



**Nyaga v Chandaria Industries Limited (Cause E031 of 2024)  
[2024] KEELRC 1065 (KLR) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1065 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E031 OF 2024**

**JK GAKERI, J  
APRIL 25, 2024**

**BETWEEN**

**EDWIN NYAGA ..... CLAIMANT**

**AND**

**CHANDARIA INDUSTRIES LIMITED ..... RESPONDENT**

**RULING**

1. Before the court for determination is the Claimant’s Notice of Motion dated 16<sup>th</sup> January, 2024 filed under Certificate of Urgency seeking Orders That:-
  1. Spent.
  2. Spent.
  3. Pending the hearing of the main claim, this Honourable Court be pleased to issue orders restraining the Respondent from giving any adverse information against the Claimant/Applicant to any potential employer.
  4. The Honourable Court be pleased to issue any other orders it may deem just and fit in the interest of justice; and
  5. The costs of this application be provided for.
2. The Notice of Motion is expressed under Sections 3, 12 and 13 of the *Employment and Labour Relations Court Act* and Order 51 of the *Civil Procedure Rules*, 2010 and is based on the grounds set out on its face and the Claimant’s affidavit sworn on 16<sup>th</sup> January, 2024 who deposes that he was employed by the Respondent on 5<sup>th</sup> October, 2020 as a Sales Representative for corporate and hospitality and successful completed 6 months’ probation and worked until 30<sup>th</sup> October, 2023 when he was summarily dismissed and had received three warning letters on 19<sup>th</sup> April, 2023, 13<sup>th</sup> June, 2023 and 17<sup>th</sup> June, 2023.



3. The affiant depones that he received a notice to show cause on 28<sup>th</sup> September, 2023 and responded on 29<sup>th</sup> September, 2023.
4. That he was invited for a disciplinary hearing, attended on 10<sup>th</sup> October, 2023 accompanied by a witness.
5. It is the affiant's case that the summary dismissal on 30<sup>th</sup> October, 2023 was unfair as no investigation was conducted and the Respondent neither complied with its policies and procedure nor the law.

### **Response**

6. In its grounds of opposition dated 7<sup>th</sup> February, 2024, the Respondent states that the application does not meet the three-prong test for granting an injunction as enunciated in *Giella V Cassman Brown Co. Ltd* (1973) 1 E.A 35 as it does not raise any special circumstances.
7. That the application is incompetent, vexatious and a blatant abuse of the process of the court and prays for its dismissal with costs.
8. In a further affidavit sworn by Catherine Mwangi on 14<sup>th</sup> February, 2024, the Respondent's Human Resource Manager depones that the Claimant was given a company car on 23<sup>rd</sup> June, 2022 to enable him execute his duties effectively.
9. That the notice to show cause dated 28<sup>th</sup> September, 2023 was issued against the backdrop of 3 warning letters owing to the manner the Claimant/Applicant treated the Respondent's clients and his explanation was unsatisfactory.
10. That he attended a hearing on 17<sup>th</sup> October, 2023 accompanied by a colleague of his choice and was thereafter dismissed and paid final dues and signed for the same on 11<sup>th</sup> November, 2023 confirming that he had no further claims against the Respondent.
11. The affiant depones that the applicant had not adduced evidence of any breach of his rights.

### **Applicant's submissions**

12. Counsel addressed two issues; whether the application meets the threshold for the grant of an interlocutory injunction and who should bear the costs.
13. On the 1<sup>st</sup> issue, counsel urged that guided by the principles enunciated in *Giella V Cassman Brown Co. Ltd* (Supra) and highlighted in *American Cyanamid Co. V Ethicom Ltd* (1975) AAER 504, the application meets the threshold as the termination was unfair for non-compliance with the provisions of the [Employment Act](#), 2007 as the Claimant's views were never sought before the warnings were issued.
14. That if the Respondent is not restrained from giving adverse information to potential employers, the applicant may miss employment opportunities and once employment is missed, it cannot be compensated in monies counted.
15. According to counsel, the balance of convenience tilts in favour of the Claimant/Applicant.
16. Reliance was made on the sentiments of the court in [Mrao Ltd V First American Bank of Kenya](#) (2003) KLR 125, cited with approval in [Moses C. Mubia Njoroge & 2 others V Jane W. Lesaloi & 5 others](#) (2014) eKLR as well as [Joseph Sire Oromo V Housing Finance Company of Kenya](#) (2008) eKLR and *American Cyanamid Co. V Ethicom Ltd* (Supra).



17. On costs, counsel cited *Halsbury's Laws of England* (4<sup>th</sup> Edition) Vol. 37 page 552 to urge that costs follow the event and the same ought to go to the applicant.
18. The Respondent did not file submissions even after a 7 days extension as requested by counsel on 26<sup>th</sup> February, 2024.

### **Determination**

19. The only issue for determination is whether the applicant's Notice of Motion herein is merited.
20. The applicant seeks the restraining of the Respondent from giving any adverse information about him to any potential employer pending the hearing of the main claim.
21. The factual background of the application is simply that the applicant's employment was summarily terminated by the Respondent on 30<sup>th</sup> October, 2023 allegedly for negligence in the execution of his duties.
22. It is common ground that the applicant had previously been issued with three warning letters in a span of less than 2 months.
23. The 1<sup>st</sup> warning has three concerns which had been discussed by directors and the applicant during a meeting on 15<sup>th</sup> April, 2023.
24. The second relates to a cash client who had complained about the manner in which he was handled by the Claimant and particulars of the complaint were availed to the applicant by the Human Resource Officer.
25. The last warning resulted from a complaint from Hilton Nairobi Airport.
26. Strangely, the applicant did not file a copy of the notice to show cause and only filed part of his response to the notice.
27. As decipherable from the grounds of opposition, the Respondent's case is principally that the application does not meet the threshold in *Giella V Cassman Brown & Co. Ltd* (Supra) for the grant of a temporary injunction against the Respondent.
28. In *Giella V Cassman Brown Co. Ltd* (Supra), the Court of Appeal stated as follows;  

“First, an applicant must show a prima facie case with a high 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 an application on the balance of convenience (*E.A Industries Ltd V Trufoods* (1972) EA 420).”
29. Before delving into the foregoing requirements, it is essential to underline the fact that whether or not to grant an interlocutory injunction involves the exercise of judicial discretion and the relevant conditions are well settled as held in *Abel Salim & others V Okong'o & others* (1976) KLR 42 at 48.
30. As regards prima facie case, the sentiments of the Court of Appeal in *Mrao Ltd V First American Bank of Kenya* (Supra) cited by the applicant's counsel are instructive that;  

“A Prima facie case in a civil application includes but not confined to “genuine and arguable case.” It is a case in which on the material presented to the court, a tribunal properly directing



itself will conclude that there exist a right which has apparently have been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

31. The pith and substance of the applicant’s notice of motion is that he was maliciously, unfairly, unlawfully and discriminately terminated from employment without due regard to the contract of employment and the law.
32. Regrettably, neither the grounds set out on the face of the Notice of Motion nor the Supporting Affidavit sworn by the applicant provide the particular clauses of the contract of employment or provisions of law which the Respondent allegedly violated.
33. Similarly, neither the grounds relied upon nor the affidavit allege or claim that the applicant had lodged any application(s) for employment and was apprehensive that the Respondent was likely to release adverse information about him.
34. The applicant makes no allegation as to the adverse information the Respondent could potentially release to potential employers as it is common ground that the applicant was issued with and received three warning letters regarding complaints by the Respondent’s clients among others.
35. Whereas employers are legally obligated to issue certificates of service to the exiting employees under Section 51 of the *Employment Act*, 2007, they are under no obligation to give recommendations but potential employers ordinarily seek specific information from previous employees about persons who desire to join them and employers routinely do so.
36. Nevertheless, the applicant alleges that he was unfairly condemned as the allegations made against him were not substantiated and was not heard.
37. The absence of particulars as to what the Respondent allegedly did unlawfully or discriminatively notwithstanding, as they are evidentiary proved, the court is persuaded that the applicant has demonstrated that he has a prima facie case with a probability of success.
38. The concept of probability of success was explained in *Habib Bank AG Zurich V Eugene Marion Yakob* CA No. 43 of 1982.
39. Concerning irreparable injury, the court is guided by the sentiments of the Court of Appeal in *Nguruman Ltd V Jan Bonde Nielsen & 2 others* (2014) eKLR as follows;

“On the second factor that the applicant must establish “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold required and the burden is on the applicant to demonstrate prima facie the nature of the injury.
40. According to the *Halsbury’s Laws of England* (3<sup>rd</sup> Edition) Vol. 21 paragraph 739 at 352,

“. . . By the term irreparable injury meant injury which is substantial and could never be adequately remedied or atoned for by damages, not which cannot possibly be repaired . . .

In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured . . .”
41. Strangely, the applicant has not alleged that he has been searching for employment and fears that his efforts will be rendered futile if any adverse information is released by the Respondent.



42. However, case law is consistent that a party should not be permitted to benefit by acting unlawfully just because it is in a position to pay for it as held in *Aikman V Muchoki* (1984) KLR 353.
43. In his Supporting Affidavit, the applicant makes no reference to the irreparable injury or loss he stands to suffer if the orders sought herein are not granted.
44. The allegation that the entire suit shall be rendered otiose if the Notice of Motion is not granted fails to capture the irreparable injury likely to be suffered to justify the orders sought.
45. In sum, the applicant has not demonstrated that the loss likely to be suffered is unquantifiable in moneys counted.
46. The last of the three foundational stones of an interlocutory injunction is balance of convenience which comes in if the court is in doubt.
47. The concept of balance of convenience has been explained variously.
48. (See *Byran Chebii Kipkoech V Barnabas Tuitoek Bargarioria & another* (2019) eKLR, where the court addressed the critical issue of the inconvenience the parties stand to suffer if the injunction is granted or not granted, the court stated thus;  
  
“ . . . In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.”
49. In the instant application, the applicant has not demonstrated the comparative inconvenience to the parties if the injunction sought is granted or is withheld.
50. In the upshot, having failed to demonstrate that he stood to suffer irreparable injury as required by the 2<sup>nd</sup> principle in *Giella V Cassman Brown & Co. Ltd* (Supra) if the injunction is not granted, the court is less persuaded that the balance of convenience is indeed in the applicant’s favour.
51. For the foregoing reasons, it is the finding of the court that the applicant has failed to demonstrate that the instant Notice of Motion is merited and it is accordingly dismissed with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 25<sup>TH</sup> DAY OF APRIL 2024**

**DR. JACOB GAKERI**

**JUDGE**

**Order**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.



**DR. JACOB GAKERI**  
**JUDGE**

