Theuri v Jomo Kenyatta University of Agriculture and Technology (Cause E173 of 2023) [2023] KEELRC 2100 (KLR) (18 September 2023) (Ruling)

Neutral citation: [2023] KEELRC 2100 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E173 OF 2023

JK GAKERI, J

SEPTEMBER 18, 2023

BETWEEN

PROF DAVID MWANGI THEURI ..... CLAIMANT

AND

JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND TECHNOLOGY ..... RESPONDENT

RULING

1. Before the court for determination is a Notice of Motion by the Claimant/Applicant dated 13th March, 2023 seeking Orders That;

    1. Spent.

    2. The Honourable Court be pleased to grant the Claimant/Applicant a temporary order by way of injunction directed against the Respondent University restraining it from filing the Claimant's job position of Associate Professor at the Respondent's University pending the hearing and determination of this Application.

    3. The Honourable Court be pleased to grant the Claimant/Applicant a temporary order of injunction directed against the Respondent University restraining it from filing the Claimant's job position of Associate Professor at the Respondent University pending the hearing and determination of this suit.

    4. The costs of this application be provided for.

2. The Notice of Motion is expressed under Articles 41 and 47 of the *Constitution* and Rule 17 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* and other enabling provisions of law.

3. It is based on the grounds itemised on its face and the Supporting Affidavit of the Claimant/Applicant sworn on 13th March, 2023.

4. The affiant deposes that he joined the Respondent University as an Assistant Lecturer in 1992 in the Department of Mathematics and Computer Science and had since then risen to the position of Associate Professor effective 22nd April, 2015.

5. That his employment was unlawfully terminated by the Respondent on 7th November, 2022 notwithstanding his commitment, diligence and honesty throughout his employment.

6. The affiant states that by a report dated 11th August, 2022, the Chief Security Officer of the Respondent informed the Deputy Vice-Chancellor (Administration) (DVC (A)) that the applicant had been making inappropriate advances to a female student in the Department and the Deputy Vice Chancellor (Administration) issued a Notice to Show Cause on 22nd September, 2022 which the applicant responded to on 29th September, 2022 denying the allegations.

7. The affiant states that he was invited to a disciplinary hearing on 7th November, 2022 and attended.

8. That the Committee did not conduct investigations and had insufficient evidence against him.

9. That a student by the name Sally Wamucii Ngugi Reg. No SCM 212-0298/2019 had claimed that the applicant had intentionally failed her in two examination papers being SMA 2212 and SMA 2217 allegedly for refusing the applicant's alleged sexual advances.

10. That on remark, the student passed the papers.

11. The affiant deposes that the one who remarked was neither an employee of the Respondent nor an experienced examination marker.

12. That the applicant's request to have the examination papers and marking scheme tendered at the disciplinary hearing were ignored.

13. That the details of the charges were never disclosed during the disciplinary hearing.

14. That he was not given the statements made by the student, Chair of Department or the Chief Security Officer.

15. That the Respondent's staff Disciplinary Committee of Council returned a guilty verdict and the applicant was summarily dismissed maliciously, wrongfully and unlawfully and the appeal letter dated 24th November, 2022 was not responded to.

16. That although the applicant was dismissed on 21st November, 2022, the Respondent did not pay the salary for November 2022 demand notwithstanding.

17. The affiant depones that he has suffered immensely as his career and standing have been damaged in addition to mental stress and emotional anguish.

18. That unless the orders sought herein are granted, the prayer for reinstatement will be defeated.

Response

19. By the time the court retired to prepare this ruling, the Respondent had not filed a Replying Affidavit despite being granted 14 days on 24th April, 2023 to do so but had filed grounds of opposition dated 24th April, 2023 that;

    1. The court lacks jurisdiction to hear this matter as against the Respondent and the Notice of Motion should be dismissed.

2. The Notice of Motion is fatally defective, incurable in law and an abuse of the court process.

Claimant/Applicant's submissions

20. Counsel for the applicant submitted on the propriety of the Notice of Preliminary Objection and whether the Notice of Motion herein is merited.

21. As regards the Notice of Preliminary Objection, counsel urged that since the suit was based on unfair termination of employment as provided by Section 45 of the *Employment Act*, the court had the requisite power to hear and determine the suit since the applicant was entitled to the remedies under Section 49 of the *Employment Act*, 2007.

22. Counsel relied on the provisions of Section 12 of the *Employment and Labour Relations Court Act*, 2011 to urge that the court had jurisdiction to hear and determine the suit.

23. Counsel submitted that the applicant had exhausted all possible remedies before filing the suit including an appeal which the Respondent ignored.

24. Counsel urged the court to strike out the preliminary objection.

25. On the Notice of Motion, counsel submitted that it had high probability of success as during the hearing the applicant was not accorded a fair hearing as the Respondent did not conduct a proper investigation of the matter and lacked sufficient evidence against the applicant and the termination of employment was unfair.

26. Reliance was also made on the provisions of Section 4 of the *Fair Administration Action Act* to underscore the requirements of procedural fairness.

27. Counsel invited the court to note that the person who remarked the alleged scripts was neither an employee of the Respondent nor an experienced examiner.

28. That the applicant's request to have the remarked examination papers tabled before the disciplinary committee was ignored and/or denied.

29. Counsel submitted that the alleged charges were not disclosed to the applicant during the hearing and statements by the Chair of Department and security officers were not supplied.

30. Counsel urged that the right to fair hearing under Article 50 of the *Constitution* of Kenya, 2010 was violated.

31. That the applicant stood to suffer irreparable loss if the orders sought were not granted in view of the unlawful termination of employment.

32. Reliance was made on the decisions in *Florence A. Odhiambo v Wananchi Telcom Ltd & another* and *Dr. Zablon Bundi Mutongu v St. Paul University*.

Respondent's submissions

33. Counsel submitted on the court's jurisdiction to entertain the Notice of Motion and whether the notice of motion had met the threshold for issuance of an injunction.

34. On jurisdiction, counsel relied on the sentiments of Nyarangi JA in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* (1989) eKLR and *Phoenix EA Assurance Co. Ltd v S.M. Thiga t/a*

Newspaper Service (2019) eKLR to urge that a suit filed in a court with no jurisdiction could not be remedied.

35. On the doctrine of exhaustion, counsel cited the sentiments of the 5-Judge Bench in Mombasa High Court Constitutional Petition No 159 of 2018 consolidated with Petition No 201 of 2019 *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslim for Human Rights & 2 others (Interested Parties)* (2020) eKLR among others to underscore the essence of the doctrine of exhaustion and urge that the exceptions did not apply to the instant suit.

36. That the challenge to the court's jurisdiction was exemplified by the Conditional Memorandum of Appearance dated 23rd March, 2023.

37. The decision in *Prabhudas (N) & Co. v Standard Bank* (1968) EA 679 was cited on the effect of an unconditional appearance.

38. That the applicant's suit was unsustainable.

39. As regards the threshold for an injunction, counsel submitted that the same was dependent on the requirements enunciated in *Giella v Cassman Brown & Co.* (1973) EA 358 as *prima facie* case with probability of success, otherwise suffer irreparable injury and balance of convenience.

40. Reliance was also made on the sentiments of the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (2003) eKLR on *prima facie* case to urge that the applicant had not established that he had such a case as all processes were complied with.

41. That the loss the applicant stood to loose was compensatable by way of damages.

42. The decision in *Nguruman Ltd v Jan Bonde Nielsen & 2 others* (2014) eKLR was relied on to demonstrate the requirement of irreparable injury.

43. Counsel urged that the balance of convenience would be in favour of the Respondent to fill the vacant position as quickly as possible.

44. The sentiments of Mativo J (as he then was) in *Paul Gitonga Wanjau v Gathuthi Tea Factory Co. Ltd & 2 others* (2016) eKLR were relied upon on the balance of convenience.

45. Counsel invited the court to dismiss the Notice of Motion.

Determination

46. The issues for determination are;

    i. Whether the court has jurisdiction to hear and determine the Notice of Motion herein and

    ii. Whether the Notice of Motion herein is merited.

47. It is common ground that jurisdiction is everything and without it, the court must down its tools as eloquently put by Nyarangi JA in *Owners of the Motor Vessel "Lillian S" v Caltex Oil Kenya Ltd* (supra).

48. Similarly, in *Samuel Kamau Macharia v Kenya Commercial Bank*, the Supreme Court was emphatic that a court derived its jurisdiction from the *Constitution* or legislation or both.

49. It is not in dispute that this court derives its jurisdiction from Article 162(2)(a) of the *Constitution* of Kenya, 2010 and the provisions of Section 12 of the *Employment and Labour Relations Court Act*, 2011 as tabulated by the applicant's counsel.

50. The Respondent's counsel submitted that this court lacked jurisdiction to determine the Notice of Motion herein as the Respondent had notified the applicant that his appeal would be heard once the Respondent's council was appointed hence the doctrine of exhaustion was applicable.

51. Puzzlingly, counsel made no reference to the communication alleged nor the timelines involved or better still why an appeal filed on 24th November, 2022 was still outstanding including the efforts expended by the Respondent to ensure expeditious disposal.

52. As aptly captured by the Respondent's counsel, the doctrine of exhaustion ensures that administrative approaches to settlement of disputes, where prescribed, are exhausted before the same is filed in court.

53. In *Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others* (2015) eKLR, cited by the Respondent, the Court of Appeal stated;

> " It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the court is invoked. Courts ought to be the fora of last resort and not the first part of call the moment a storm brews . . . The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts."

54. It is common ground that after the applicant's employment was terminated vide letter dated 10th November, 2022, received on 21st November, 2022, the applicant filed an appeal on 24th November, 2022. The appeal raised 10 grounds. The appeal is yet to be determined.

55. The pith and substance of the Respondent's case is that the applicant had not exhausted the internal disciplinary mechanism as the appeal was and is still outstanding.

56. The applicant's counsel did not address the doctrine of exhaustion specifically but urged that the court had jurisdiction.

57. Evidently, the internal mechanism has not been exhausted.

58. Significantly, the doctrine of exhaustion is subject to exceptions where the court may find its upholding unhelpful in the resolution of a dispute.

59. Section 9(4) of the *Fair Administrative Action Act*, 2015 provides that;

> "Notwithstanding subsection (3), the High Court or a Subordinate Court may, in exceptional circumstances and on application by the applicant exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice."

60. In *William Odhiambo Ramogi & 3 others v Attorney General & 4 others* (supra), the court stated as follows;

> " . . . the first principle is that the High Court may in exceptional circumstances consider and determine that the exhaustion requirement would not serve the values enshrined in the *Constitution* or law before it. It is also essential for the court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

> The second principle is that the jurisdiction of the courts to consider valid grievances from parties who lack adequate audience before the forum created by a statute or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted."

61. The court is in agreement with these sentiments.

62. Although the Respondent's counsel insists on compliance with the internal mechanisms, the documents filed by the Respondent so far are reticent on why the applicant's appeal dated 24th November, 2022 is yet to be heard and determined more than 7 months later and no timelines have been provided.

63. In effect, the Respondent's counsel is persuading the court to uphold the exhaustion doctrine at the expense of the applicant as there is no guarantee as to when the appeal will be heard and determined. The Respondent has not offered any respite. This is arguably detrimental to the applicant.

64. Regrettably, the Respondent's counsel availed no documentary evidence to demonstrate why it has taken inordinately long to conclude an appeal.

65. In the court's view, it would be injudicious to uphold the exhaustion doctrine at the expense of the applicant.

66. The court is satisfied that the applicant's Notice of Motion falls within the exemptions created by Section 9(4) of the *Fair Administrative Action Act*, 2015 and is thus exempted from the obligation to exhaust the appellate process of the Respondent owing to the Respondent's inaction ostensibly due to the absence of a council.

67. Holding otherwise would deny the applicant audience before the court yet he has no other audience. Such a holding would additionally violate the provisions of Article 47(1) of the *Constitution* of Kenya, 2010 which guarantees the right to fair administrative action that is "expeditious, efficient, lawful, reasonable and procedurally fair" also captured in Section 4(1) of the *Fair Administrative Action Act* and Section 3(1) of the *Employment and Labour Relations Court Act*, 2011.

68. Finally, the court is satisfied that it is judicious to exempt the applicant from the exhaustion doctrine to prevent the Respondent from keeping him on tenterhooks indefinitely in addition to subjecting him to vagaries of politics.

69. Consequently, the Respondent's objection is unsustainable and it is accordingly dismissed.

70. As to whether the Notice of Motion herein is merited, the court proceeds as follows; The applicant is seeking a temporary injunction against the Respondent to restrain it from filing his job position of Associate Professor at the University pending the hearing and determination of this suit.

71. It requires no belabouring that the principles governing the grant of a temporary injunction are well settled and were enunciated in *Giella v Cassman Brown Co.* (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 an application on the balance of convenience. (*E.A. Industries Ltd v Trufoods* (1972) E.A 420."

72. Before delving into the specific requirements 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 p.48.

73. As regards a *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 in a civil application includes but is 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 exist a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

74. The pith and substance of the Notice of Motion is that termination of the Claimant/Applicant's employment was unfair both substantively and procedurally as the evidence before the Disciplinary Committee was insufficient to return a verdict of culpability and the applicant's right to fair hearing was violated.

75. From the documents furnished by the applicant, it is discernible that Respondent does not appear to have complied with the law in its totality which necessitates a substantive response by the Respondent.

76. It is unclear as to whether the student and other witnesses testified at the disciplinary hearing and were cross-examined by the applicant or whether the documentary evidence relied upon by the committee had been availed to the applicant.

77. In its totality, the material before the court is sufficient for the court to hold that the applicant has demonstrated that he has a *prima facie* case with a probability of success.

78. The concept of probability of success was explained in *Habib Bank AG Zurich v Eugene Marion Yakob* CA No 43 of 1982.

79. As regards irreparable injury, 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 "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.

80. 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 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 . . ."

81. Judicial authority is however unequivocal that a party should not be permitted to benefit by acting unlawfully just because it is in a position to pay for it as held in *Aikman v Muchoki* (1984) KLR 353.

82. In his Supporting Affidavit, the applicant deposes that if the position of Associate Professor was not preserved in the meantime, he stood to suffer great prejudice as the prayer of reinstatement would be defeated.

83. In the premises, the applicant has not demonstrated how the "great prejudice" is unquantifiable in monetary terms.

84. In the circumstances, the court is not persuaded that the second requirement has been met.

85. Lastly, the concept of balance of convenience was explained in *Bryan Chebii Kipkoech v Barnabas Tuitoek Bargoria & another* (2019) eKLR, 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 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. . . 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."

86. In the instant suit, the applicant has not demonstrated the comparative inconvenience to the parties if the injunction sought is granted or withheld.

87. In sum, having failed to establish that he stood to suffer irreparable injury as required by the guiding principles in *Giella v Cassman Brown Co.* (supra) if the temporary injunction is not granted, the court is not persuaded that the balance of convenience would be in his favour.

88. For the above stated reasons, it is the finding of the court that the applicant has failed to demonstrate that the application for temporary injunction is merited.

89. It is essential to underline that since the Claimant/Applicant has prayed for reinstatement, which is a terminal remedy and which is most appropriate after hearing the parties on the issues arising, other parties are deemed aware of the prayers made.

90. In the upshot, the Notice of Motion dated 13th March, 2023 is unmerited and it is accordingly dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 18TH DAY OF SEPTEMBER 2023

DR. JACOB GAKERI

JUDGE