



Ojode v Kenya National Shipping Line Limited & another (Cause E009 of 2024) [2024] KEELRC 13505 (KLR) (18 December 2024) (Ruling)

Neutral citation: [2024] KEELRC 13505 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E009 OF 2024
M MBARÚ, J
DECEMBER 18, 2024**

BETWEEN

JOSEPH JUMA OJODE CLAIMANT

AND

KENYA NATIONAL SHIPPING LINE LIMITED 1ST RESPONDENT

**BOARD OF DIRECTORS, KENYA NATIONAL SHIPPING LINE
LIMITED 2ND RESPONDENT**

RULING

1. The claimant filed an application dated 19 September 2024 under the provisions of 1A, 1B, 3A, 63(e), and 100 of the Civil Procedure Act (CPR Act), Order 40 and Order 51 rule 1 of the Civil Procedure Rules and seeking orders;
 1. Spent.
 2. Spent.
 3. Spent.
 4. The court be pleased to suspend the transfer of the claimant herein pending the hearing and determination of the substantive suit herein.
 5. This court be pleased to issue an order directing the respondents, their agents or any person or entity acting on their instructions or on their behalf, from taking any action in relation to the applicant’s employment either transferring or adjusting his remuneration downwards or any matter that has a bearing in the substantive suit herein pending the hearing and determination of the substantive suit herein.
 6. Costs of this application be awarded to the claimant.



2. The application is supported by the claimant's affidavit on the grounds that despite an active suit between the parties herein, the respondents have transferred him to Nairobi, altering his position to a lower job group and adjusting his salary downwards without notice. The letter of transfer was done on 6 September 2024 while the claimant was on leave but delivered to him on 13 September 2024, a clear indication of intention to frustrate his employment. The claimant was required to report to his new station on 16 September 2024, which is impractical because he has been undergoing medical therapy in Mombasa for 3 months. The transfer has the effect of demoting the claimant to a lower job group than the position he is holding from the position of acting managing director to a general manager.
3. In his affidavit, the claimant avers that the respondents have reviewed his salary and allowances downwards despite the same being the subject of litigation. The respondent's actions are meant to frustrate the main claim, and unless the orders sought are issued, he will suffer loss and damage.
4. In reply, the respondents filed the Replying Affidavit of Gerald Kamau, the acting managing director and the manager, accounts of the 1st respondent and aver that the application by the claimant is incompetent for seeking to injunct and stay and suspend events which have already occurred. The transition process of the 1st respondent to its new HR Instruments has already been completed for all employees. The claimant's transfer to the Nairobi office has been completed, and he has been paid the transfer allowance of Ksh.351, 380 following his reporting to the new office on 23 September 2024. When filing his claim, the claimant had worked in Nairobi for two weeks.
5. Where the court was to grant the orders sought, the court's jurisdiction to grant an injunction needs to be properly invoked. The claimant has relied on Section 1A, 1B, 3A, 63(e) and 100 of the *Civil Procedure Act* and Orders 40 and 51 Rule 1 of the Civil Procedure Rules. In contrast, the provisions of the *Employment and Labour Relations Court Act* govern different jurisdictions. The provisions of the *Civil Procedure Act* and the rules thereof do not apply on their own to proceedings before this court. The application should be struck out for abuse of the court process.
6. Kamau avers that the respondents' administrative decision to transfer the claimant's expertise from Mombasa to the Nairobi office was made free of malice and based on valid and fair reasons, including the need to improve operations and business activities. The decision is purely administrative and follows reviews of job remuneration grading by relevant state agencies. The decision relates to the claimant's unlawful and prolonged acting appointment as the acting managing director.
7. Through a letter dated 15 June 2022, the head of the Public Service and State Corporations Advisory Committee (SCAC) letter dated 25 July 2022 approved the new HR Instruments for the 1st respondent. Through a letter dated 19 February 2024, the 1st respondent submitted information on job grading to the SRC. The SRC replied on 3 July 2024 and approved the same with a final remuneration grading structure for the 1st respondent.
8. By letter dated 27 June 2024, the current acting managing director of the 1st respondent confirmed to the secretary of SCAC that it had received the grading and salary structure from SRC. The letter invited officers of SCAC to attend a retreat to develop guidelines for the transition from the old HR instruments to the new HR Instruments. The 2nd respondent held its 94th Board of Directors meeting on 19 July 2024, and the new HR Instruments were approved for implementation.
8. Following the 2nd respondent's approval of the new HR Instruments, the 1st respondent issued an internal memo dated 20 July 2024 to all staff on the changes and conversion table for the daily subsistence allowances for local and foreign travel. The staff were informed that the 1st respondent would issue new job grades and remuneration letters to apply from 1 July 2024.



9. Through a letter dated 22 July 2024, the 1st respondent informed the claimant of the implications of the job evaluation and remuneration grading on his terms of employment with effect from 1 July 2024;
- New grade – KNLSL 2;
- New designation – General Manager, finance and investment;
- Terms of service – permanent;
- Remuneration – i) basic pay Ksh.351, 380
- ii) House allowance Ksh.56, 000
- iii) Commuter allowance Ksh.16, 989;
- Salary increment date – 1 July.
10. The claimant currently holds the position of KNLSL2 in line with the guidelines issued under clause 2.7 of the Career Guidelines of the 1st respondent. He replied to the letter dated 22 July 2024 on 12 and 13 September 2024 and raised various complaints, alleging his salary had been reduced. The 1st respondent replied and clarified that the new HR Instructions had transitioned the claimant’s job grade T and that the house and telephone allowances were equally prescribed under the SRC circular of 10 December 2014 and HOS circular of 5 March 2010. The SRC circular of 14 December 2014 provided for payment of house allowance to the claimant in his new position of chief accountant at ksh.35, 000. Compared to the current position of general manager, finance and investment, this position is at Ksh.56, 000 and Ksh.80, 000 in the two stations of Mombasa and Nairobi. The basic salary was not affected at Ksh.351, 380 per month.
11. Kamau avers that the claimant cannot claim the managing director's salary because he held this position in an acting capacity. The acting appointment was terminated upon the appointment of a substantive holder on 24 May 2024. After orders in Nakuru ELRC Petition E004 of 2024 suspended the taking into effect of the 1st respondent managing director, the 2nd respondent, while at the 93rd Board of Directors meeting resolved to appoint Gerald Kamau as the acting managing director of the 1st respondent pending the hearing and determination of the petition or the lapse of 6 months, whichever comes first. The orders were issued on 21 May 2024.
12. The claimant's claim that his salary has been reduced is not correct. The 2nd respondent, at its 95th Board of Directors meeting on 6 September 2024, approved the transfer of the claimant from Mombasa to the Nairobi office within the same position and grade. Through a letter dated 6 September 2024, the 1st respondent informed the claimant that the reasons for the transfer were to utilize his expertise in the performance of the 1st respondent's office in Nairobi, and he was to take charge.
13. The claimant's transfer is provided under the terms of the new HR instruments. The claimant raised concerns about the transfer, including that he was undergoing medical therapy in Mombasa for 3 months and needed to attend proceedings herein. Through an email dated 17 September 2024, the 2nd respondent reiterated the transfer of the claimant was done in line with the policy and the need to have a senior officer oversee operations in Nairobi. There is comprehensive medical coverage for all employees, which is accessible countrywide. Employees enjoy comprehensive medical coverage with MS Jubilee Health Insurance, available at all major hospitals, including Aga Khan University Hospital, whose main hospital is in Nairobi—the issue of attending court proceedings while in Mombasa should not arise since proceedings are virtual.
14. Kamau avers that through a letter dated 3 July 2024, the Cabinet Secretary, Ministry of Public Service, Performance and Delivery Management suspended all new and ongoing recruitment in the public



- service pending the establishment of a tripartite committee by the government to evaluate the ongoing recruitment initiatives in the public service to ensure reduction of the wage bill. The respondents had to explore other options to improve the operations of the 1st respondent, including transferring the claimant to Nairobi.
15. The orders sought pending the hearing of the main suit should not be granted. The claimant has no prima facie case, and the balance of convenience favours the respondents.
 16. The claimant filed his Supplementary Affidavit and avers that his transfer dated 13 September 2024 was issued while on annual leave. He was required to report to Nairobi from Mombasa on 16 September 2024, which was not practical. When he reported on 23 September 2024, the suit herein had been filed on 20 September 2024. The suit is still pending and should be allowed to conclude on merit.
 17. Both parties attended and agreed to address the application through written submissions.
 18. The claimant, as the applicant, submitted that whereas the employer has the prerogative to transfer an employee, the same should be done procedurally and without malice. The transfer should wait for the outcome of the main suit to preserve the sanctity of the court process, despite the letter of transfer being issued while the claimant was on annual leave. In the case of *Henry Ochido v NGO Coordination Board* [2015] eKLR, the court, in considering a similar scenario, held that to ambush an employee with an immediate transfer was an unfair labour practice. In this case, the claimant is undergoing treatment at his current station and was only consulted after the immediate transfer from Mombasa to Nairobi.
 19. Under Section 10(5) of the *Employment Act*, an employer should not vary employment terms without the employee's written approval. In the case of *Kamau v Kenya Accreditation Service* Petition E053 of 2021, the court held that altering employment terms without the written consent of the employee is unlawful. Specific roles within the administrative ranks should be performed by specific officers in accordance with the organizational guidelines.
 20. The court has the power to interfere with the employer's administrative powers where they result in injustice to the employee, as held in *Mulwa Msanifu Kombo v Kenya Airways Limited* [2013] eKLR. In this case, the claimant has demonstrated that the changes to his job position and grade will be detrimental, and hence, he desires the orders sought to stop the transfer and changes to his position and workstation from Mombasa to Nairobi.
 21. The respondent submitted that the jurisdiction of the Court to grant an injunction needs to be properly invoked by the Claimant. The principal objective of the Court is provided under section 3 of the ELRC Act to facilitate the just, expeditious, efficient, and proportionate resolution of disputes governed by the Act. The provisions of section 12 (3)(i) of the ELRC Act, as read together with rule 17 of the ELRC Rules 2016, clothe the Court with the jurisdiction to grant injunction orders as sought in the Claimant's motion. However, the Claimant has elected to ignore the above provisions of the ELRC Act and brought his motion under sections 1A, 1B, 3A, 63(e), and 100 of the *Civil Procedure Act* (CPR Act), Order 40 and Order 51 rule 1 of the Civil Procedure Rules and the inherent jurisdiction of the Court. None of the provisions invoke the jurisdiction of the Court to grant orders of injunction as sought in the Claimant, particularly in the face of the express provisions under the ELRC Act and its Rules.
 22. Where the interests of justice permit and serve the ends of justice for the parties, the Court may exercise its inherent powers to grant an injunction. However, such an injunction can only be granted under the correct law and principles. The *Civil Procedure Act* and the *Employment and Labour Relations Court Act* govern different jurisdictions. Therefore, the provisions of the CPR Act and the rules thereunder do not outrightly apply to the proceedings before this court as held in the case of TNT



- Express Worldwide (Kenya) Limited v Timothy Graeme Steel [2022] eKLR. The claimant should not be allowed to overlook the express provisions of the ELRC Act and rush to invoke the provisions of the Civil Procedure in seeking remedies of injunction as sought in his application.
23. The 2nd Respondent did the transfer of the Claimant in line with the provisions of sections 5(3) and 27(3) of the *State Corporations Act* and sections 38 and 43(4) of the *Public Service Commission Act*, which guided the transition from the old to the new HR instruments of the 1st Respondent. This led to the transfer and the provisions of sections 11, 12 and 13 of the SRC in determining the job evaluation and grading for all employees of the 1st Respondent.
 24. There is no interference with the claimant's salary as alleged. The salary of the Claimant remained the same as prescribed in the SRC Circular of 3 July 2014; the house allowance and the telephone allowance were dictated by the SRC Circular dated 10 December 2014 and the Head of Public Service circular of 5 March 2010. The 2nd Respondent duly approved and communicated to the Claimant his impugned transfer to the Nairobi office, which was in the same position as the General Manager at KNSL job grade 2, via a transfer letter dated 6 September 2024.
 25. The terms informed the decision of the 2nd Respondent of clauses 2.13.3 and 2.34.1 of the 1st Respondent's HR Policy and Manual. The Claimant's transfer to the 1st Respondent's Nairobi office has been completed, and the Claimant has been paid a transfer allowance of Kshs. 351,380.00, followed by his subsequent reporting to his new station on 23 September 2024. The claimant has worked at the Nairobi office for over a month. Orders of injunction cannot be issued to restrain an event that has taken place. The transfer has already taken effect, and public funds have already been expended to oversee the same.
 26. Section 12 (3)(i) of the ELRC Act, as read together with rule 17 of the ELRC Rules, 2016, is instructive on cases where a temporary injunction may be granted. In the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, the court relied on the case of *Giella v Cassman Brown* (1973) E. A 358 and held that;

Since authoritative pronouncements in the precedents already codify those principles, they may be conveniently noted in brief as follows: In an interlocutory injunction application, the applicant has to satisfy the triple requirements to (a) establish his case only at a prima facie level, (b) demonstrate irreparable injury if a temporary injunction is not granted, and (c) ally any doubts as to (b) by showing that the balance of convenience is in his favour. These are the three pillars on which the foundation of any order of injunction, interlocutory or permanent, rests. It is established that all three conditions and stages are to be applied as separate, distinct, and logical hurdles, which the applicant is expected to surmount sequentially. ...
 27. The Court should, therefore, weigh the prayers sought in the Claimant against the well-settled conditions restated above, that is, a prima facie case in which the Claimant has failed to properly invoke the jurisdiction of the Court to grant the orders of an injunction. The transfer was done under the law, and the 1st Respondent's human resource instruments and the transfer have already taken effect. The Claimant cannot demonstrate a prima facie case with a probability of success. Therefore, the orders sought cannot be issued.
 28. The Claimant cannot suffer irreparable injury or loss that would not adequately be compensated by an award of damages. The claimant has failed to demonstrate a prima facie case. No irreparable loss can be suffered in the circumstances obtained herein that cannot be compensated by an award of damages.



Determination

29. The respondent has challenged the claimant in relying on the provisions of the *Civil Procedure Act* and the rules thereto instead of the *Employment and Labour Relations Court Act* and the rules thereto. It is correct that a party filing suit before this court should first apply the rules for the court and not overly rely on the *Civil Procedure Act* and its rules. However, these rules complement each other, and an application premised on the *Civil Procedure Act* and its rules is not fatal, so an applicant applying such provisions may fail to apply the correct content under Section 3 of the *Employment and Labour Relations Court Act*. These are the core objectives for employment and labour relations. Under the Court Rules, the Employment and Labour Relations Court (Procedure) Rules, 2024, parties are thus guided on how to urge an application as herein done by the claimant.
30. Applying the correct rules of procedure and the applicable statutes is imperative.
31. The core issues for determination in this matter at this stage are whether the transfer of the claimant by the respondent should be suspended pending the hearing of the main claim and whether the respondents should be stopped from taking any action to the claimant's employment by either transferring or adjusting his remuneration downwards pending the determination of the main claim herein.
32. These issues are intertwined in that, whereas the transfer of the claimant from the Mombasa office to Nairobi is challenged, under it, there are aspects of stopping such action and the remunerations attendant thereto.
33. As correctly submitted by the claimant, the employer has the prerogative to organize its operations and ensure the placement of employees accordingly. However, such reorganization and movement of employees should secure employee rights and should not be undertaken arbitrarily.
34. In the case of *Republic v Kenya Marine & Fisheries Institute Ex-parte Ben B. Oisera* [2018] KEELRC 778 (KLR), the court held that the transfer of employees is a management prerogative which should not be curtailed. In the case of *Henry Ochido v NGO Co-ordination Board* [2015] eKLR, the court held that;

Therefore, a transfer of an employee is one such prerogative of an employer subject to sufficient notice to enable the subject employee to report to the new transfer station with requisite facilitation. It is, therefore, not in the choice of an employee to dictate where they wish to work; once work has been created, and in the view of the employer, they find that a particular employee is best placed in a certain location or work station, the duty on the employer is to inform the employee and the employee's role is to ensure their work performance in the allocated station.
35. This position is reiterated in the case of *Simeon Kiprotich Langat v Kenya Ports Authority & Commission on the Administration of Justice (Office of the Ombudsman)* [2017] KEELRC 217 (KLR) and *Severine Luyali v Ministry of Foreign Affairs & International Trade & 3 others* [2014] KEELRC 754 (KLR) and that Even though transfers, relocation and recall are allowed and within the prerogative of the employer, the same must be exercised within a context that is valid and reasonable based on the legitimate expectation of the officer subject to such measures.



37. The court has further addressed a similar case as herein in the case of Mutegi v Chief Executive Officer, Kenya Development Leather Council & another [2024] KEELRC 1447 (KLR) the court held that;

It is difficult to accept that an Employee who has received and accepted the transfer allowance and reported at the new station can then dispute the legality and fairness of the transfer.

38. In this case, the claimant has taken up the position of his transfer to Nairobi, which has been facilitated, and his allowances have been paid.

39. As of 19 September 2024, when the instant application was filed, the basis of the application was that the transfer would have affected the claimant's attendance at therapy following an illness. He needed three (3) months for the therapy. With time, such time has lapsed, and the issue has dissipated.

40. The claimant is covered under the respondents' medical scheme. He does not state that such service is unavailable at his new station in Nairobi. With the transfer, he continues to enjoy such benefits and coverage.

41. The other matter is the question of being placed in Mombasa during the hearing of the main claim. The place of filing suit, whether Nairobi or Mombasa, cannot apply to negate the claimant's main claim. Attendance in court is as agreed by the parties on a date to be confirmed by the court. To issue orders sought on the basis that the claimant has to remain in Mombasa is not tenable. Such would negate the essence of access to justice that is now widely available countrywide through virtual attendance in court. Even if the claimant may be required to attend court physically, such would apply, considering his availability.

42. Regarding adjusted remuneration downward, there are facilitative and remunerative payments in employment. With the acting position of managing director, the claimant retained his substantive role under KNSL2, general manager, finance and Investment. An acting role, unless substantively filled, the attendant facilitative remuneration is for the acting role. The claimant cannot justify a claim to retain such facilitative payments upon cessation of the acting role. The respondents have since appointed another employee in the acting position of managing director, and there is full disclosure of Nakuru ELRC Petition E004 of 2024.

43. In the case of Nguruman Limited v Jan Bonde Nielsen, Herman Philipus Steyn, also known as Hermannus Phillipus Steyn & Hedda Steyn [2014] KECA 606 (KLR), the court held that where the apprehended injury was quantifiable in damages, the balance of convenience should be applied in favour of the respondent, unlike that of the applicant. These principles are settled in Giella v Cassman Brown & Co. Ltd [1973] EA 358.

44. The question of the claimant's remuneration in his current role and position, whether wrongfully applied or not, should be ripe for a full hearing. Determining such a matter at this stage would deny the court critical information that is not in the affidavits filed.

45. Accordingly, the application dated 19 September 2024 is declined. Costs to abide by the outcome of the main claim.

DELIVERED IN OPEN COURT AT MOMBASA THIS 18TH DAY OF DECEMBER 2024.

M. MBARŪ

JUDGE

In the presence of:



Court Assistant: Japhet

..... and

