



**Ikiara v Adeso (Employment and Labour Relations Cause  
1241 of 2018) [2023] KEELRC 1912 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1912 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1241 OF 2018**

**K OCHARO, J  
JULY 27, 2023**

**BETWEEN**

**ANNE KAJUJU IKIARA ..... CLAIMANT**

**AND**

**ADESO ..... APPLICANT**

**RULING**

1. The Applicant filed a Notice of Motion dated 5<sup>th</sup> September 2022 brought under Certificate of Urgency seeking the following orders: -
  - a. Spent
  - b. Spent
  - c. A temporary injunction be issued restraining the Claimant by herself, her agents, servants, employees or otherwise howsoever from contacting the Respondent’s donors, harassing the Respondent’s employees, disclosing the Respondent’s confidential information, causing to be published and/or publishing disparaging materials about the Respondent, disparaging the Respondent’s reputation by making false claims against the Respondent to the donors on the internet, newspapers, Facebook, Twitter, YouTube, WhatsApp or any other medium whatsoever or in any other manner whatsoever pursuing any conduct designed to undermine the Respondent’s operations, pending the hearing and determination of this Claim.
  - d. An order be issued compelling the Claimant to forthwith retract her negative emails and/or communications sent to the Respondent’s donors and also remove from Facebook, Twitter, WhatsApp or any other social media platform, confidential information relating to the Respondent, disparaging materials about the Respondent on the internet, newspapers, Facebook, Twitter, YouTube, WhatsApp or any other medium whatsoever or in any manner



whatsoever pursuing any conduct designed to undermine the Respondent's wellbeing and operations pending the hearing and determination of this suit.

- e. The Respondent be granted leave to amend the Memorandum of Response to incorporate a counterclaim, as attached hereto.
  - f. Costs of this application be borne by the Claimant.
  - g. The Respondent to pay the costs of this claim.
2. The Claimant/Respondent opposed the Notice of Motion through grounds of opposition dated 11<sup>th</sup> October 2022; as well as a Replying Affidavit sworn on 11<sup>th</sup> October 2022.
  3. The Applicant filed submissions dated 2<sup>nd</sup> December 2022 in support of their Notice of Motion; while the Claimant/Respondent filed submissions dated 7<sup>th</sup> December 2022, as well as a List of Authorities dated the same day.
  4. The Applicant essentially seeks two types of prayers from this Court: temporary injunction restraining the Claimant from contacting the Respondent's donors, harassing the Respondent's employees, disclosing confidential information and publishing disparaging materials about the Respondent; with an order compelling the Claimant to retract any emails and/or communications with the Respondent's donors and other disparaging materials already published; and leave to amend their Memorandum of Response to, among other things, include a counterclaim.
  5. I have considered the Notice of Motion dated 5<sup>th</sup> September 2022, the Grounds thereof, the Supporting Affidavit sworn on 5<sup>th</sup> September 2022, the Claimant/Respondent's Grounds of Opposition dated 11<sup>th</sup> October 2022 and Replying Affidavit sworn on 11<sup>th</sup> October 2022, the respective submissions filed by both parties and authorities relied on.

### **Prayers for injunctions**

6. The application for an injunction is brought under Sections 3 and 12 of the Employment and [Labour Relations Act](#) No. 20 of 2011. Section 12 (3) grants this Court jurisdiction to make interim preservation orders including injunctions, prohibitory orders, and any other reliefs that the Court deems appropriate.
7. The Applicant argues in the Grounds upon which the Notice of Motion dated 5<sup>th</sup> September 2022 is brought, that the Claimant/Respondent herein has taken to contacting the Applicant's donors in an effort to tarnish the Applicant's hard-earned reputation. That the Claimant/Respondent has spread falsehoods and peddled lies through direct emails to the donors, on the internet, Facebook, Twitter, and WhatsApp among other social media platforms.
8. Further, the Applicant states that the Claimant/Respondent has threatened to cause malicious and falsified information to be published in the media disparaging the Respondent's operations and its top management.
9. In fact, it is averred that some of the contacted donors have now withheld further funding to the Applicant, negatively impacting their operations and grossly hampering their well-being.
10. I have noted the documentary evidence attached to the Affidavit in Support of Motion sworn on 5<sup>th</sup> September 2022, marked as annexure DA.
11. On the other hand, in her Replying Affidavit sworn on 11<sup>th</sup> October 2022, the Claimant/Respondent denies contacting any of the Applicant's donors with a view to tarnishing the Applicant's name or at all. She disowns the statements made in the annexure marked DA and states that the messages cannot



- be attributed to her as it is not clear when the messages were written, or who is being referred to in them, but in any event, they do not make mention of her.
12. The Claimant/Respondent is emphatic that the Applicant has based their application on unreasonable and unjustified apprehensions and sensationalism.
  13. The law on grant of injunctions is well established. The threshold for grant of injunctions is set out in the locus classicus of *Giella vs Cassman Brown & Company Limited* (1973) E A 358, where the court expressed itself 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 an application on the balance of convenience.”
  14. The first condition that the Applicant must meet, therefore, is to establish that they have a prima facie case before an order of injunction can be issued.
  15. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 others*, the Honourable Court of Appeal defined a prima facie case with a probability of success. It stated:

“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.”
  16. However, this Court must be extremely careful not to adjudge the main suit between parties when considering whether a prima facie case has been established at the interlocutory stage as was stated in *Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others* [2015] eKLR while citing *Habib Bank Ag Zurich V. Eugene Marion Yakub*, Ca No. 43 Of 1982 And In *National Bank Of Kenya V. Duncan Owour Shakali & Another*, Ca No. 9 Of 1997.
  17. In order to benefit from the equitable relief of an injunction, the applicant must make full candid disclosure of all material facts as was held in the case of *Kenleb Cons Ltd vs New Gatitu Service Station Ltd & another* [1990] K.L.R 557 where Bosire J held that:

“to succeed in an application for injunction, an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable, which requires protection by injunction.”
  18. In the present application, the Applicant claims that the Claimant/Respondent has perpetuated falsehoods against it to its donors causing some of them to withhold funding from the Applicant.
  19. However, no evidence is produced to support their averments in the form of publications by the Claimant/Respondent on social media platforms, direct emails to donors sent by the Claimant/Respondent or emails from Donors stating that the Claimant/Respondent had contacted them, and/or screenshots of messages from the Claimant/Respondent threatening to contact the media.
  20. A perusal of the annexure marked DA indicates that the same is a screenshot of Whatsapp messages with one Dedo N. Baranshamaje Se...



21. There is no clear indication of a date and time when the messages were sent, who the said “Dedo” is, and who he was sending the messages to. While the messages refer to the “ED of NEAR 2017-2018”, there appears to no connection that can be discerned in relation to the other messages.
22. It is my considered view that the material placed forth by the Applicant to support their Notice of Motion dated 5<sup>th</sup> September 2022 is not sufficient to persuade this Court to grant the orders sought. It would have been prudent for the Applicant to present this Court with the social media publications alleged to have been made by the Claimant/Respondent, direct emails to the donors or from donors indicating that they were contacted, messages showing the Claimant/Respondent threatening to approach the media, and communication from the donors indicating that they have resolved to withhold funding.
23. In light of the foregoing, I find that the Applicant has not established a prima facie case for grant of injunction.
24. Having made the above finding, I hold that it is not necessary to delve into the remaining two conditions in the *Giella vs Cassman Brown* case. In giving it this approach, this Court finds support in the Court of Appeal holding in the case of *Nguruman Limited V Jan Bonde Nelsen & 2 others* [2014] eKLR, thus;

“If damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”

25. By reason of the foregoing premises, the Applicant’s Prayers (c) and (d) are disallowed.

#### **Leave to amend the Memorandum of Response**

26. I now turn to the prayer for leave to amend the memorandum of Response.
27. Order 8 Rule 3 (1) of the Civil Procedure Rules 2010 allows this Court to allow an application for leave to amend their pleadings at any stage of the proceedings.
28. The guiding principles in an application for leave to amend pleadings were summarized in *St. Patrick’s Hill School Limited v Bank of Africa Kenya Limited* [2018] eKLR as cited in *Peter Bogonko Onchonga v National Bank of Kenya Limited & another* [2021] eKLR as follows;

“21. A wider footage on the same issue was given in a more recent case of *Ochieng and Others v First National Bank of Chicago* Civil Appeal Number 147 of 1991 the court of Appeal clearly set out the principles under which Courts may grant leave to amend the pleadings. The same is as follows:

- a) the power of the court to allow amendments is intended to determine the true substantive merits of the case;
- b) the amendments should be timeously applied for;
- c) power to amend can be exercised by the court at any stage of the proceedings;



- d) that as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side;
  - e) the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint, the defendant would be deprived of his right to rely on the Limitations Act subject however to powers of the court to still allow an amendment notwithstanding the expiry of current period of limitation.”
29. In the Peter Bogonko case (Supra) an application for leave to amend made one and a half years after the filing of the Plaint was found to have been made timeously, and not to be prejudicial to the Defendant.
30. In the present case, the matter is yet to be fixed for hearing of the main suit by the parties.
31. While the application for leave to amend has been brought 4 years after filing the Reply to Statement of Claim dated 14<sup>th</sup> August 2018, the same has been brought by the current Counsel for the Respondent, who came on record on 15<sup>th</sup> July 2022.
32. I have perused the draft Amended Memorandum of Response & Counterclaim attached by the Applicant/Respondent to their Notice of Motion dated 5<sup>th</sup> September 2022, and am satisfied that the proposed amendments will assist this Court to determine the true and substantive merits of this suit.
33. I am further persuaded that the Claimant will not be prejudiced if leave to amend the Memorandum of Response is granted, as they shall have an opportunity to file their amended Reply to Memorandum of Response and Reply to Counterclaim.
34. Pursuant to the foregoing, I grant Prayer (e) of the Notice of Motion dated 5<sup>th</sup> September, 2022. The Applicant/Respondent is granted 14 days to file their Amended Memorandum of Response and Counterclaim.
35. Each party is to bear its own costs in the application.

**READ, SIGNED AND DELIVERED THIS 27<sup>TH</sup> DAY OF JULY, 2023.**

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**OCHARO KEBIRA**

**JUDGE**

**In the Presence of;**

Ms Kinyua holding brief for Mr. Olewe for Claimant.

No appearance for Respondent.

**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 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.

A signed copy will be availed to each party upon payment of Court fees.

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**OCHARO KEBIRA**

**JUDGE**

