behalf of its members who are in the employment of the Respondent.
2. The Claimant’s grievance revolves around the Respondent’s review of its members’ performance at work in the year 2022. It is the Claimant’s contention that the process was flawed and inimical to the interests of its members.
3. It is the Claimant’s case that the performance measurement instruments that are relied on by the Respondent to evaluate its members’ performance were developed without consultations. It is contended further that the instruments were developed without regard for due process. As a result, the Claimant argues that its members have been unprocedurally evaluated and placed on performance improvement plans in disregard of the bank’s policies and the law.
4. In the Claimant’s view, the Respondent’s performance setting mechanisms are skewed. As a consequence, its (the Claimant’s) members have been given performance targets that are impracticable.
5. The Claimant also contests the Respondent’s requirement that its (the Claimant’s) member’s performance scores be subjected to moderation. It (the Claimant) contends that the moderating panels have no capacity to review performance scores that have been assigned to its members by their (the



- employees') immediate supervisors because the panels lack firsthand information regarding the affected employees' performance.
6. The Claimant believes that the performance mechanisms that the Respondent has adopted are a smokescreen to justify the unfair targeting of its members. As a result, it (the Claimant) prays that the Respondent be stopped from undertaking further performance reviews until the modalities for conducting them are changed. The Claimant asserts that future performance reviews should be undertaken in consultation with it.
  7. Accompanying the Memorandum of Claim, is an application for injunction. Through it, the Claimant seeks orders to stop the Respondent from terminating or suspending its (the Claimant's) members from employment based on the impugned performance reviews pending the trial of the cause.
  8. The Respondent has opposed the application. According to it, the performance review process that the Claimant challenges was undertaken in accordance with its (the Respondent's) existing performance review matrix which is known to the Claimant's members. Therefore, it is inaccurate for the Claimant to suggest it was unfair.
  9. The Respondent avers that it has a performance management policy which guides performance review process for all members of staff including those in management. The policy is intended to facilitate the attainment of its (the Respondent's) corporate objectives.
  10. The Respondent avers that the performance policy aims at engendering high performance of its employees thus assisting them to develop their personal careers. In addition, the policy aims at assisting it to identify talent from amongst its workforce and reward it.
  11. It is the Respondent's case that this policy is not new to its employees. It has been in place since November 2015 and has undergone revision from time to time with the last one having taken place in December 2019.
  12. The Respondent avers that the policy was developed in consultation with its employees and their line managers. It provides performance management principles that guide the performance evaluation process. These principles include the following:-
    - a. maintenance of a robust and accountable performance review system which is owned by the line managers and employees;
    - b. offering training to members of staff on performance management;
    - c. ensuring development of balanced scorecards for employees;
    - d. ensuring constant flow of feedback to employees on performance reviews;
    - e. setting up of performance moderation mechanisms to facilitate fairness and consistency in the performance review process;
    - f. development of performance improvement mechanisms for employees who do not meet the agreed performance targets; and
    - g. providing appeal mechanisms for employees who are dissatisfied with the performance results to challenge them.
  13. The Respondent contends that the impugned performance review of 2022 was conducted in compliance with the above principles. It contends that all of its employees, including the Claimant's



members, were evaluated with their line managers before the results were subjected to a moderation process in line with the policy.

14. The Respondent avers that the results of the reviews were shared with all of its employees including the Claimant's members. That employees who were dissatisfied with the results challenged them in line with the performance evaluation policy. These included some of the Claimant's members.
15. The Respondent contends that upon receipt of the appeals, the affected employees' scorecards were reevaluated. Whilst the Appeal's Panel reviewed some scorecards upwards, others were maintained.
16. The Respondent avers that the results from the appeals were shared with all the affected employees individually. Therefore, the grievance by the Claimant is without basis.
17. The Respondent contends that it has a Staff Grievance Policy which is meant to address all employee grievances including those that stem from performance review. The policy requires members of staff to formally raise all grievances with it. Despite this requirement, no member of the Claimant has filed any grievance with regard to the 2022 performance review after the appeal process was finalized.
18. The Respondent also avers that the Recognition Agreement between the parties provides for dispute resolution mechanisms between the parties before the matters are escalated to court. The Agreement establishes a Joint Negotiating Council to address all disputes that the parties are unable to resolve amicably.
19. The Respondent avers that the Claimant and its members ought to have invoked these dispute resolution processes before approaching the court. Therefore and to the extent that this was not done, the instant action is premature.

### **Analysis**

20. The instant application seeks interim orders of injunction. Therefore, it ordinarily must satisfy the principles for grant of interlocutory injunction as set out in the decision of *Giella v Cassman Brown* (1973) EA. These include that:-
  - a. the applicant must demonstrate that he has a prima facie case with a probability of success;
  - b. the applicant must demonstrate that if the orders sought do not issue, he/she will suffer irreparable harm; and
  - c. where the court is in doubt, it should decide the application on a balance of convenience.
21. On the first condition, the applicant argues that the impugned performance review guidelines were developed without consultations with it and or its members. Therefore, they impose conditions which the employees were not afforded a chance to comment on.
22. This contention is contested by the Respondent which argues that the performance review policy was developed with employees on board. Further, the Respondent contends that the policy provides for an appeal mechanism which is intended to infuse fairness in the exercise.
23. From the foregoing, it is apparent that the parties are not in agreement regarding how the impugned performance review policy was developed. At this juncture, the court cannot pronounce itself on the issue with any measure of finality. This will only be possible after hearing the parties during the main trial.
24. All that the court is required to consider at this juncture is whether the facts placed before it establish a prima facie case. In law, a prima facie case is not necessarily a case that will ultimately succeed on the



merits. Rather, it is one that raises issues that suggest violation of a right and which are compelling enough to warrant a trial.

25. In *Mohamed Abubakar v Benjamin Sila t/a Legacy Auctioneers Services & 3 others* [2022] eKLR, the court, quoting with approval decisions by other courts, described a prima facie case 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 case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the appellant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

26. In the instant case, the Claimant asserts that the performance measuring tools were developed without the input of its members. It further asserts that performance targets are often not communicated to some of its members until very late in the performance review quota. Therefore, the employees are, in effect, evaluated against targets that they were not aware of.
27. In a bid to substantiate its claims, the Claimant has given examples of its members (Sharon Owiti and Abdullahi Kampicha) who were allegedly supplied with their performance targets for the period falling between January 2023 and June 2023 in March 2023. According to the Claimant, this means that the affected employees are to be evaluated for periods in respect of which they were unaware of their set performance targets.
28. A careful review of the Claimant’s case demonstrates that the action is quite generalized. The complaints that are raised do not target specific employees. Yet, it is a truism that employment contracts are individual in nature.
29. That said, the issue whether some employees were furnished with their performance targets long after the evaluation quota had commenced certainly raises a reasonable concern. Similarly, questions regarding whether the process of development of performance matrixes was participatory raises valid concerns which require further interrogation. In my view therefore, these complaints point to the presence of a prima facie case.
30. The second condition for grant of interim injunctive orders relates to whether the applicant has demonstrated that he/she will suffer irreparable damage should the orders that are sought not issue. From the record, the Claimant has not addressed this requirement. There is no mention of the injury that will flow from the failure to grant the injunctive orders that are sought.
31. I have considered the position expressed by the Respondent that the review window is in fact closed with most appeals having been heard and determined. The employees who did not meet their targets have already been placed on performance improvement plans.
32. Having regard to this evidence, I see no threat of imminent termination of the Claimant’s members’ contracts of service. Therefore, I see no evidence of possible loss by them. In any event, it has not been demonstrated that if the affected employees’ contracts were terminated for poor performance, the loss that they will suffer will be incapable of redress through an award of damages.
33. It was up to the Claimant to demonstrate to the court the gravity of the loss that will flow from failure to grant the interim orders that have been sought. As the record shows, this was not done. Therefore, I arrive at the conclusion that the Claimant has not demonstrated that its members will suffer irreparable injury should the interim injunctive orders sought not issue.



- 34. On the balance of convenience, I note that the dispute between the parties is premised on the results of the performance review for the year 2022. I note further from the preliminary evidence on record that this process is now closed with most employees having appealed against the performance results and decisions having been rendered.
- 35. The foregoing being the position, any orders of injunction that issue now will have no bearing on the impugned 2022 review process. Instead, they will most likely affect the performance review for 2023. This is likely to unnecessarily affect the bank’s internal processes. In the premises, I consider that issuing the orders sought at this stage will occasion inconvenience to the Respondent rather than promote justice to the parties.
- 36. As for the request to stop the Respondent from subjecting the Claimant’s members to disciplinary process, the court cannot issue such order without specific details showing violation of the law or the Respondent’s internal procedures. This has not been cogently demonstrated. It will be helpful for the Claimant to consider focusing on cases for specific employees and indicating what grievance they raise instead of attempting to prosecute a generalized case.

**Determination**

- 37. The upshot is that I decline to grant the orders for interim injunction as sought.
- 38. The costs of the application shall abide the outcome of the case.

**DATED, SIGNED AND DELIVERED ON THE 8<sup>TH</sup> DAY OF FEBRUARY, 2024**

**B. O. M. MANANI**

**JUDGE**

In the presence of:

.....for the Claimant

.....for the Respondent

**ORDER**

In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**B. O. M MANANI**