Trenk & 2 others v Cricket Kenya (Cause E376 of 2023)
[2023] KEELRC 3026 (KLR) (23 November 2023) (Ruling)

Neutral citation: [2023] KEELRC 3026 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E376 OF 2023

JK GAKERI, J

NOVEMBER 23, 2023

BETWEEN

WALTER MUKINGINYI TRENK ..... 1ST CLAIMANT

MAURICE OKANGA ..... 2ND CLAIMANT

ABRAHAM LUGADA ..... 3RD CLAIMANT

AND

CRICKET KENYA ..... RESPONDENT

RULING

1. Before the court for determination is a Notice of Motion by the Applicants dated 8th May, 2023 and filed on 11th May, 2023 seeking Orders That;

    1. Spent.

    2. Spent.

    3. This Honourable Court do issue a temporary injunction restraining officials/Directors, their representatives and/or agents of the Respondent from accessing and withdrawing funds from its bank accounts within Prime Bank, I&M and Kenya Commercial Bank pending the determination of this suit.

    4. The applicants be paid their dues amounting to Kenya Shillings Eight Million Six Hundred and Eighty-Seven Thousand (Kshs.8,687,000/=).

    5. The costs of this suit.

2. The Notice of Motion is expressed under Sections 17(1), (2), 20(1), 20(2)(b) of the *Employment Act*, 2007, Section 1A, 1B and 3A of the *Civil Procedure Act*, Order 39 and 40 of the *Civil Procedure Rules*, 2010 and is based on the grounds set out on its face and the Supporting Affidavit of Walter Mukinginyi

Trenk sworn on 8th May, 2023 who deposes that the Claimants/Applicants were employed by the Respondent under a three (3) year contract.

3. The affiant states that he was employed on 1st March, 2022 as the Deputy Chief Executive Officer and signed a Memorandum of Understanding with the Chairman of the Board of Directors and the Respondent was expected to pay him USD 3,600 per month but was not paid for the entire period of employment.

4. That the affiant was supposed to co-ordinate the co-operation between the Respondent and Barbados Cricket Association which entailed staying abroad for long periods.

5. That the Chairman of the board held a meeting with staff in April 2022 and promised to clear all salary arrears as soon as the bank accounts were opened following a restraining order following a petition challenging the elections held in February 2020. However, the court allowed temporary access whenever an application was made. The orders were lifted in September 2022 but no salary was paid.

6. The affiant states that employees of the Respondent are mostly in the field and output is measured by the number of prayers one introduces to the sport and keeps them hooked to it and the growth in numbers of youngster who have joined the sport is a clear manifestation of their hard work and dedication to the sport.

7. The affiant states that the Respondent owes them as follows;

    1st Claimant Walter Mukinginyi Trenk USD 54,000.

    2nd Claimant Maurice Okanga Kshs.684,000.

    3rd Claimant Abraham Lugada Kshs.713,880.

Response

8. In its Replying Affidavit sworn by Ronald Bukusi on 22nd May, 2023, the affiant deposes that the Respondent does not owe the Claimants the sum claimed as they had not tendered evidence to prove the same.

9. That the 1st Claimant was not an employee of the Respondent and the Memorandum of Understanding he signed with the Respondent was not ratified by the board of directors of the Respondent and was not binding as such.

10. That the 1st Claimant's position did not exist in the Respondent's Constitution and he rendered no services to the Respondent as the MOU between the Respondent and the Barbados Cricket Association did not materialise and in any case the MOU was between the 1st Claimant and the Respondent and was not an employment contract and it provided for the payment of a sum of Kshs.400,000/= as opposed to monthly salary in Kshs or USD and dispute resolution under the MOU was by Mediation and Arbitration and the court had no jurisdiction to entertain the suit.

11. The affiant further depones that the 2nd and 3rd Claimant failed to disclose that they signed letters dated 1st April, 2023 acknowledging receipt of full and final payments less withholding tax as follows; 2nd Claimant Kshs.114,000/=, 3rd Claimant Kshs.118,980/= and the two were seeking to enrich themselves unjustly.

12. That the Respondent's accounts were accessible with and without the court's intervention.

13. The affiant further states that the sum claimed by the Applicants was not supported by any court decree and lacked supportive pleadings.

14. That the prayers sought would paralyze the Respondent if granted as it relies on the accounts to receive funds from the government, well-wishers and the International Cricket Council (ICC) and its certificate of registration may be cancelled under Section 51 of the *Sports Act*.

15. That the Applicant stood to suffer no prejudice as any decree obtained was executable against the Respondent.

16. The affiant prays for dismissal of the application with costs.

Applicant's Submissions

17. Counsel isolated 5 issues for determination touching on employer/employee relationship between the 1st Claimant and the Respondent, rendering of services by the 1st Claimant, damages for discrimination, status of the 2nd and 3rd Claimant, claim for loss of earnings.

18. On the 1st issue, counsel relied on the holding in *Indigo EPZ Limited V Eastern and Southern African Trade Development Bank* and *Tononoka Steel Ltd V Eastern & Southern African Trade Development Bank* to submit that an agreement purporting to oust the court's jurisdiction is void, that the choice of arbitration does not oust the jurisdiction of the court.

19. Counsel submitted that the 1st Claimant became an employee of the Respondent in his capacity as the Deputy Chief Executive Officer to help raise Standards of Cricket and the two signed MOU and the 1st Claimant fulfilled his part of the bargain.

20. That the salary payable would be negotiated which took place in June 2022.

21. Counsel submitted that the 1st Claimant learnt that he was not an employee of the Respondent from the Replying Affidavit sworn by Ronald Bukusi.

22. That the MOU was supposed to guide the Respondent in the drafting of the appointment letter.

23. Reliance was made on the provisions of Section 9(2) and 10(7) of the *Employment Act* on the contract of employment and proof of terms of employment.

24. As regards rendering of services, counsel submitted that the 1st Claimant rendered services as he organized tournaments and procured services of vendors.

25. On the alleged discrimination, counsel submitted that the board's failure to approve the MOU between the Respondent and the 1st Claimant was discriminatory as the board had welcomed new board members without approval of the Council.

26. Counsel relied on Board minutes to urge that the 1st Claimant was discriminated as other persons whose positions did not exist were considered, such as the position of Chief Finance Officer.

27. Reliance was also made on the sentiments of the Court of Appeal in *Barclays Bank of Kenya Ltd V Gladys Muthoni & 20 others* (2018) eKLR and the Supreme Court in *Law Society of Kenya V Attorney General & COTU*, Petition No. 4 of 2018 on the concept of discrimination.

28. That working for 6 months without an appointment letter was discriminatory.

29. Counsel further cited the decisions in *Willis V United Kingdom* 36042/97 and *Keith V Kentegra Biotechnology Ltd* (2021) eKLR to urge the court to accept his invitation.

30. That the remuneration was negotiated in US Dollars hence the claim for payment in USD.

31. As regards the 2nd and 3rd Claimant, counsel submitted that they entered into "some agreement" with the Respondent surrendering their claims for salary arrears for 36 months but the document signed by the 2nd Claimant does not indicate the parties or why the agreement was signed.

32. Counsel further submitted that the 3rd Claimant's messages on WhatsApp chat was unclear and ought to be viewed as a conversation between two friends working for the same employer as opposed to a surrender of a claim for salary arrears and the documents should be ignored by the court.

33. Counsel further submitted that the fact that the 2nd and 3rd Claimant signed agreement forfeiting their salary arrears was evidence that they were employees.

34. Finally, counsel submitted that the list of staff members of the Respondent annexed by the Claimants shows the persons who had not been paid by the Respondent but had not filed any suit.

Respondent's submissions

35. Counsel isolated no specific issues for determination but submitted on the reasons why the Notice of Motion ought to be dismissed.

36. Counsel submitted that the applicant's submissions had not addressed the application specifically and the last page addressed the final reliefs sought in the Memorandum of Claim and had introduced evidence unsupported by the Supporting Affidavit.

37. Counsel submitted that the reliefs sought were self-defeating in nature in that the applicants sought an injunction to restrain the Respondent from operating its accounts yet they were claiming payment of Kshs.8,687,000/= which would be impracticable.

38. Counsel further urged that the applicants had not satisfied the principles of granting of an injunction enunciated in *Giella V Cassman Brown* as they did not produce documents to establish a prima facie case, and in particular of the alleged funding and the amount claimed against the Respondent was denied and the application was premature.

39. That under the MOU, the fee payable to the 1st Claimant was Kshs.400,000/= for the study not per month.

40. Counsel submitted that there was no dispute between the Claimants and the Respondent regarding the latter's accounts or evidence of an employment relationship between the Claimants and the Respondent.

41. That the Claimants had not proved that they were employees in the first place as none of them had provided a payslip, proof of salary, contract of employment or statutory deductions or other evidence of such a relationship.

42. In the case of the 1st Claimant, the MOU on record did not create an employment relationship but a partnership. That he had not filed evidence to show that he had any other engagement with the Respondent otherwise than through the MOU which was not ratified by the Respondent.

43. Counsel further urged that neither the 2nd nor the 3rd Claimant had adduced evidence to prove that they were employees of the Respondent or that the amounts paid to them were salary arrears and the payroll relied upon did not belong to the Respondent.

44. Counsel submitted that the Respondent had a superior right to the monies in its bank account and the Claimants had not proved that they would suffer any loss not compensatable in damages as they

were not employees, and the amount claimed is due and owing, and on proof it will be paid or executed against the Respondent.

45. Finally, counsel urged that the balance of convenience was not in Claimants favour as an injunction would cripple the Respondent's operations and the applicants stand to suffer no prejudice if the order was declined.

46. As regards the claim for Kshs.8,687,000/=, counsel urged that this was a prayer for attachment before hearing the suit and cited the sentiments of the court in *Godfrey Oduor Odhiambo V Ukwala Supermarkets Kisumu Ltd* (2016) eKLR to urge that the Claimants had not proved that the Respondent was frustrating their decree or anticipated decree.

47. Counsel argued that there was no evidence that the Respondent would abscond the court's jurisdiction or use the monies in a manner to frustrate any judgment made against it and the Respondent had not been requested to grant security and there was no evidence of how the sum claimed was arrived at.

48. Counsel finally submitted that the Respondent was unaware of the Claimant's case as their Submissions were silent on the application and there were allegations of redundancy and no evidence had been adduced to prove that the Respondent intended to defeat the judgement, if any, in favour of the Claimants.

49. Counsel prayed for dismissal of the application with costs.

Determination

50. It is common ground that the 1st Claimant executed a Memorandum of Understanding (MOU) with Cricket Kenya on 9th May, 2022 which *inter alia* set out the objectives and scope of the engagement as to;

    1. Conduct a study of the cricket counties in Kenya and identify their immediate needs for the development of the game at the grassroots.

    2. Develop and strengthen the National body to be responsive to the needs of the twenty first century.

51. The MOU makes reference to a partnership and areas of collaboration and additionally sets out duties and obligations of the parties.

52. The parties appear to be in agreement that the MOU was the basis of their engagement.

53. Regrettably, the 2nd and 3rd Claimants availed no documentary evidence of their relationship with the Respondent or when it commenced and the intended duration.

54. As correctly submitted by the Respondent's counsel, the Claimant's counsel appear to have filed submissions for the main suit as opposed to the Notice of Motion dated 8th May, 2023, the subject matter of this ruling.

55. Evidently, the Claimants are praying for an injunction as well as special damages of Kshs.8,687,000.00 being the amount the Respondent allegedly owes them.

56. Before delving into the specific conditions for the grant of an injunction as prescribed by law, it is elemental to underline 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 and others* (1976) KLR 42 at page 48.

57. Needless to belabour, the attendant principles 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 the application on a balance of convenience (E.A Industries Ltd V Trufoods (1972) EA 420."

58. I will now proceed to determine whether the applicants have satisfied the conditions necessary for grant of a temporary injunction.

Prima facie case

59. In *Mrao Ltd V First American Bank of Kenya Ltd & 2 others* (2003) eKLR, the Court of Appeal expressed itself as follows as regards a *prima facie* case.

> " 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."

60. Similarly, in *Nguruman Ltd V Jan Bonde Nielsen & 2 others* (2014) eKLR, the Court authoritatively stated 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 threated 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."

61. Equally, probability of success was explained in *Habib Bank AG Zurich V Eugene Marion Yakob* C.A No. 43 of 1982.

62. The court is guided by these foregoing sentiments of the Court of Appeal.

63. The pith and substance of the Claimants case is that they were employees of the Respondent who owes them salary arrears for 15 months. It is unclear as to when the Respondent stopped paying the alleged salaries as no payslips have been provided, no emails or demands for the outstanding salary.

64. It is equally unclear to the court as to how the sum of Kshs.8,687,000.00 was arrived at let alone the salary claimed by the 1st Claimant and why in US Dollars while the other two Claimants were allegedly paid in Kenya Shillings.

65. In order for the Claimants to establish that the Respondent owes them the amount claimed, it is incumbent on them to prove that they were indeed employees of the Respondent and/or rendered certain services for which they were not paid. Since they allege to have been employees, it behooves them to demonstrate that the employer/employee relationship existed between them and the Respondent.

66. While the 1st Claimant availed a signed copy of a MOU between himself and the Respondent, the 2nd and 3rd Claimant have not availed any documentary evidence of their association with the Respondent.

67. The court is cognisant of the fact that since this is an interlocutory application, more evidence is likely to be availed for purposes of disposal of the main suit.

68. However, in the court's view, the Claimants have not placed sufficient material before it for a preliminary finding that they were employees of the Respondent for purposes of this application, so as to contextualize the rights allegedly violated or threatened with violation.

69. Although the 1st Claimant appears to have a "genuine and arguable case" as stated in Mrao Ltd (*Supra*), the 2nd and 3rd Claimants have not established such a case, but since the action is joint, the court is persuaded that the 2nd and 3rd Claimant may for purposes of this application ride on the fact that the 1st Claimant has established that he has what may be described as a prima facie case against the Respondent.

Irreparable injury

70. According to *Halsbury's Law of England* 3rd Edition Vol. 21 paragraph 739 at page 352,

> ". . . By the term irreparable injury 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 . . ."

71. In *Nguruman Ltd V Jan Bonde Nielsen & 2 others* (*supra*) the Court of Appeal stated as follows;

> "On the second factor, that the Applicant must establish 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 nature and extent of the injury.

72. The applicant's case is hinged on restraining the Respondent from accessing and withdrawing monies from its bank accounts at Prime Bank, I&M Bank and the Kenya Commercial Bank Ltd pending the hearing and determination of the suit.

73. It is unclear as to how much is in the alleged bank accounts and who the signatories of the accounts are.

74. It is also unclear as to whether these are the only accounts the Respondent has and through which it finances its operations and receive funds from various sources.

75. Puzzlingly, the Supporting Affidavit sworn by the 1st Claimant makes no reference to the prejudice the Claimants stand to suffer if a temporary injunction is not granted.

76. In other words, the Claimants have failed to demonstrate "prima facie nature and extent of the Injury" they stand to suffer.

77. Relatedly, the amount allegedly owed by the Respondent is specific and thus remediable by damages.

78. The court, is in the circumstances not persuaded that the requirement of irreparable Injury has been established.

79. Finally, the concept of balance of convenience was aptly explained in *Byran 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 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."

80. Significantly, the case relates to the operations of a registered sports body and the only national governing body for Cricket in Kenya which is responsible for promoting the Sports in the Country and whose operations should not be hindered unless the said operations are an infringement of rights or freedoms guaranteed by law.

81. In the court's view, since the Claimants have failed to demonstrate the prejudice or inconvenience they stand to suffer in the absence of an injunction, the balance of convenience cannot be in their favour.

82. For the above mentioned reasons, it is the finding of this court that the applicants have failed to demonstrate their entitlement to a temporary injunction against the Respondent.

83. Similarly, the effect of such an injunction would be to paralyze the operations of the Respondent indefinitely.

84. As regards the claim for Kshs.8,687,000.00, the Applicants/Claimants did not submit on this issue or demonstrate why the same ought to be paid or secured before the suit is heard and determined on merit where the same amount is claimed as prayer No. (b) under paragraph 14 of the Memorandum of Claim.

85. As correctly argued by the Respondent's counsel, the Claimants have failed to demonstrate that the Respondent has taken or is threatening to take any action to obstruct or delay execution of a court decree or render such a process useless.

86. More significantly, the amount claimed by the Claimants is denied by the Respondent and thus a contested issue which can only be determined on the basis of the evidence availed by the parties at the hearing of the main suit.

87. To order the Respondent to pay the amount claimed would be tantamount to condemning the Respondent unheard and rewarding the Claimants for a suit they are yet to prove in court.

88. From the foregoing, it is clear that the prayer for Kshs.8,687,000.00 by the Claimants against the Respondent is for dismissal and it is accordingly dismissed

89. In the upshot, the Notice of Motion dated 8th May, 2023 is for dismissal and it is accordingly dismissed.

90. Costs shall be in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 23RD DAY OF NOVEMBER, 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