Kalasinga & 3 others v Moi University (Cause 30 of 2019)
[2023] KEELRC 2581 (KLR) (12 October 2023) (Ruling)

Neutral citation: [2023] KEELRC 2581 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET

CAUSE 30 OF 2019

MA ONYANGO, J

OCTOBER 12, 2023

BETWEEN

JOHN KALASINGA ..... 1ST CLAIMANT

J. MBAI AZIHEMBA ..... 2ND CLAIMANT

STANLEY K. KIPROP ..... 3RD CLAIMANT

WILSON KIPTARBEI KEMBOI ..... 4TH CLAIMANT

AND

MOI UNIVERSITY ..... RESPONDENT

RULING

1. The Application before me has been filed by the Claimants under the provisions of section 12 of the *Employment and Labour Relations Court Act*, 2011 seeking for orders that:

   i. Spent

   ii. Spent

   iii. That the Honourable Court be pleased to issue an injunction against the respondent restraining it whether by itself, its servants and/ or agents from enforcing the surcharge against the Claimants pursuant to its decisions as communicated on the 8th August 2018 and 11th July 2019 and from harassing or victimizing the 1st, 2nd and 3rd Applicants during their continued employment relationship pending the hearing and determination of the intended appeal to the Court of Appeal

   iv. That the costs of this application be provided for

2. The Respondent filed a Replying affidavit sworn on 24th July 2023 by Petronila C. Chepkwony, the Respondent's Senior Legal Officer in opposition to the application. According to the Respondent,

vide the judgment dated 15th June 2023 this court established that the Claimants had failed to prove their allegations in their claims; that the Claimants are therefore seeking injunctive orders against the Respondent restraining it from enforcing the irregularly obtained payment by way of a surcharge, against each Claimant.

3. The Respondent maintains that the Claimants intended appeal is preposterous and is highly unlikely to succeed. It is further contended that the Claimants are required to prove that the Respondent will be unable to refund them the total surcharge payment amounting to Kshs 2,174,200 in the unlikely event that their appeal succeeds.

4. It is the Respondent's proposal that each Claimant deposits ¾ of the surcharge amount to an interest earning account, in the joint names of the advocates on record pending the hearing and determination of the intended appeal.

5. The Respondent urged the court to instruct the Claimants to furnish security of costs in their pursuit of the deliberation of this matter and that it is in the interests of justice and fairness to the Respondent that the Claimants do furnish Kshs 1,630,650.

6. According to the Respondent, if the application is allowed without the requisite security for due performance , the same will occasion substantial injustice to the Respondent, as it will have the effect of prolonging the expeditious surcharge upon the Claimants as their case against the Respondent was dismissed.

7. In a rejoinder, the Claimants filed a supplementary affidavit dated 7th August 2023 sworn by the 1st claimant reiterating the contents of his supporting affidavit to the application dated 12th July 2023. Mr Kalasinga averred that the Respondent had already commenced the process of enforcing the surcharge against the Claimants through issuance of letters seeking to enforce the surcharges. He maintains that the risk of the appeal being rendered nugatory is imminent as the appeal seeks to challenge, among others, the decision of the Respondent to impose the surcharges on them.

8. The application was canvassed by way of written submissions. The Claimants filed their application on 11th August 2023. I have perused the record and found no submissions for the Respondent.

Determination

9. I have considered the application herein, the rival affidavits and the submissions on record. The issue that falls for my determination in my view is whether a temporary injunction should issue in favour of the Claimants.

10. In the instant case, the Claimants have stated that they have preferred an appeal against the judgment of this court delivered on 15th June 2023 which judgment dismissed their claim. In that Statement of claim dated 24th July 2019, the Claimants had sought an interlocutory injunction to restrain the Respondent from enforcing the surcharge against the Claimants pursuant to the Respondent's decision as communicated on 8th August 2018 and 11th July 2019.

11. The Claimants have contended that the Respondent has commenced the process of surcharge against the them as evidenced by the letters marked A,B,C and D annexed to the Claimant's supplementary affidavit.

12. I have perused the said letters dated 17th July 2023 which are similar in content. I wish to reproduce one such letter hereunder;

PF/NO. 0298 17th June, 2023

Mr Jose M. Azihemba

Box 44,

NDALU

Dear Mr Azihemba,

RE: SURCHARGE OF KSHS. 1,168,000

The above subject matter refers,

The Moi University Management Board during its 144th meeting held on Monday 3rd July ,2023 noted that the court matter Eldoret ELRC No. 30 of 2019, in which you challenged the decision to surcharge you Kshs. 1,168,000, was dismissed from the judgment , the University is at liberty to enforce the surcharge.

This is, therefore , to inform you that you are required to pay Kshs 1,168,000 being money you were irregularly paid ,on or before 17th AAugust,2023 failure to which legal action shall be taken against you.

Signed

Prof. Eng . Kirimi H. Kiriamiti, Ph.D

Deputy Vice Chancelor ,(Administration, Planning and Strategy)

Cc Vice Chancellor

Deputy Vice Chancellor

Chief Finance Officer

Senior Legal Officer

Pensions Manager

13. The applicants have stated in the supporting affidavit that since the orders made in the judgment are negative they cannot seek stay of execution but have instead prayed for injunction against the Respondent as the surcharge against them may be effected at any time together with further unspecified action which will be detrimental to them and they are likely to suffer that may not be compensated by damages.

14. The applicants have not specified what action is likely to be taken against them by the Respondent other than enforcing the surcharge against the applicants. The letters written to them by the Respondent does not mention any other action to be taken against the Applicants.

15. In an application of this nature, the conditions that must be were laid out in the classical case of *Giella v Cassman Brown & Company Limited* (1973) E A 358 where the court expressed itself as hereunder;

> " 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."

16. The applicants have already preferred an appeal at the Court of Appeal. In view the appeal is to the Court of Appeal it is not for this court to determine whether or not the appeal has probability of

success as that is for the appeal court to determine. The court will however make a presumption that there is a prima facie appeal as the same has been filed.

17. Having made the assumption the court must consider the second principle on irreparable injury that would not be adequately compensated with damages.

18. In the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court of Appeal observed:

> "If the applicant establishes a prima facie case that alone is not sufficient to grant an interlocutory injunction, the Court must further be satisfied that the injury the applicant will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is 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 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."

19. The Court of Appeal further held that:

> "On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be 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."

20. In the instant case the Respondent is the employer of the applicants and it has not been demonstrated that it will be unable to refund all or any money recovered should the appeal be successful.

21. For these reasons I find no merit in the application herein with the result that the same is dismissed with costs.

DATED AND DELIVERED VITUALLY AT ELDORET THIS 12TH DAY OF OCTOBER 2023.

MAUREEN ONYANGO

JUDGE