



**Ogada v Multimedia University of Kenya (Cause E1036 of 2023)  
[2024] KEELRC 1284 (KLR) (27 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1284 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E1036 OF 2023**

**JK GAKERI, J**

**MAY 27, 2024**

**BETWEEN**

**PETER OGERO OGADA ..... CLAIMANT**

**AND**

**MULTIMEDIA UNIVERSITY OF KENYA ..... RESPONDENT**

**RULING**

1. Before the court for determination is the Claimant/Applicant's Notice of Motion dated 15<sup>th</sup> December, 2023 filed under Certificate of Urgency seeking orders that:-
  1. Spent.
  2. Spent.
  3. An Order of injunction do issue restraining the Respondent and/or its servants, agents or anyone acting on its behalf from retiring or proceeding with the intended retirement of the Applicant pending the hearing and determination of this suit.
  4. Any suitable orders calculated to meet the ends of justice be made.
  5. The costs of this application be provided for.
2. The Notice of Motion is expressed under Section 3A of the *Civil Procedure Act* and based on the grounds set out on its face and the Claimant's Supporting Affidavit sworn on 15<sup>th</sup> December, 2023.
3. The affiant deposes that when he sought employment, his identification card indicated that he was born in 1964 which was erroneous as his age was exaggerated and contradicted his birth certificate.
4. The affiant states that his birth date is 1<sup>st</sup> of January 1970.



5. That he brought the contradictory date of birth to the attention of Ministry of Interior and Citizen Services and has since been issued with a new identification card with a new date of birth.
6. That he brought the new development to the attention of the Respondent.
7. The affiant depones that the Respondent issued a retirement notice dated 6<sup>th</sup> February, 2024 and attempts have been made to the Respondent to make the necessary alterations.

### **Response**

8. By a Replying Affidavit sworn by Wilson Kagwe on 11<sup>th</sup> March, 2024, the affiant depones that the Applicant's Notice of Motion is made in bad faith, misconceived, incompetent, lacks merit and an abuse of the court process.
9. The affiant depones that the applicant was employed by the Respondent on 25<sup>th</sup> November, 2008 as a Driver-Scale K7 and had submitted an identification card which showed that his date of birth was 1964 on the basis of which his personal details were captured and was expected to retire on attainment of the age of sixty and a retirement notice was issued on 6<sup>th</sup> February, 2024.
10. The affiant depones that the Claimant/Applicant retired from service on 1<sup>st</sup> January, 2024 and the application and claim has been overtaken by events.
11. The affiant further depones that the Claimant's allegation that his birth date is 1970 is unfounded and an afterthought to avert retirement from service.
12. That the Claimant/Applicant had not met the threshold for the grant of injunctive relief.
13. In his further affidavit sworn on 18<sup>th</sup> March, 2024, the Claimant deposes that in 2008 he submitted his old identification card for purposes of employment and the State Department of Interior made the necessary changes and issued a new identification card after the Respondent gave him an introductory letter dated 15<sup>th</sup> March, 2017 and thanked the Deputy Vice-Chancellor of the Respondent for the introductory letter.
14. The affiant deposes that he was still on the payroll of the Respondent, had not been paid terminal dues and resides in the Respondent's house with his family.
15. That the Respondent had not adduced evidence to controvert his new date of birth as communicated by the State Department of Interior and Citizen Services.
16. That early retirement will occasion loss of income and the retirement notice was not issued in good faith and the balance of convenience lay in his favour.

### **Claimant's/Applicant's submissions**

17. As to whether the applicant has established a prima facie case, counsel submits that the Claimant's rights to fair labour practices are threatened with violation if the Respondent does not withdraw the notice of retirement as it would rob the Claimant 7 years of gainful employment.
18. As regards authenticity of the new identification card issued by the Government, counsel urges that the Respondent had not questioned the documents authenticity and it was direct evidence to prove the facts.
19. That the production of the old identification with an erroneous date of birth was the oversight of the public authority and the new identity card is valid and authentic.



20. Concerning the Respondent's notice of retirement, counsel submits that the Claimant presented a previously issued identity card with an erroneous date of birth which was corrected and the new one had the correct date and the Claimant communicated the rectification in sufficient time to obviate the instant challenge.
21. That the Claimant was unlikely to secure comparative employment owing to his advanced age and it was fair that he remained in employment as he had not attained the age of 60.
22. Reliance was made on the decision in *Julius Miheso Atisiaya V National Social Security Fund* to reinforce the submission.

### **Respondent's submissions**

23. On 11<sup>th</sup> April 2024, the court accorded the Respondent 7 days to file and serve submissions as requested by counsel, but had not done so by 3<sup>rd</sup> May, 2024 when the court retired to prepare this ruling.
24. After careful consideration of the application, response by the Respondent and the submissions by counsel for the applicant, the singular issue for determination is whether the Claimant/Applicant's Notice of Motion dated 15<sup>th</sup> December, 2023 is merited.
25. It is common ground that the applicant seeks injunctive relief to restrain the Respondents, its servants, agents or persons acting on its behalf from retiring him pending the hearing and determination of the main suit.
26. The grant or refuse of an injunction, which has an equitable origin involves the exercise of judicial discretion having regard to the totality of the circumstances.
27. See *Ringera J. in Dr. Simon Waiharu Chege V Paramount Bank of Kenya Ltd HCCC No. 360 of 2001* and *Esso Kenya Ltd V Mark Makwata Okiya Civil Appeal No. 69 of 1991*.
28. The principles that govern the grant of orders of injunction remain as clearly articulated by the court in *Aniello Giella V Cassman Brown & Co. Ltd (1973) EA. 358* and restated in legions decisions such as *MM V DCJ & another (1995) eKLR* as follows;

“The necessary conditions for the grant of an interlocutory injunction were spelt out by *Giella V Cassman Brown & Co. Ltd (1973) EA 358*. They are that, 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; and thirdly, if the court is in doubt, it will decide an application on a balance of convenience.”

29. (See also *East African Industries V Trufoods (1972) EA 420* and *Nguruman Ltd V Jan Bonde Nielsen & 2 others (2014) eKLR*).
30. In the latter case, the Court of Appeal stated that:

“These are three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd V Afraha Education Society (2001) Vol. 1 EA 86*. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the Respondent will suffer, in the event the injunction is not granted, will be



irreparable. In other words, if damages recoverable in law is an adequate remedy and the Respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may be at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. . .”

31. 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) KLR 125 are instructive as follows:

“In civil cases, a prima facie 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 applicant's case upon trial. That is clearly a standard, which is higher than arguable case.”

32. In *Nguruman Ltd V Jan Bonde Nielsen and 2 others* (Supra), the Court of Appeal emphasised that;

“The party on whom the burden of proving a prima facie case lie must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be urgent necessity to prevent the irreparable damage that may result from the invasion.”

33. The court is guided by the foregoing sentiments.

34. In the instant case the applicant's case is that he is apprehensive that the Respondent will retire him by virtue of its letter dated 6<sup>th</sup> February, 2024 which according to the applicant is based on his previous held identity card which indicated that he was born in 1964 which was based on an erroneous date of birth and the error has since been corrected and new identity card and birth certificate issued by the relevant State Department.

35. It is thus the applicant's case that his constitutional right to fair labour practice are threatened with infringement.

36. To that extent, the court is persuaded that applicant has demonstrated that he has a prima facie case for purposes of the threshold enunciated in *Giella V Cassman Brown & Co. Ltd* (Supra).

37. The rendition in *Giella's case* (Supra) is emphatic that a temporary injunction is unavailable unless the applicant “might otherwise suffer irreparable injury”.

38. In *Director of Public Prosecutions V Justus Mwendwa Kathenge & 2 others* (2016) eKLR, the Court of Appeal underscored the essence of this requirement in the following words;

“even where a prima facie case is established, an injunction will not be granted if the injury or damage to be suffered is not irreparable or is capable of compensation.”

39. In *Pius Kipchirchir Kogo V Frank Kimeli Tenai* (2018) eKLR, the court explained the concept of irreparable injury as follows;

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is



not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury”.

40. In *Nguruman Ltd V Jan Bonde Nielsen & 2 others (Supra)*, the Court of Appeal was unambiguous that;

“... Speculative injury will not do; there must be more than unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual substantial and demonstrable injury that cannot adequately be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation of whatever amount will never be adequate remedy.”

41. Significantly, the applicant’s case is that his rights to fair labour practices are threatened with violation should the Respondent have its way to retire him on January 1<sup>st</sup> 2024 as opposed to 1<sup>st</sup> January, 2030.

42. Equally, the applicant has not demonstrated the injury or loss likely to be suffered if the temporary injunction is not granted and that damages would not be an inadequate remedy.

43. Based on the material placed before the court, the court is of the view that the applicant has not established the second requirement of the rule in *Giella V Cassman Brown & Co. Ltd (Supra)*.

44. As regards the issue of balance of convenience, the court is guided by the sentiments of the court in *Pius Kipchirchir Kogo V Frank Kimeli Tenai (Supra)* 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 plaintiffs, 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 is ultimately dismissed.

Although it is called balance of convenience, it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer? 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.”

45. Clearly, the applicant in this case has not shown the comparative inconvenience the parties are likely to suffer and that the Claimant would suffer more.

46. In light of the foregoing findings, the court is satisfied that the applicant has not satisfied the conditions necessary for the grant of the injunctory orders sought.

47. In the premises, the Applicant’s Notice of Motion dated 15<sup>th</sup> December, 2023 is unmerited and is accordingly dismissed and the interim orders vacated.

48. Parties shall bear own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 27<sup>TH</sup> DAY OF MAY 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**

