



Mbaja & 28 others v County Government of Migori & another (Cause E041 of 2023) [2023] KEELRC 2562 (KLR) (19 October 2023) (Ruling)

Neutral citation: [2023] KEELRC 2562 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E041 OF 2023
CN BAARI, J
OCTOBER 19, 2023

BETWEEN

SYMON AYORO MBAJA 1ST CLAIMANT
ABICH OMONDI MICHAEL 2ND CLAIMANT
JACOB OUMA NYAMBO 3RD CLAIMANT
KENNEDY OUMA ORONDO 4TH CLAIMANT
SMITH DAVIDE JOHN 5TH CLAIMANT
GEORGE O ACHOLA 6TH CLAIMANT
MAURINE AKINYINYANGOKO 7TH CLAIMANT
DAPHROS AKINYA 8TH CLAIMANT
KENNEDY PANYAKO 9TH CLAIMANT
DENIS ABUGA 10TH CLAIMANT
CAROLINE ONGALO 11TH CLAIMANT
PAMELA NGOME 12TH CLAIMANT
JANE ONGOLA 13TH CLAIMANT
DANIEL ODHIAMBO 14TH CLAIMANT
GRACE AKINYI OPONDO 15TH CLAIMANT
JUDITH AKOTH NYAMWAYA 16TH CLAIMANT
MAURICE ODIERE SWAO 17TH CLAIMANT
HARRY PHILIP OGENDO 18TH CLAIMANT
QUIRY AWUOR OUMA 19TH CLAIMANT



MARGARET ATIENO AOL 20TH CLAIMANT
ISAIAH MWITA 21ST CLAIMANT
ROBI CAROLINE 22ND CLAIMANT
JOEL OKUTA 23RD CLAIMANT
DENNIS ABICH GWEWA 24TH CLAIMANT
ROSA ACHIENG ODHIAMBO 25TH CLAIMANT
SAMUEL OCHIENG OPIYO 26TH CLAIMANT
EZEKIEL OPOLO ONYANGO 27TH CLAIMANT
BENTA ADHIAMBO ODIRA 28TH CLAIMANT
MAURICE OKELLO OBONYO 29TH CLAIMANT

AND

COUNTY GOVERNMENT OF MIGORI 1ST RESPONDENT
MIGORI COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

RULING

1. This ruling relates to the Claimants' motion application dated 19th June, 2023, brought pursuant to Order 40 Rules 1, 2, & 3 of the *Civil Procedure Rules*, Section 3A of the *Civil Procedure Act*, Articles 27 (1), 35(b), 41(1) and 47 of *the Constitution* and Sections 10 (7), 37 (1,2,3 & 4) and Section 35 of the *Employment Act*. The Applicants/Claimant seek orders:
 - i. Spent.
 - ii. Spent.
 - iii. That an order do issue restraining the Respondents, their agents, representatives and/or any other person acting through the directions of the Respondents from intimidating and/or unlawfully terminating the contracts of the Applicants pending hearing and determination of the claim.
 - iv. That in the alternative, pending the hearing and determination of this claim, an order do issue directing the Respondents, their agents, representatives and/or any other person acting through the directions of the Respondents to reinstate the Applicants to their respective positions of employment if already considered terminated.
 - v. That an order do issue compelling the Respondents to employ the Applicants/Claimants on permanent terms.
 - vi. That the costs of the application be provided for.
2. The motion is supported by grounds on the face and the affidavit of Jacob Ouma Nyambo, Abich Omondi Michael and Symon Ayoro Mbaja sworn on 19th June, 2023. The crux of the motion is that the Respondents have continued retaining the Applicants as casual labourers despite having served for between 4 to 14 years.



3. It is the Applicants' case that the Respondents have been verbally threatening them with termination until recently, when they published a list of employees leaving them out, hence constructively terminating their services.
4. The Applicants aver that the new employees have been employed without following due process, and that the process of their termination remains questionable and lacking in transparency. It is the Applicants' case that they were not informed of the reasons for their termination contrary to Article 47 of *the Constitution*.
5. The Respondents opposed the application vide a replying affidavit sworn by one Gadus Oluoch Adis on 20th July, 2023. The Respondents' position is that the Applicant were employed on fixed term contracts of three months which indicated that they will not be renewable.
6. The Respondents further aver that the Applicants' contracts have since expired, and were not renewed, and hence they have ceased being employees of the 1st Respondent
7. It is the Respondents' case that they have not breached any law and have paid the Applicant their dues upon the lapse of their contracts. They aver that the Applicants' motion is misconceived and ought to be disallowed.
8. The motion was urged orally on 19th September, 2023. The Respondents' Counsel did not attend Court during the hearing.

Determination

9. Upon careful consideration of the Applicants' motion, their Counsel's oral submissions and the Respondents' reply, the issue that arise for my determination is whether the Applicants are entitled to the award of injunctive reliefs.
10. In *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR the Court restated the law on grant of injunctions in the following words:
 - 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.....”
11. The Court of Appeal in the case of *Nguruman Limited (Supra)* further stated thus:

“...these are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially... if the applicant establishes a *prima facie* case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be



granted, however strong the applicant's claim may appear at that stage. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration."

12. Further, Ringera, J in *Dr. Simon Waiharo Chege v Paramount Bank of Kenya Ltd*. Nairobi (Milimani) HCCC No. 360 of 2001 held thus:

"The remedy of injunction is one of the greatest equitable relief. It will issue in appropriate cases to protect the legal and equitable rights of a party to litigation which have been, or are being or are likely to be violated by the adversary. To benefit from the remedy, at an interlocutory stage, the applicant must, in the first instance show he has a *prima facie* case with a probability of success at the trial. If the Court is in doubt as to the existence of such a case, it should decide the application on a balance of convenience. And because of its origin and foundation in the equity stream of the jurisdiction of the Courts of judicature, the applicant is normally required to show that damages would not be an adequate remedy for the injury suffered or likely to be suffered if he is to obtain an interlocutory injunction. As the relief is equitable in origin, it is discretionary in application and will not issue to a party whose conduct as appertains to the subject matter of the suit does not meet the approval of the eye of equity."

13. The first issue is whether the Applicants have established a *prima facie* case. The Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR 125, held:

".....It may not be easy to define what is meant by "*prima facie* case", but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...The terms "*prima facie*" case, and "genuine and arguable" case do not necessarily mean the same thing, for in using another term, namely a sustainable cause of action, the words "*prima facie*" are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant's interest to adopt a genuine and arguable case standard rather than one of a *prima facie* case, the former being the lesser standard of the two...In civil cases a *prima facie* case is a case in 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 to call for an explanation or rebuttal from the latter. A *prima facie* case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."

14. The Applicants in their grounds and supporting affidavit state that they have been in the service of the Respondents for between 4 and 14 years. The Respondents on their part, argue that the Applicants were employed on fixed term contracts and which have since terminated by effluxion of time.
15. It is not disputed that the Applicants have been in the service of the Respondents, and which in itself, is indication that their employment is threatened and needs to be protected. This in my view, amounts to establishment of a *prima facie* case.



16. On the whether the Applicants have demonstrated irreparable injury, the Court of Appeal in Nguruman Limited case (*Supra*) opined:

“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 requirement and the burden is on the applicant to demonstrate, *prima facie*, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

17. The Applicants have been in the service of the 1st Respondent and the amount each of them earned on account of monthly salary is a known figure. This in my opinion confirms that the injury they may incur by this court not granting the injunctive reliefs, is measurable and that it is also true, that such injury if, any, is the nature that can be compensated monetarily.

18. Further, it is also not clear from the record whether the Applicants are still in the service of the 1st Respondent, and which is not only unclear to the Court, but to the Applicants as well, especially going by their alternative prayer, where they seek reinstatement.

19. The general rule is that a prayer for reinstatement should not be granted at an interim stage. (See Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR). The Applicants’ alternative prayer fails on this account.

20. The Applicants’ final prayer is for the Court to compel the Respondents to hire them on permanent terms of service. This no doubt is a final order which is not available to the Applicants at this stage. It likewise fails and is dismissed.

21. In whole, I hold that the Applicants have not proved a case for the grant of the injunctive orders sought, and I dismiss the application with no orders on costs.

22. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 19TH DAY OF OCTOBER, 2023.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Ogwe present for the Applicants/Claimants

N/A for the Respondents

Ms. Omolo & Erwin C/As

