



REPUBLIC OF KENYA



KENYA LAW
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**Kandie v Communications Authority of Kenya (Cause
E413 of 2023) [2023] KEELRC 1708 (KLR) (10 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1708 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E413 OF 2023**

JK GAKERI, J

JULY 10, 2023

BETWEEN

JUMA KIPRONO KANDIE CLAIMANT

AND

COMMUNICATIONS AUTHORITY OF KENYA RESPONDENT

RULING

1. This is a Notice of Motion by the applicant dated 25th May, 2023 filed under Certificate of Urgency seeking Orders That;
 1. Spent.
 2. Spent.
 3. This Honourable Court be pleased to issue an order of temporary injunction restraining the Respondent from implementing and/or enforcing the separation letter dated 22nd May, 2023 that illegally retired the applicant as the Director of Human and Capital Administration of the Communications Authority of Kenya before reaching the mandatory retirement age of 60 years pending the hearing and determination of this claim.
 4. This court be pleased to grant temporary injunction restraining the Respondent through its board, agents, employees or any other person duly authorised to act on its behalf from interfering with the Applicant's employment as Director of Human and Capital Administration of the Communications Authority of Kenya and fulfilment of his duties in any manner whatsoever pending the hearing and determination of this claim.
 5. This court be pleased to grant temporary injunction restraining the Respondent, through its boards, agents, employees or any other person duly authorised to act on its behalf from interfering with the Applicant's employment as the Director of Human and Capital



Administration of the Communications Authority of Kenya and fulfilment of his duties in any manner whatsoever pending the hearing and determination of this claim.

6. Spent.
 7. The court be pleased to grant a temporary injunction restraining the Respondent from purporting to advertise and/or fill the Applicant's position as the Director of Human and Capital Administration of the Communications Authority of Kenya pending the hearing and determination of this claim; and
 8. The costs of this Application be provided for.
2. The Notice of Motion is expressed under Section 12 of the Employment and *Labour Relations Act*, Order 40 of the Civil Procedure Rules, 2010 and all other enabling laws and is based on the grounds set out on its face and the Supporting Affidavit by the Applicant dated 25th May, 2023.
 3. The affiant deposes that he was competitively recruited by the Respondent in August 2000 and served diligently, with commitment and integrity.
 4. That after adoption of new Human Resource instruments, the Director General (DC) by letter dated 21st October, 2021 offered the Claimant a transition from permanent to contract terms of service at the same salary Grade CA3 upto 12th December, 2024.
 5. The affiant states that on 20th July, 2022, the Director General issued another letter of confirmation of the transition above and the Claimant signed the contract. That other Directors did not accept the transition.
 6. The Claimant's employment was effective 1st August, 2022 to 12th December, 2024.
 7. The affiant deposes that in 2015, the Respondent sought to declare him redundant but was restrained by the court.
 8. That in 2023, the Respondent's board members witch hunted, intimidated and victimized the Claimant.
 9. The affiant further depones that on 7th March, 2023, he was advised to proceed on leave for investigations on the discrepancy in the Claimant's year of birth as the Passport and Identity Card had different dates and the Claimant proceeded on a 30 days leave. That he received a letter on 24th March, 2023 requesting him to explain the discrepancy between 12th December, 1962 on the Identity Card and 12th December, 1964 on the Passport and that he explained by letter dated 25th March, 2023.
 10. That the discrepancy had not been brought up for 23 years.
 11. The affiant states that he took the Identity Card during a mass registration exercise and the date of birth entered was 1962 in lieu of 1964 but the same was corrected when he obtained a Passport in March 1986 and the School Certificates had the new date and he had indicated the same on the employment form.
 12. The affiant further deposes that on his motion, he applied for the date to be corrected and a new Identity Card was issued.
 13. The affiant deposes that he was surprised by being sent on compulsory leave for 14 days, on 22nd April, 2023 and interdicted for 90 days on 5th May, 2023.



14. That during suspension, he was under immense pressure from the Director General to resign and received a separation letter on 22nd May, 2023 stating that the National Registration Bureau had revoked the Identity Card No. xxxx of Serial Number xxxx issued on 3rd April, 2023 and the National Registration Bureau did not communicate to him about the revocation of the Identity Card for a hearing.
15. The affiant states that the termination letter herein is illegal and amount to an unfair termination of employment.
16. That if a conservatory order staying the separation letter is not granted, the applicant will be forcefully retired before attaining the mandatory retirement age of 60 years.

Response

17. In its Replying Affidavit dated 30th May, 2023 sworn by Mr. Ezra Chiloba, the Respondent's Director General (DG), the affiant deposes that under the Respondent's Human Resource Instruments, employees in Grade CA2 and CA3 are engaged on 5 years term contract renewable subject to performance and attainment of retirement age. That the mandatory retirement age is sixty (60) years and sixty five (65) for persons living with disability.
18. That by letter dated 24th March, 2023, the applicant was called upon to explain a discrepancy in his year of birth contained in the Passport and Identity Card and did so via an internal memo dated 25th March, 2023 admitting the same and later confirmed he had applied for rectification and a new Identity Card had been issued.
19. That at the Respondent's instigation, the National Registration Bureau by letter dated 22nd May, 2023 stated that the applicant's new Identity Card had been invalidated advising that his correct date of birth is 12th December, 1962 according to its records.
20. The affiant states that the applicant applied for 30 days leave on 7th March, 2023 and the same was granted.
21. That the Respondent merely perused the applicant's records to verify his retirement status and the discrepancy was discovered and he was given an opportunity to make representations on the issue and did so.
22. It is the Respondent's case that the fact that the National Registration Bureau did not communicate with the applicant is a matter between the applicant and the National Registration Bureau.
23. The affiant states that authentication of a person's date of birth is by the Birth Certificate and the National Identification Card and in the absence of a specific date, the Respondent was guided by the information provided by the National Registration Bureau (NRB).
24. The affiant deposes that the applicant sought rectification of the date after the issue was brought to his attention.
25. The affiant further states that the Respondent merely notified the applicant that he ought to have retire on 12th December, 2022 as the discrepancy had led him to remain in service beyond his retirement age.
26. That the notice on retirement was not a termination of employment and the applicant was not pressurised to resign.
27. That the applicant is to blame for the absence of notice of retirement to the pension scheme having misrepresented the date of birth and his retirement is lawful.



28. The affiant further states that if the orders sought are granted, the Respondent stood to suffer financial loss as it would be forced to retain an employee who had attained retirement age.
29. Finally, the affiant depones that the instant suit and Notice of Motion are an abuse of the court process as;
 - a. The applicant has a pending suit ELRCC No. 128 of 2015 and the current issues are before the court.
 - b. The instant suit and application were filed while the other suit is pending determination slated for hearing on 6th June, 2023 and the issues raised are not dissimilar.
30. That the suit should be struck out.

submissions.

31. By the time court retired to prepare this ruling, none of the parties had filed submissions.

Determination

32. It is common ground that the applicant is a long serving and diligent employee of the Respondent having risen from the General Manager Human Resources & Administration to the Director Human Capital & Administration CA3.
33. It is also not in contest that the Respondent adopted new Human Resource Instruments in February 2021 which altered the structure of employment for employees in Grades CA2 and CA3 from permanent and pensionable terms to fixed term contracts of 5 years renewable subject to performance and attainment of retirement age.
34. The transition was however voluntary.
35. Records reveal that the Respondent made an offer to the applicant by letter dated 21st October, 2021 to transition from permanent and pensionable terms to contractual.
36. The applicant was further reminded to confirm acceptance by letter dated 20th July, 2022 and the applicant accepted the offer on even date as evidenced by the Employment Contract executed by the applicant and the Respondent dated 20th July, 2022.
37. The contract was for two (2) years four (4) months and 12 days from 1st August, 2022 to 12th December, 2024 and not renewable.
38. It is also common ground that the applicant has another matter pending determination ELRCC 128 of 2015 with certain orders still in force. The applicant made reference to this suit in the grounds of the Notice of Motion and Supporting Affidavit without elucidating the issues before the court.
39. Similarly, it is also not in dispute that sometime early this year, the Respondent discovered that the applicant's National Identification Card issued on 28th May, 2012 and the Passport dated 10th March, 1986 had different dates of birth and an explanation was sought by letter dated 24th March, 2023 and the same rendered by an internal memo dated 25th March, 2023 and the applicant explained the circumstances in which the Identity Card was obtained and further explained that the date of birth was erroneously captured as 1962 instead of 1964, which error was according to him corrected by the Passport No. xxxx and all documents issued thereafter had the new date of birth including the KRA Pin Certificate issued in 1993.



40. Strangely, the applicant gave the Respondent copies of both documents bearing different dates of birth with no supporting affidavit or explanation as to the discrepancy and for unexplained reasons the discrepancy was not discovered until early 2023, which is typical in many organizations for purposes of retirement.
41. The applicant's leave was extended by 14 days effective 22nd April, 2023 and interdiction followed on 5th May, 2023 for his failure to regularise the date of birth as the Head of Department, which was his duty. The applicant responded by letter dated 8th May, 2023.
42. Relatedly documents on record show that the applicant applied to the National Registration Bureau (NRB) for rectification of the "error" on or after Wednesday 29th March, 2023 and a new identity card was issued on 3rd April, 2023 in a record 2 or 3 days and when the Respondent sought clarification from the National Registration Bureau by letter dated 25th April, 2023, the secretary, by letter dated 22nd May, 2023 confirmed that the applicant had not presented a birth certificate when the passport was issued in 1986 and there were no records at the Civil Registry and his correct date of birth was 12th December, 1962.
43. The separation letter is dated 22nd May, 2023.
44. The applicant is accused of having misrepresented his date of birth which led to the grant of the two (2) year contract dated 20th July, 2022.
45. This is the letter the applicant seeks to be stayed in the instant application.
46. Having summarised the factual basis of the instant applications, I now proceed to determination whether the applicant has satisfied the conditions necessary for the grant of a temporary injunction but before delving into the specific conditions as prescribed by law, it is essential to underscore the fact that whether or not to grant an interlocutory injunction involves the exercise of judicial discretion and the conditions are well settled as held in *Abel Salim & others V Okong'o & others* (1976) KLR 42 at page 48.
47. Needless to belabour, the principles governing the grant of a temporary injunction were enunciated in *Giella V Cassman Brown & Co. Ltd* (1973) EA 358 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 a balance of convenience (*E.A. Industries V Trufoods* (1972) E.A. 420)."
48. As regards a prima facie case, the sentiments of the Court of Appeal in *Mrao Ltd V First American Bank of Kenya & 2 others* (2003) eKLR are instructive;

"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."



49. Similarly in *Nguruman Ltd V Jan Bonde Nielsen & 2 others* (2014) eKLR, the Court of Appeal held as follows;

“ . . . The party on whom the burden of proving a Prima facie case lies, 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 an urgent necessity to prevent the irreparable damage that may result from the invasion. . . All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation . . . The standard of proof of that prima facie case is on a balance, or as otherwise put, on a preponderance of probabilities . . . ”

50. Probability of success was explained in *Habib Bank AG Zurich V Eugene Marion Yakub* CA No. 43 of 1982.

51. The court is guided by these sentiments.

52. The pith and substance of the applicant’s case is that the separation letter dated 22nd May, 2023 is illegal and amounts to an unlawful termination of employment as the alleged discrepancy of the date of birth was corrected by the Passport issued on 10th March, 1986 and is reflected in all other documents issued thereafter.

53. Similarly, the National Registration Bureau issued a new Identity Card with the correct date of birth and the applicant responded to all queries promptly.

54. Without delving into the merits of the case, the court is persuaded that the material furnished by the applicant meets the threshold of a “genuine and arguable case” as enunciated in the *Mrao Ltd Case* (Supra).

55. As to whether the applicant stands to suffer irreparable injury or harm, the court is guided by the sentiments of the Court of Appeal in *Nguruman Ltd V Jan Bonde Nielsen & 2 others* (Supra) 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.

56. According to *Halsbury’s Laws of England*, 3rd Edition, Vol. 21 paragraph 739 at page 352;

“ . . . By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned 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 . . . ”

57. However, judicial authority is clear that a party should not be allowed to gain an advantage or benefit by acting unlawfully just because it is in a position to pay for it as held in *Aikman V Muchoki* (1984) KLR 353.

58. The applicant’s case is hinged on restraining the Respondent from implementing the letter of separation served on 22nd May, 2023 which would amount to a reinstatement and other than contending that the letter is unlawful and illegal and amounted to an unlawful termination of



employment before attaining the mandatory retirement age, the applicant has not availed any other material to demonstrate the nature and extent of the harm he stands to suffer and how damages would not be an effective remedy in an employment contract.

59. In the circumstances, the court is not persuaded that this requirement has been met.
60. As regards the balance of convenience, in *Bryan Chebii Kipkoech V Barnabas Tuitoek Bargarioria & another* (2019) eKLR, the court explained the concept of balance of convenience 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. . . 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.”
61. In the instant suit, the applicant has not demonstrated the comparative inconvenience to the parties if the injunction is granted or withheld.
62. Having failed to establish that he stood to suffer irreparable injury if the injunction was not granted, the court is not persuaded that the balance of convenience is in his favour.
63. Significantly, this case relates to the legacy of a long-serving public officer who served the Respondent unreservedly and rose to become its Director Human Resource and Administration and its outcome is dependent on its facts which are contested by the parties. In the court’s view, it is essential that the facts of the case be canvassed and tested before any substantive orders are made.
64. For the above reasons, it is the finding of the court that the applicant has failed to make a sustainable case for the grant of a temporary injunction. Similarly, the effect of the temporary injunction in the instant suit would be a reinstatement which is one of the reliefs sought in the main suit, the most appropriate stage for its consideration.
65. In the upshot, the Notice of Motion dated 25th May, 2023 is unmerited and is dismissed.
66. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 10TH DAY OF JULY 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.

DR. JACOB GAKERI

JUDGE

