



**Jakaiti v Independent Policing Oversight Authority (IPOA) (Cause E265 of 2024) [2024] KEELRC 1991 (KLR) (29 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1991 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E265 OF 2024**

**JK GAKERI, J**

**JULY 29, 2024**

**BETWEEN**

**REBECCA ATYANG JAKAITI ..... CLAIMANT**

**AND**

**INDEPENDENT POLICING OVERSIGHT AUTHORITY  
(IPOA) ..... RESPONDENT**

**RULING**

1. Before the court for determination is the Claimant/Applicant's Notice of Motion dated 11<sup>th</sup> April, 2024 seeking orders that;
  1. Spent.
  2. Spent.
  3. This Honourable Court be pleased to issue an injunction restraining the Respondent from advertising, recruiting and/or otherwise conducting interviews for the position of Assistant Director pending the hearing and determination of the suit herein.
  4. Costs of this application be provided for.
2. The Notice of Motion filed under Certificate of Urgency is expressed Under Article 10 and 50 of [the Constitution](#) of Kenya, 2010 and Section 1B and 3A of the [Civil Procedure Act](#).
3. The Notice of Motion is based on the grounds set out on its face and the Supporting Affidavit of Rebecca Atyang Jakaiti sworn on 11<sup>th</sup> April, 2024 who deposes that she was an employee of the Respondent serving as a Principal Administration Officer – Grade 4 which was converted to Assistant Director Administration since 6<sup>th</sup> January, 2014.



4. The affiant deposes that on 16<sup>th</sup> August, 2023, she was issued with a notice to show cause for failure to account for the whereabouts of Motor Vehicle GKB 429M from 15<sup>th</sup> to 18<sup>th</sup> July, 2023 and further notice to show cause on 11<sup>th</sup> October, 2023 following an incident involving Motor Vehicle GKB 109M.
5. That the Claimant appeared before the Human Resource Management Advisory Committee on 1<sup>st</sup> November, 2023 for a hearing on similar charges and was dismissed from employment vide letter dated 14<sup>th</sup> December, 2023 for reasons similar to those in the notice to show cause which were not categorised as offences under the Respondent's Human Resource Manual.
6. The affiant further deposes that she appealed through her advocate vide letter dated 23<sup>rd</sup> January, 2024, which the Respondent acknowledged and on 19<sup>th</sup> March, 2024, advertised vacancies including the position previously held by the Claimant/Applicant.
7. That the appeal has reasonable prospects of success but has not been fixed for hearing and it is in the interest of justice that the prayers sought be granted.

### **Respondent's case**

8. In its grounds of opposition, the Respondent argues that the Notice of Motion is fatally defective and devoid of merit as termination of the Claimant's employment was procedural and the orders sought are final in nature and can only be granted on merits of the case after parties have tendered evidence.
9. That if the order is granted, it could affect the running of operations of the Respondent thereby occasioning prejudice and the duration of the case is uncertain.
10. The Respondent argues that the Claimant shall suffer no prejudice if the prayer sought is denied as monetary compensation would be adequate.
11. The Respondent prays for dismissal of the Notice of Motion with costs.
12. In its Replying Affidavit sworn by Elema Halake, the affiant states that Claimant was dismissed from employment for gross misconduct as evidenced by the preliminary investigation and was taken through the attendant processes and defended herself.
13. That the position the Claimant held is crucial to the operations of the Respondent and cannot be left vacant for too long.
14. That the Claimant is seeking an award of damages and stands to suffer no prejudice.

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

15. As to whether a temporary injunction ought to issue pending the hearing and determination of the instant suit, counsel for the Claimant/Applicant cited the test in *Giella V Cassman Brown & Co. Ltd* (1973) EA 358 as reiterated in *Nguruman Ltd V Jan Bonde Nielsen* (2014) eKLR.
16. Using the decision in *Mrao Ltd V First American Bank of Kenya Ltd & 2 others* (2003) KLR 125, counsel urges that the Claimant/Applicant has demonstrated a prima facie case and has a pending appeal in accordance with the Human Resource Manual.
17. That the Respondent has pre-empted the decision of the appeal without considering it on merit.
18. As regards irreparable loss, reliance was made on *Pius Kipchirchir Kogo V Frank Kimeli Tenai* (2018) eKLR to urge that the Claimant/Applicant stood to suffer irreparable harm and the Respondent disregarded its procedures on appeal.



19. That if the prayers are not granted, the appeal will be rendered moot and the Respondent stands to suffer no prejudice.
20. On the balance of convenience, counsel urges that the same is tilted in his favour and if the suit is successful, the Respondent will have filled the position and costs are recoverable if the Claimant/Applicant lost the suit.

### **Respondent's submissions**

21. On the threshold in Giella's case (supra), counsel for the Respondent relies on the decision in Kenya Power & Lighting Co. Ltd V Sheriff Molana Habib (2018) eKLR to urge that the three conditions apply distinctly and must be surmounted sequentially, to urge that the Claimant's Supporting Affidavit lacks the three requirements.
22. Counsel further cited the decision in Mrao Ltd V First American Bank of Kenya & 2 others (Supra) for the definition of a prima facie case to argue that the Claimant had failed to prove her case.
23. On irreparable injury or damage, counsel's reliance was made on Nguruman Ltd V Jan Bonde Nielsen & 2 others (Supra) to urge that the Claimant/Applicant had not provided evidence of irreparable loss if the injunction is not granted and in any case as held in Dolly Nyambura Mwangi V Faulu Microfinance Bank Ltd (2020) eKLR, an injunction cannot issue where monetary compensation would be adequate.
24. The Claimant/Applicant is seeking injunctive orders to restrain the Respondent from filing the position of Assistant Director, Administration, which she previously held on the premises that she has a pending appeal before the Respondent and stood to suffer prejudice if the Order is not granted.
25. The singular issue for determination is whether the Claimant/Applicant's Notice of Motion is merited.
26. Before delving into the specific requirements, as prescribed by law, it is essential to underline the fact that whether or not to grant an interlocutory injunction involves the exercise of judicial discretion and the conditions necessary are well settled as was held in Abel Salim & others V Okong'o & others (1976) KLR 42 at 48.
27. It requires no emphasis that the principles that govern the grant of a temporary injunction are well settled as enunciated in Giella V Cassman Brown Co. Ltd (Supra) as follows;

“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).”
28. Concerning prima facie case, the sentiments of the Court of Appeal in Mrao Ltd V First American Bank of Kenya Ltd & 2 others (supra) are instructive;

“A Prima facie case includes but not confined to “genuine and arguable case.” It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently have been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
29. The pith and substance of the Claimant/Applicant's case is that the termination of his employment by the Respondent was unfair as inter alia the appeal has not been heard and determined.



30. The Claimant/Applicant avers that the reasons for dismissal did not match those in the notice to show cause.
31. Based on the evidence provided by the Claimant/Applicant, it is arguable that she has demonstrated that she has a prima facie case as his case is arguable.
32. The principle of probability of success was explained in *Habib Bank AG Zurich V Eugene Marion Yakob CA No. 43 of 1982*.
33. As regard irreparable injury, the court is guided by the sentiments of the Court of Appeal in *Nguruman Ltd V Jan Bonde Nielsen & 2 others (supra)* thus;

“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 the nature of the injury”.
34. According to the *Halsbury’s Law of England 3<sup>rd</sup> Edition Vol. 21 paragraph 739 at 352*,

“. . . By the term irreparable injury is 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”.
35. In his Supporting Affidavit, the Claimant/Applicant makes no averment on the nature or extent of the loss she stands to suffer if the temporary injunction is not granted.
36. Strangely, the Claimant alleges that she will suffer irreparable loss as the appeal will be rendered moot.
37. In determining this issue, it is worth noting that the Claimant/Applicant has not prayed for reinstatement but general damages.
38. Relatedly, the Claimant’s employment was terminated vide letter dated 14<sup>th</sup> December, 2023 and the instant suit was filed in April, 2024, 4 months later.
39. In sum, it is the finding of the court that the material placed before the court is insufficient for a finding that the Claimant has proved that he will suffer irreparable loss if an injunction is not granted.
40. Finally, the concept of balance of convenience has been explained variously.
41. In *Pius Kipchirchir Kogo V Frank Kimeli Tenai (Supra)*, the court stated as follows:

“The meaning of balance of convenience . . . 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 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. Inconvenience be equal, it is the plaintiff who will suffer . . .”
42. See also *Byran Chebii Kipkoech V Barnabas Tuitoek Bargarioria & another (2019) eKLR*.



43. In this case, the Claimant/Applicant has not demonstrated the comparative inconvenience to the parties if the injunction sought is granted or withheld.
44. In the circumstances, the court is not persuaded that the balance of convenience is tilted in favour of the Claimant.
45. The totality of the foregoing is that the Claimant/Applicant has failed to demonstrate that the application for a temporary injunction (though identified as permanent) is merited.
46. In the upshot, the Notice of Motion dated 11<sup>th</sup> April, 2024 is unmerited and it is accordingly dismissed.
47. Parties shall bear own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 29<sup>TH</sup> DAY OF JULY 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**

