



**Olwande v Welthungerhilfe e. V (Cause E010 of 2024)
[2024] KEELRC 896 (KLR) (24 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 896 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E010 OF 2024
JK GAKERI, J
APRIL 24, 2024**

BETWEEN

ALEX OHUMA OLWANDE CLAIMANT

AND

DEUTSCHE WELTHUNGERHILFE E. V RESPONDENT

RULING

1. Before the court for determination is the Claimant/Applicant's Notice of Motion dated 9th January, 2024 filed under Certificate of Urgency seeking ORDERS THAT:-
 1. Spent.
 2. Spent.
 3. Pending hearing and determination of this suit, the Respondent Deutsche Welthungerhilfe be restrained whether by themselves, their agents, consultants, employees or proxies from advertising, recruiting and filing the position of Regional IT Manager Africa.
 4. Spent.
 5. The Respondent reinstates the Applicant to his immediate former posting as Regional IT Manager Africa pending hearing and determination of this suit.
 6. Costs of this Application be provided for.
2. The Notice of Motion filed under Certificate of Urgency is expressed under Article 41 of *the Constitution* of Kenya, 2010, provisions of the *Civil Procedure Act* and the *Employment Act*, 2007 and Order 51 of the Civil Procedure Rules, 2010 and is based on the grounds set out on its face and the Supporting Affidavit sworn by the Claimant/Applicant on 9th January, 2024, who deposes that he had



been an employee of the Respondent since 2011 and the contract was renewed on 1st May, 2023 and was suspended on 27th September, 2023 for purposes of investigation of falsifying documents leading to overpricing in procurement.

3. That the suspension letter invited the applicant for a meeting to discuss the details of the investigation process and on 3rd October, 2023, the team required the GPS Co-ordinates for all suppliers he had obtained quotations from which had not been communicated and was not involved in the investigation and his employment was terminated after he supplied the GPS Co-ordinates.
4. The applicant assails the termination of employment as unfair and wrongful as he was not accorded an opportunity to defend himself.
5. The applicant deposes that he realized that the Respondent had advertised his position and the applications closed on 31st December, 2023 and stands to suffer prejudice and irreparable loss if the reliefs sought are not granted.

Response

6. By its grounds of opposition dated 19th January, 2024, the Respondent states that the applicant has not met the conditions for the grant of an injunction and in particular, the claim had no prayer for injunction nor reinstatement both sought and granting the orders sought will prejudice the Respondent.
7. That reinstatement is a substantive remedy and can only be granted after hearing and the balance of convenience tilts in favour of the Respondent.
8. In a Replying Affidavit sworn on 24th January, 2024, the Respondent's Country Director, Mr. Christian Schniepper deposes that in September 2023, the Respondent learnt that the Claimant had submitted and approved suspicious quotations and he was invited for a meeting on 27th September, 2023, he was notified of the allegations and a letter to that effect was later issued and suspension for purposes of an investigation.
9. That the applicant was invited for a hearing on 3rd October, 2023 when the applicant confirmed having visited Luistar, Liken General Ventures and Peak Solar Solutions and confirmed the existence of Liken General Ventures and that Peak Solutions quotation was authentic and gave the City Stadium as their location and the PIN location of Peak was Karen, not City Stadium.
10. That the applicant was accorded the opportunity to prove the authenticity of the quotations as requested and share the pin location of the suppliers and hearing was adjourned but the applicant did not avail the required information after 7 days despite reminders by sms, WhatsApp message and letter dated 16th October, 2023 but sent the PIN locations on 17th October, 2023 via email.
11. That when contacted, Peak Solar Solutions confirmed that the quotation did not originate from it and gave samples of their quotations and invoice and Liken General Solutions could neither be reached on the phone number nor email provided by the applicant.
12. The affiant deposes that based on the information the Respondent had at its disposal, it resolved to summarily dismiss the applicant and did so on 27th October, 2023.
13. The affiant asserts that the Respondent followed due process as it accorded the applicant a fair hearing and ample opportunity to defend himself and it had lost faith in the applicant.
14. The Respondent denies the contents of paragraphs 1, 2, 3, 4, 5, 8, 9, 10, 11, 12 and 13 of the Supporting Affidavit and prays for dismissal of the application with costs.



Applicant's submissions

15. On 22nd February, 2024, the applicant was accorded 3 additional days to file and serve submissions but had not filed by the time the court retired to prepare this ruling.

Respondent's submissions

16. Counsel submitted that the applicant's Notice of Motion was fatally defective by virtue of Order 2 Rule 6 of the Civil Procedure Rules, 2010 in that the Notice of Motion and the Claim were not in tandem as the prayers are different. That the Memorandum of Claim neither seeks an injunction nor reinstatement and the defect is fatal as held in *Heiwa Autospares and Distributors Ltd V Barclays Bank of Kenya Ltd* (2010) eKLR as well as *Yang Guang Property Design & Manufacturing Ltd V China Wu Yi Company (K) Ltd* (2021) eKLR.
17. Counsel urged that the applicant's suit should be struck out with costs.
18. Further, counsel submitted that even if the court considered the Notice of Motion on merits, it does not meet the threshold for the grant of injunctive orders or for reinstatement as no prima facie case had been made.
19. Reliance was made on *Festus Kyalo Muthiani V Kenyatta National Hospital* (2013) eKLR to urge that the applicant had not proved a prima facie case.
20. That the applicant had similarly failed to prove that he will suffer irreparable loss and the balance of convenience was not tilted in his favour.
21. Reliance was made on the holding in *Kenya Plantation and Agricultural Workers Union V Kakuzi Ltd* (2015) eKLR to buttress the submission.
22. On reinstatement, counsel relied on the holding in the foregoing decision in *Kenya Plantation & Agricultural Workers Union V Kakuzi Ltd* to urge that reinstatement is a substantive order and ought not be granted at the interlocutory stage.
23. Reliance was also made on the decision in *Joab Mehta Oudia V Coffee Development Board of Trustees* (2014) eKLR as well as *Sosten Kipruto Kerich V Monarch Insurance Co. Ltd* (2018) eKLR to reinforce the submission.

Determination

24. The issues for determination are;
 - i. Whether the Notice of Motion dated 9th January, 2024 is fatally defective.
 - ii. Whether the Notice of Motion is merited.
25. On the 1st issue, which is technical in nature but a substantive issue, counsel for the Respondent submitted vociferously that the instant Notice of Motion is fatally defective as the reliefs it seeks are not anchored on the Memorandum of Claim dated 9th January, 2024 which offends Order 2 Rule 6(1) of the Civil Procedure Rules, 2010.
26. The issue demands consideration in limine.
27. Order 2 Rule 6 provides;



1. No party may in any pleading make an allegation of fact or raise any new ground of claim inconsistent with a previous pleading of his in the same suit.
 2. Sub-rule (1) shall not prejudice the right of a party to amend or apply for leave to amend his previous pleading so as to plead the allegations.
28. In *World Explorers Safaris Ltd V Cosmopolitan Travel Ltd & another* (2021) eKLR, Mativo J. (as he then was) stated as follows;
- “The function of a pleading in civil proceedings is to alert the other party the case they need to meet (and hence satisfy basic requirements of procedural fairness) and further, to define the precise issues for determination so that the court may conduct a fair trial. The Cardinal rule is that a pleading must state all the material facts to establish a reasonable cause of action (or defence). Material facts are only those relied on to establish the essential elements of the cause of action . . .”
29. See also *Dakianga Distributors (K) Ltd V Kenya Seed Co. Ltd* (2015) eKLR, *MNM V DNMK & 13 others* (2017) eKLR, *Chalicha FCS Ltd V Odhiambo & 9 others* (1987) KLR 182, *Kenya Commercial Bank Ltd V Sheikh Osman Mohammed CA No. 179 of 2010*.
30. The court is further guided by the principle that parties are bound by their pleadings as elucidated in several decisions such as *Independent Electoral and Boundaries Commission & another V Stephen Mutinda Mule & 3 others* (2014) eKLR where the court cited the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) V Nigeria Breweries Ltd PLC 91/2002* as follows;
- “ . . . it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded . . .
- . . . In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”
31. In *World Explorers Safaris Ltd (Supra)*, the court stated;
- “It is a principle of law that parties are generally confined to their pleadings unless pleadings are amended during the hearing of a case . . .”
32. The Supreme Court of Kenya expressed similar sentiments in *Raila Odinga V IEBC & 2 others* (2017) eKLR.
33. As adverted by Olga Sawe J. in *Yang Guang Property Design & Manufacturing Ltd V China Wu Yi Company (K) Ltd (Supra)*, cited by the applicant’s counsel;
- “In the case of interlocutory applications, it is to be expected that they are attuned to the primary pleadings by the parties . . .
- Hence an analogy can be drawn between the instant application and interlocutory applications for injunctions in respect of which it is now well settled that for a litigant to seek temporary injunction as an interim relief, the applicant must have included a substantive prayer for permanent injunction or similar relief in the plaint. There are of course instances



where departure would be excusable to prevent the ends of justice from being defeated under Section 63(c) and (e) of the *Civil Procedure Act* or Order 40 Rules (1) and (2) of the Civil Procedure Rules.”

34. Applying the foregoing authorities to the facts of the instant application, it is discernible that neither of the reliefs sought by the applicant in the instant application have anchorage in the Memorandum of Claim and thus offend Order 2 Rule 6 of the Civil Procedure Rules, 2010 as they are inconstant with the primary pleadings.
35. It is unclear why the applicant’s counsel did file submission after having received the Respondent’s submissions and was granted additional time by the court to do so as requested on 22nd February, 2024 or apply for leave to amend the Memorandum of Claim.
36. I will now proceed to determine the 2nd issue on the assumption that the applicant’s Notice of Motion had no technical challenges.

Whether the applicant’s Notice of Motion is merited.

37. The Respondent’s counsel submits that the notice of motion does not meet the test in *Giella V Cassman Brown & Co. Ltd* (1973) EA 358 and the remedy of reinstatement was unavailable at this stage.
38. As held in *Abel Salim & others V Okong’o and others* (1976) KLR 42, whether or not to grant an interlocutory injunction involves the exercise of discretion which is exercisable under the aegis of the principles enunciated in *Giella V Cassman Brown Co. Ltd* (Supra);

“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 application on a balance of convenience (*E.A Industries Ltd V Trufoods* (1972) EA 420.”
39. As regards prima facie case, the sentiments of the Court of Appeal in *Mrao Ltd V First American Bank of Kenya Ltd & 2 others* (2003) eKLR are instructive;

“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 exists a right which apparently have been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
40. The pith and substance of the applicant’s Notice of Motion is that the Respondent should be restrained from recruiting and filling the position the Claimant held on the premise that the summary dismissal vide letter dated 27th October, 2023 was unfair as no forensic investigation was done and he was not accorded an opportunity to defend himself.
41. That the decision by the Respondent to advertise the position the applicant held would deny him the remedies available in law.
42. A copy of the advertisement was provided to buttress the application.
43. The Respondent on the other hand avers that the applicant was summarily dismissed for fraudulent conduct and the vacant position had to be filled to enable the Respondent’s day-to-day operations of distributing aid to people affected by hunger to continue.



44. Based on the material before the court, the court is persuaded that the applicant has demonstrated that he has a prima facie case with probability of success.
45. The concept of probability success was explained in *Habib Bank AG Zurich V Eugene Marion Yakob* CA No. 43 of 1982.
46. As regards 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 that “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 nature of the injury.
47. In his Supporting Affidavit, the applicant deposes that he is at risk of prejudice and irreparable loss if and when the Respondent completes the advertisement and fills the position.
48. The affidavit is reticent on the nature of the irreparable loss, the applicant might otherwise suffer.
49. Equally, the reliefs sought in the suit are all of a financial nature and have been quantified save for the declaration.
50. From the foregoing, it is decipherable that the applicant has failed to demonstrate on a balance of probabilities that the loss he is likely to suffer if injunctive relief is not granted would be irreparable.
51. The foregoing is reinforced by paragraph 739 of Halsbury’s Laws of England (3rd Edition) Vol. 21 is unequivocal that;
- “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.”
52. In the circumstances, the second requirement has not been met.
53. Finally, the applicant is required to show that the balance of convenience, in the circumstances tilts in his favour.
54. In *Byran Chebii Kipkoech V Barnabas Tuitoek Bargoria & another* (2019) eKLR, the court explained the concept of balance of convenience as follows;
- “The meaning of balance of convenience in favour of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favour of the plaintiff, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants, if an injunction is granted but the suit ultimately dismissed. . .
- In other words 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.”
55. In the present case, the applicant has not shown that the comparative inconvenience would be greater on him than the Respondent.
56. Equally, having failed to prove that he stood to suffer irreparable injury, a mandatory requirement under *Giella V Cassman Brown & Co. Ltd* (Supra), the court is not persuaded that the balance of convenience would be in his favour.



57. For the above-stated reasons, it is the finding of the court that the applicant has failed to prove that the temporary injunction sought is merited.
58. On reinstatement at the interlocutory stage, the court is in agreement with the Respondent's counsel's submission that the remedy is a substantive order and is typically made after hearing both parties and making a determination based on the evidence adduced.
59. Indeed, the provisions of Section 49(3)(a) of the [Employment Act](#), 2007 do not envision reinstatement before the suit is heard and determined.
60. The sentiments of Nduma Nderi J. in *Kenya Plantation and Agricultural Workers Union V Kakuzi Ltd* (2015) eKLR are instructive.
61. Flowing from the foregoing, it is discernible that the applicant's Notice of Motion dated 9th January, 2024 is for dismissal and it is accordingly dismissed.
62. Parties shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 24TH 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 15th March 2020 and subsequent directions of 21st 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



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