



Mukherjee v Software Technologies Limited; Attorney General & 3 others (Interested Parties) (Cause E416 of 2022) [2023] KEELRC 944 (KLR) (27 April 2023) (Ruling)

Neutral citation: [2023] KEELRC 944 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E416 OF 2022**

JK GAKERI, J

APRIL 27, 2023

BETWEEN

CHAITANYA MUKHERJEE CLAIMANT

AND

SOFTWARE TECHNOLOGIES LIMITED RESPONDENT

AND

THE ATTORNEY GENERAL INTERESTED PARTY

THE NATIONAL POLICE SERVICE INTERESTED PARTY

DIRECTORATE OF CRIMINAL INVESTIGATIONS INTERESTED PARTY

ENKO AFRICA PRIVATE EQUITY FUND LTD INTERESTED PARTY

RULING

1. Before the court for determination is a Notice of Motion by the claimant/applicant dated July 28, 2022 seeking orders that:-

1. Spent.
2. Pending the hearing and determination of this application and suit, a temporary order of injunction does issue restraining the Respondent the summons issued by Lilian Wanjiru, a Police Officer attached at the Economic and Commercial Crimes Unit at the National Police Service (NPS) at the headquarters of the Directorate of Criminal Investigations (DCI) to the Claimant to attend before her on July 29, 2022 at 9 am be and is hereby suspended.



3. Pending the hearing and determination of this application and this suit, a temporary order of injunction does issue restraining the Respondent and officers of the 2nd and 3rd Interested Parties from harassing, threatening and issuing summons for allegations emanating from the employment of the Claimant as the Chief Operations Officer of the Respondent.
 4. Pending the hearing and determination of this application and suit, a temporary order of injunction does issue restraining the Respondent and the 2nd and 3rd Interested Parties from undertaking any act or omission which shall be in violation and/or frustration of the Claimant's peaceful discharge of duties as the Respondent's Chief Operations Officer.
 5. Any further relief that the court deems fit in the interest of justice.
 6. The costs of this application be the plaintiff's in any case.
2. The Notice of Motion filed under Certificate of Urgency is based on the grounds set out in the face and the Affidavit sworn by the claimant/applicant on July 28, 2022.
 3. The affiant depones that on July 4, 2022, Honourable Lady Justice Anne Mwaure issued orders to the effect that;
 - a. The Claimant be reinstated as the respondent's Chief Operating Officer.
 - b. Pending the hearing and determination of this application and suit, a temporary order of injunction be and is hereby issued restraining the Respondent from enforcing its resolution made on 16th June, 2022 where the Claimant was removed as a signatory to all the Respondent's bank accounts.
 - c. Pending the hearing and determination of the application and suit, a temporary order of injunction be and is hereby issued restraining the Respondent from enforcing its resolutions made on 16th June, 2022 wherein the claimant was denied access to the Respondent's company premises, Software and IT Hardware including email addresses and any other Respondent's materials.
 - d. In the alternative to prayers 2, 3 and 4 above, the status quo obtaining before the Respondent's board meeting of June 16, 2022 be maintained.
 - e. Costs in the cause.
 4. The affiant further deposes that despite the court orders, the Directors of the Respondent in collusion with officers of the National Police Service and the Directorate of Criminal Investigations have continued to frustrate the affiant by fabricating and perpetrating mistruths against him.
 5. The affiant states that the Respondent had reported him to the Directorate of Criminal Investigations (D.C.I) on false claims in an endeavour to force him out of his position as the Chief Operating Officer of the Respondent and had been summoned to appear before the DCI Economic and Commercial Crimes Unit.
 6. That the Respondent and its Directors continue to act in blatant violation of court orders by employing tactics to frustrate the affiant.



7. That the Respondent had roped in officers of the 1st and 2nd Interested Parties to harass and frustrate the affiant to circumvent court orders.
8. That the affiant will suffer substantial loss and damage if the orders sought are not granted as a matter of urgency occasioning irreparable loss and damage.

Response

9. In a Replying Affidavit sworn by Lilian Wanjiru on September 9, 2022, the affiant depones that she is a Police Officer attached at the Economic & Commercial Crimes Unit of the National Police Service.
10. The affiant states that the Directorate of Criminal Investigations (3rd Interested Party) derives its mandate from article 247 of *the Constitution* of Kenya, 2010 and the *National Police Service Act*, 2011 and its core functions are detection, prevention and investigation of crime.
11. That the Claimant/Applicant enjoined the 1st, 2nd and 3rd Interested Parties in the Notice of Motion dated July 28, 2022 for an order not to honour summons issued by the affiant on July 29, 2022.
12. That the application was an abuse of the court process to circumvent impending investigations and being an employer/employee matter, the interested parties had no role in the application.
13. The affiant further states that Directorate of Criminal Investigations received a complaint against the Claimant/Applicant from ENKO Africa Private Equity Fund Ltd, a Private Equity Investment Fund across Africa, that the Claimant/Applicant and two others by misrepresentation induced the Fund to conclude an investment agreement under which the Fund subscribed for shares in the Respondent company valued at USD 3,874,112.
14. That the complaint precipitated the summon for purposes of inquiry/investigation.
15. The affiant states that the Notice of Motion lacked merit, is frivolous and vexatious and an abuse of court process and seeks to interfere with the mandate of the 3rd Interested Party and ought to be dismissed.

Claimant/Applicant's submissions

16. The Applicant's counsel identified two issues for determination as follows;
 - i. Whether actions of the Respondent and the 2nd and 3rd Interested Parties are against the spirit of the court order dated July 4, 2022.
 - ii. Whether the temporary injunction should be granted.
17. On the 1st issue, counsel submitted that the court order by the learned judge was issued due to previous harassment of the Applicant in an endeavour to have him relinquish his position in the Respondent company and the Respondent and its directors had acted in blatant disregard of the spirit of the court order by employing tactics to frustrate the Claimant/Applicant to resign.
18. Counsel further submitted that the dispute between the parties was an employment dispute and the 2nd and 3rd Interested Parties should not be involved in.
19. That by the summons issued by a Police Officer, attached to the Economic and Commercial Crimes Unit of the National Police Service, the Respondent was using officers of the 1st and 2nd Interested Parties to harass and frustrate the Applicant's employment to circumvent court orders.



20. That the alleged loss of money was the subject of forensic investigations, the Respondent and Interested Parties were aware of.
21. That the summons was an affront to the court orders dated 4th July, 2022.
22. Reliance was made on the sentiments of the court in *Republic v Principal Secretary, Ministry of Defence Ex Parte George Kariuki Withaka* (2018) eKLR to underscore the essence of court orders and their effect.
23. That the Respondent and ENKO Africa Private Equity Fund Ltd should have moved the court to have the orders varied.
24. Counsel submitted that any investigations relating to the Claimant's employment be put on hold until the suit herein was determined.
25. Further reliance was made on the sentiments of the court in *Kenya Commercial Bank Ltd & 2 others V Commissioner of Police and the Director of Criminal Investigations Department & another* (2012) eKLR where the court emphasized that although it had power to stop proceedings if satisfied that they were oppressive, vexatious or an abuse of the court process and in breach of fundamental rights and freedoms, the power had to be exercised sparingly as public interested dictated that crimes be detected and culprits apprehended for accountability.
26. Counsel urged that the court can stay the investigations by the 2nd and 3rd Interested Parties if oppressive, vexatious and abuse of the court process.
27. The court was invited to adopt an approach similar to the one in the foregoing case where the Respondents were restrained from investigating, summoning or arresting the Petitioners.
28. That the court should take judicial notice of withdrawal of cases by the Investigative Agencies.
29. Finally, the court was invited to find that the investigations are oppressive and vexatious and against the spirit of the court orders.
30. As to whether temporary injunction should be granted, counsel relied on the test in *Giella V Cassman Brown & Co. Ltd* (1973) EA 358 to urge that the prayer for injunction against the Respondents be granted since the applicant had a prima facie case with a probability of success.
31. That costs be awarded to the applicant.

Respondent's submissions

32. Counsel isolated two issues for determination as to whether the Respondent acted in violation of court orders dated 4th July, 2022 and whether the Respondent can halt, prevent or otherwise interfere with the mandate of the 2nd and 3^d Interested Parties.
33. On the 1st issue, counsel underscored the overriding principle that court orders must be obeyed and cited the sentiments of the court in *Commercial Bank of Africa Ltd V Isaac Kamau Ndirangu* that;

“It is imperative that orders of the court must be obeyed as a cardinal basis for endurance of judicial authority and dignity. To do otherwise would erode the dignity of the courts.”
34. Counsel urged that the Respondent understood the court orders and did not pursue the matter further as alleged by the applicant, having agreed to reinstate the Applicant as its employee until the orders were abrogated by hearing and determination of the suit.



35. On the mandate of the 2nd and 3rd Interested Parties, counsel submitted that Directorate of Criminal Investigations as one of the arms of the National Police derived its mandate from *the Constitution* of Kenya, 2010 and *National Police Service Act* to inter alia detect and prevent crimes and operated independently in the ordinary course of discharging its mandate as by law provided.
36. Counsel relied on the sentiments of Odunga J. in *Isaac Tumunu Njunge V Director of Public Prosecutions & 2 others* (2016) eKLR to demonstrate that the court can intervene if it is shown that investigations were being conducted with ulterior motives or to achieve a collateral purpose unconnected with the criminal offence.
37. Counsel submitted that the Respondent could not interfere with the operations of the 2nd and 3rd Interested Parties and no evidence of collusion had been provided of any communication between the Respondent and the 2nd and 3rd Interested Parties.

1st, 2nd and 3rd Interested Parties written submissions

38. Counsel for the Interested Parties identified two issues for determination as to whether;
 - i. The 2nd and 3rd Interested Parties acted within their mandate.
 - ii. The Notice of Motion has met the threshold for granting temporary orders.
39. As regards the 1st issue, counsel submitted that the 3rd Respondent derived its mandate from *the Constitution* and the *National Police Service Act*, specifically Sections 28 and 35 of the Act which mandate the 3rd Respondent to detect, prevent and investigate crime and it acted within its mandate by summoning the Applicant after a complaint was made by ENKO Africa Private Equity Fund Ltd.
40. Counsel submitted that the accusation by the Applicant was baseless and a ploy not to hold the Applicant accountable and enjoined the Interested Parties without leave.
41. That the matter at hand was an employer/employee dispute between the two and the Interested Parties had no role in the instant Application.
42. As to whether the Notice of Motion meets the threshold for the grant of temporary injunction, counsel relied on *Giella's case* as well as the sentiments of the court in *Showind Industries V Guardian Bank Ltd & another* (2002) 1 EA 284 to urge that an injunction ought to be granted sparingly and only in exceptional circumstances where the applicant had a strong and straight forward case and may be denied on the basis of the Applicant's conduct.
43. Counsel submitted that the Applicant ought to have honoured the summons as opposed to making the instant Notice of Motion Application whose effect is to curtail the constitutional and statutory mandate of the 3rd Interested Party as he who comes to equity must do so with clean hands.
44. Finally, counsel submitted that the instant Notice of Motion did not meet the threshold for the grant of injunctive orders as the Applicant had not established a prima facie case against the 2nd and 3rd Interested Parties.

4th Interested Party's written submissions

45. Counsel for the 4th Interested Party highlighted one issue for determination, namely; whether the Application dated 28th July, 2022 is merited.



46. Counsel submitted at the onset that the Application ought to be dismissed as it was an abuse of the court process as it did not raise any real, live or ripe issue to warrant the court's intervention and the prayers sought had no nexus with prayers in the main claim, the previous application or the orders issued on 4th July, 2022.
47. Counsel further submitted that the 2nd and 3rd Interested Parties acted at the behest of the 4th Interested Party.
48. In counsel's view, the Application before the court had not met the threshold in *Giella V Cassman Brown & Co. Ltd (Supra)* and relied on the sentiments of the court in *Republic V Commissioner of Police & another Ex Parte Michael Monari & another (2012) eKLR* to urge that the police had a constitutional mandate to detect and prevent crime and the court should be reluctant to interfere with the discharge of their mandate.
49. Reliance was also made on the sentiments of the Court of Appeal in *Dande & 3 others V Director of Public Prosecutions & 2 others (2022) KECA 102* that courts typically do not interfere with the exercise of constitutional and statutory powers of executive authorities unless there exists grounds to do so. Counsel further urge that the Applicant had not provided grounds to warrant the court's intervention.
50. That pursuant to the orders issued on 4th July, 2022, the Respondent had not enforced its resolutions dated 16th June, 2022 and the Applicant remained a signatory of all the Respondent's bank accounts and had resumed work and had access to the Respondent's premises, Software and IT hardware email address and other materials and had not provided evidence to the contrary and the status quo before the resolution on 16th June, 2022 remains.
51. That the complaint dated 16th February, 2022 was made by the 4th Interested Party prior to the filing of the instant suit and was not based on the Applicant's employment.
52. Counsel submitted that the Applicant had not provided sufficient evidence to demonstrate a factual basis for the court to interfere with the exercise of investigative powers of the police and the Application was a ploy to interfere with the police investigations.
53. Finally, counsel submitted that the instant Application had not met the 1st condition that the Applicant had a prima facie case with a probability of success and because all the three condition must be met, the Application was doomed to fail.
54. Counsel urged the court to dismiss the Application with costs.

Findings and determination

55. The issues for determination are;
 - i. Whether the 2nd and 3rd Interested Parties acted within their powers.
 - ii. Whether the instant Notice of Motion meets the threshold for injunctive relief.
56. As to whether the 2nd and 3rd Interested Parties acted within their powers, parties have adopted contrasting positions. While the Applicant submitted that the two institutions were being used by the Respondent and its directors to frustrate the Applicant in a purely employment dispute, the Respondent and all Interested Parties submitted that the 2nd and 3rd Interested Parties were acting



within their constitutional and statutory mandate and the Applicant had not provided any material to justify the court's intervention.

57. Article 243 (1) of *the Constitution* of Kenya, 2010 establishes the National Police Service which comprises inter alia the Kenya Police Service under which the Directorate of Criminal Investigation falls.
58. Similarly, Article 247 confer upon Parliament power to enact legislation to establish other police services under the National Police Service and the command of the Inspector General of the Service.
59. It is on the basis of the foregoing Articles of *the Constitution* that Parliament enacted the *National Police Service Act*, 2011 which establishes the Directorate of Criminal Investigations under Section 28 of the Act whose functions are set out in Section 35 and include undertake investigations on serious crimes including economic crimes, piracy, cyber among others, detect and prevent crime, conduct forensic analysis among others.
60. The Applicant's case is that the Directorate of Criminal Investigations summons by Lilian Wanjiru dated 26th July, 2022 served on the Applicant at 12.00 on even date ought to be injuncted as it amounts to harassment by the Directorate of Criminal Investigations at the behest of the Respondent and its directors and are inconsistent with the spirit of the court order dated 4th July, 2022.
61. The orders issued by the learned judge on 4th July, 2022 did two things. They reinstated the Applicant as the Chief Operating Officer of the Respondent and restrained the Respondent from enforcing its resolution passed on 16th June, 2022.
62. Puzzlingly, although the Applicant deponed that there was collusion between the directors of the Respondent and officers of the 2nd and 3rd Interested Parties to use fabricated information and mistruths to frustrate him to procure his resignation or cessation of employment, he provided no scintilla of evidence to substantiate such a weighty statement made on oath.
63. The Applicant did not even allege that the directors of the Respondent and the alleged officers of the 2nd and 3rd Interested Parties met anywhere or communicated at all.
64. In a nutshell, the Applicant provided no shred of evidence to substantiate the allegation of collusion or the fabricated mistruths made against him.
65. Equally, he furnished no iota of evidence to demonstrate that officers or the Respondent or indeed directors reported him to the 2nd or 3rd Interested Parties on a particular date or any date at all or evidence to establish that the summons by the Directorate of Criminal Investigations was related to or was actuated by the alleged report.
66. It requires no belabouring that the operative mantra is that he who alleges anything is duty bound to prove the allegations made failing which the allegations remain unproven and worthless.
67. Section 107 of the *Evidence Act* provides that;
 1. Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.
68. Similarly, Section 108 provides;

The burden of proof in a suit or proceeding lies on that person who would fails if no evidence at all were given on either side.



69. Finally, Section 109 relates to the proof of particular facts as alleged by the Applicant in the instant Application.
70. It is incumbent upon the Applicant to adduce sufficient evidence to establish that Directors or Officers of the Respondent colluded with officers of the 2nd and 3rd Interested Parties and that the Officers of the Respondent reported him to the Directorate of Criminal Investigations and the report culminated in his being summoned by the Directorate of Criminal Investigations.
71. Similarly, the Applicant was duty bound to demonstrate that the alleged report to the Directorate of Criminal Investigations and the National Police Service was fabricated by the Respondent and its directors and/or officers for purposes of harassing and frustrating him to quit employment.
72. Based on the evidence on record, the allegation of being reported to the 2nd and 3rd Interested Parties and collusion between the three institutions remain unsubstantiated allegations.
73. More significantly, however, the Replying Affidavit sworn by Lilian Wanjiru is unambiguous that the summon was precipitated by a report made by ENKO Africa Private Equity Fund Ltd, evidence the Applicant could have controverted by a Further Affidavit, if he had information as to who made the report and when.
74. Counsel for the 4th Interested Party submitted that the 4th Interested Party made the complaint dated 16th February, 2022 and it was made prior to the filing of the Applicant's suit on 16th June, 2022, a submission the Applicant did not disprove.
75. It requires no emphasis that Section 52 of the *National Police Service Act*, 2011 confer upon the Police powers to summon persons in certain circumstances and the National Police Service does so routinely.
76. Section 52 of the Act provides;
1. A Police Officer may, in writing require any person whom the police officer has reason to believe has information which may assist in the investigation of an alleged offence to attend before him at a police station or police office in the county in which that person resides or for the time being is.
77. Other provisions of Section 52 prescribe the attendant safeguards as well as the effect of dishonour of the summon or misrepresentation.
78. In the court's view, a summon to appear before the police as was in this case was just that. It neither suggested that the Applicant had committed a criminal offence or other wrong doing. The Applicant was simply a person of interest and should have honoured the summon to respond to the questions arising thereat.
79. Although the court has power to interfere with the exercise of power by executive bodies, it only do so where there are sufficient grounds to do so and the power is exercised sparingly having regard to public interest as suspected criminal acts and omissions must be detected, prevented and persons responsible held to account as held in *Kenya Commercial Bank Ltd & 2 others V Commissioner of Police and the Director Criminal Investigations Department and another (supra)*.
80. In *Dande & 3 others V Director of Public Prosecutions & 2 others (Supra)*, the court held as follows;
- “The court ordinarily does not interfere with the exercise of constitutional and statutory power of executive authorities unless there exists grounds for doing so. For instance, where



investigations are being conducted for motives other than interests of justice as alleged by the Applicant but for the absence of evidence by the Applicant.

81. The sentiments of Odunga J. in *Isaac Tumunu Njunge V Director of Public Prosecutions & 2 others (Supra)* are also instructive;

“... the police are clearly mandated to investigate the commission of criminal offences and in so doing, they have power *inter alia* to take statements and conduct forensic investigations. In order for an applicant claiming otherwise to succeed, he must show that not only are the investigations being carried out with ulterior motives but that the predominant purpose of conducting the investigations is to achieve some collateral result not connected with the vindication of an alleged commission of a criminal offence.”

82. The High Court expressed similar sentiments in *Republic V Commissioner of Police and another Ex parte Michael Monari & another (Supra)*.

83. For the foregoing reasons, the court is satisfied and finds that the 2nd and 3rd Interested Parties were discharging their constitutional and statutory mandate and the Applicant has not made out a case for the courts intervention at this stage.

84. As to whether the Notice of Motion meets the threshold for grant of a temporary injunction, the starting point is the delineation of the requirements of injunctive relief.

85. In *Giella V Cassman Brown & Co. Ltd (Supra)*, the court held 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. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience (*E.A. Industries V Trufoods (1972) E.A. 420*).”

86. As regards the establishment of a *prima facie* case, the sentiments of the Court of Appeal in *Mrao Ltd V First American Bank of Kenya & 2 others (2003)* are instructive as follows;

“A *prima facie* case in a civil application includes but is not confined to a “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 been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

87. The pith and substance of the applicant’s complaint is that the summon to appear before one Lilian Wanjiru of the Economic and Commercial Crimes Unit of the National Police Service amounted to harassment by the Respondent and officers of the 2nd and 3rd Interested Parties.

88. However, the material before the court reveal that the complaint that led to the summon was made by a 3rd party long before the suit herein was filed.

89. Similarly, the applicant has not placed any material before the court to demonstrate that the officers of the 2nd and 3rd Interested Parties were acting at the behest of the Respondent.

90. In the circumstances, the court is constrained to agree with the submissions of the 4th Interested Party that the applicant has not established the requirement of a *prima facie* case.



91. As regards reparable injury, the court is guided by the sentiments of the court in *Nguruman Ltd V Jan Bonde Nielsen & 2 others* as follows;

“On the second factor, that the applicant must establish that he “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 and extent of the injury.

92. In the instant application other than the statement that the applicant stood to “suffer substantial loss and damage if the orders sought herein are not granted as a matter of urgency thereby causing me irreparable harm, loss and damage”, the applicant has neither demonstrated the nature nor extent of the otherwise irreparable injury.

93. In the absence of evidence of the injury, the court is satisfied that the second requirement is unproven.

94. Finally, since the three requirements must be established for an injunction to issue and the first two have not, the balance of convenience cannot be in favour of the applicant.

95. Flowing from the foregoing, it is evident that the applicant has failed to meet the test in *Giella V Cassman Brown & Co. Ltd* (Supra). The application dated 28th July, 2022 is for dismissal and it is accordingly dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 27TH DAY OF APRIL 2023

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.

