



REPUBLIC OF KENYA



KENYA LAW
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**Odhiambo v B Braun Medical Kenya Ltd (Cause E433 of 2023)
[2023] KEELRC 2972 (KLR) (21 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2972 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E433 OF 2023
JK GAKERI, J
NOVEMBER 21, 2023**

BETWEEN

SAMUEL OMOTO ODHIAMBO CLAIMANT

AND

B BRAUN MEDICAL KENYA LTD DEFENDANT

RULING

1. Before the court for determination is the claimant's notice of motion dated May 22, 2023 filed under certificate of urgency seeking Orders That:-
 1. Spent.
 2. Spent.
 3. Pending the hearing and determination of this suit, an injunction do issue restraining the Respondent either by itself, its directors, its servants, agents and or employees from interfering with the Claimant's employment at the Respondent Company as well as from advertising, shortlisting, interviewing, recruiting or in any other way filling the position of Product Specialist in Western.
 4. Costs of this application be provided for.
2. The notice of motion is based on the grounds enumerated on its face and is supported by the affidavit of the claimant/applicant sworn on May 22, 2023.
3. The affiant deposes that he was an employee of the Respondent earning a monthly salary of Kes 80,000.00.



4. That he was issued with a notice to show cause on April 11, 2023, responded, invited for a disciplinary hearing by letter dated April 18, 2023, attended, though unwell and was summarily dismissed by letter dated May 2, 2023.
5. According to the applicant, the termination of employment was based on vague grounds and his response and evidence at the hearing was not considered.

Response

6. In its grounds of opposition, the Respondent avers that the application is incompetent, frivolous and vexatious and offended the law as the Claimant has conceded that there was no employment relationship and has no basis for any injunctive relief.
7. That the Respondent had already engaged another Product Specialist Western Region.
8. The Respondent urges that the applicant had not demonstrated that an injunction was merited.
9. The respondent responded by a Replying Affidavit dated October 5, 2023 sworn by Joyce Wanjiru who deposes that the Respondent employed the Claimant on October 12, 2022 as a Product Specialist for the Western Region where he would engage Clinicians, Pharmacists, Procurement Managers and hospitals and sell the Respondent's products in the Western Region.
10. That the Claimant was dismissed in May 2023 and his position was taken over by another person recruited in June 2023 based in Kisumu and the instant application has been overtaken by events.
11. The affiant deposes that the Claimant was dismissed from employment on account of fraudulent fuel claim, absence from the workplace without authority and engaging in an altercation with another employee.
12. That the Claimant had agreed to return the Respondent's laptop but did not.
13. The affiant deposes that the hearing could not take place on April 21, 2023 as it was declared a public holiday, but attended on April 26, 2023 and made representations which the Respondent considered.
14. The affiant states that the Claimant's refusal to return the Respondent's laptop means that he did not come to court with clean hands.
15. The affiant prays for dismissal of the application with costs.

Applicant's Submissions

16. Counsel isolated three issues for determination;
 - i. Whether the applicant has a prima facie case for the orders sought to issue.
 - ii. Whether the court can interfere with the Respondent's Human Resource function on hiring and filling of a vacant position.
 - iii. Whether the claim or its substratum will be rendered nugatory.
17. On the first issue, counsel urged that the Claimant had met the threshold in *Mrao Ltd v First American Bank of Kenya & another* (2003) eKLR on the premise that the grounds of dismissal were unsubstantiated and unfounded and the procedure was a charade.
18. As regards interference with the Human Resource function by the court, counsel cited the sentiments of the court in *Aviation and Allied Workers Union v Kenya Airways Ltd* (2012) eKLR to urge that it



could it be shown that an employer acted unfairly as regards the procedural precepts in termination of employment.

19. As regards the substratum of the claim being rendered nugatory, counsel cited the sentiments of the court in *Public Service Commission & 72 others v Okiya Omtatah & 4 others* (2021) eKLR on reversibility of the act sought to be stayed and compensation in lieu.
20. Counsel urged that if the Respondent filled the position, the Claimant would suffer untold hardship in securing comparable employment as his family depended on him.
21. Counsel submitted that the Claimant had satisfied the threshold in *Giella v Cassman Brown & Co. Ltd* (1973) EA 358 and the respondent stood to suffer no prejudice.
22. Finally, counsel urged that courts only allow the employer to fill the vacant position on an acting capacity pending the hearing and determination of the application.
23. Reliance was made on the sentiments of the court in *Monica Tindi Waga v Heinrich Boll Stiftung* (2021) eKLR.

Respondent's Submissions

24. Counsel submitted that the application before the court was frivolous and an abuse of the court process and relied on rule 17(5) of the *Employment and Labour Relations Court (Procedure) Rules, 2016* to buttress the submission.
25. The decision in *Shadrack Musyoka v Middle East Bank Kenya Ltd* (2021) eKLR was cited to urge the court to make a similar finding.
26. Counsel submitted that even assuming that the Application was competent, the prayer for reinstatement was an admission that there was no employment relationship between the parties.
27. As to whether the applicant had met the threshold for grant of interlocutory injunction, counsel submitted that the applicant had neither demonstrated a prima facie case as articulated in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (2003), or irreparable harm as held by the Court of Appeal in *Nguruman Ltd v Jan Bonde Nielsen & 2 others* (2014) eKLR, nor that the balance of convenience was in his favour as any loss he stood to suffer was compensatable in damages.
28. Counsel further submitted that the applicant approached the court with unclean hands as he refused to return the Respondent's laptop and was thus unworthy of an equitable relief.
29. As to whether the remedy of reinstatement would be rendered nugatory, counsel relied on the sentiments of the court in *Rose Sang v Siginon Group Ltd* (2020) eKLR and the decision in *Monica Tindi Waga v Heinrich Boll Stiftung* (2021) eKLR cited by the applicant was distinguishable.

Determination

30. After careful consideration of the notice of motion, Supporting Affidavit, annexures, replying affidavit and submissions by counsel, the singular issue for determination is whether the Applicant's Notice of Motion dated May 22, 2023 is merited.
31. It is common ground that the only substantive order sought in the instant Notice of Motion is Prayer No. 3 which is an injunction to restrain the Respondent by itself, its directors, its servants, agents or employees from interfering with the Claimant's employment with the Respondent as well as from advertising, shortlisting, interviewing, recruiting or in any other way filling the position of Product Specialist, Western Region.



32. As correctly submitted by the Respondent’s counsel, the first limb of the prayer appear to be based on the proposition that there is an employment relationship between the applicant and the Respondent which is not supported by any documentary or other evidence before the court.
33. More significantly, in his Supporting Affidavit sworn on 22nd May, 2023, the Claimant lays it bare that his employment was terminated vide letter dated May 2, 2023 and explains that the letter cited vague grounds and the said letter is listed as part of the applicant’s list of documents dated May 22, 2023.
34. Finally, and as submitted by the Respondent’s counsel, the applicant is seeking reinstatement in the main suit, an admission that there is no employment relationship between the applicant and the Respondent.
35. An injunction, as correctly submitted by the Respondent’s counsel restrains what is threatened or may take place or is on-going in breach of a person’s rights.
36. It is unclear as to how an injunction could restrain an action or activity that has already been concluded.
37. To that extent, the court is not persuaded that the first limb of the applicant’s prayer No. 3 of the Notice of Motion is capable of being enjoined at this stage.
38. The only active portion of the prayer is the second limb namely; to restrain the Respondent from filling the position or any other action. In other words, the court is being called upon to order that the position of Product Specialist, Western should remain vacant pending hearing and determination of the main suit.
39. Needless to emphasis, the guiding principles for the grant of injunctions were articulated by the Court of Appeal in *Giella v Cassman Brown Co. Ltd* (1973) EA 358 as follows;

“The conditions for the grant of an interlocutory injunction are now, I think well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally 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.”
40. The principle of *prima facie* case with a probability of success was aptly captured by the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (supra) as follows;

“... a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It 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 as to call for an explanation or rebuttal from the latter.”
41. The foregoing principles were restated in *Kibutiri v Kenya Shell Ltd* (1981) KLR.
42. The Claimant’s case is grounded on the allegations that the grounds for dismissal were vague, unfounded and his representations both oral and written were not considered. He also alleges that he appeared for the disciplinary hearing while unwell and had a clean record.
43. According to the applicant, a warning letter would have been sufficient in the circumstances.
44. Although the foregoing can only be ascertained evidentiary during the hearing, documents on record would appear to suggest that some of the allegations made have supportive evidence.



45. In the circumstances, the court is persuaded that the applicant has demonstrated that he has an arguable case and arguably a prima facie case.
46. As regards irreparable injury, the Court of Appeal laid down the relevant principles in *Nguruman Ltd v Jan Bonde Nielsen & 2 others* (*supra*) and restated in *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR as follows;
- “Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”
47. Although the Applicant deposes that he has no source of income and was the bread-winner of his family, he has not deposed that he stood to suffer irreparable injury if the injunction sought was not granted nor particularised the nature of injury.
48. The applicant has failed to demonstrate that he will suffer injury that cannot be quantified in monetary terms.
49. In the circumstances, the applicant has failed to demonstrate that he stood to suffer irreparable injury as postulated by judicial decisions.
50. On the balance of convenience, the law requires the applicant to demonstrate that;
- “. . . the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting it” as held in *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (*supra*).
51. From the evidence on record, the claimant has not demonstrated that the balance of convenience tilts in his favour.
52. Relatedly, the Respondent’s counsel submitted that the applicant approached the court with unclean hands as he had declined to return the Respondent’s laptop valued at USD 1,260 which the Respondent was claiming in its counter-claim/set-off dated 28th July, 2023.
53. The celebrated maxims that he who comes to equity must do so with clean hands and he who seeks equity must do equity are taken into consideration in the grant or refusal of equitable reliefs.
54. The Applicant is duty bound to make material disclosure of the facts relied upon in approaching the court for an equitable relief and non-disclosure is frowned upon.
55. The Court of Appeal underscored the importance of disclosure in *Mohamed Shally Sese (Shah Sese) v Fulson Company Ltd & another* (2006) eKLR as follows;
- “The orders the applicant seeks are discretionary in nature and equitable. Equity calls to those seeking its aid to come before it with clean hands and also do equity.”



56. The court expressed similar sentiments in *John Njue Nyaga v Nicholas Njiru Nyaga & another* (2013) eKLR as follows;

“It is our considered view that one who comes to equity must come with clean hands and equity frowns upon secrecy and underhand dealings” The applicant has not done so and is undeserving of the orders he seeks.

57. In the instant application, the applicant did not disclose that he was still holding the Respondents laptop nor that he was ready and willing to hand over the same. The applicant seeks to restrain the Respondent from recruiting a replacement but is nevertheless holding on to its laptop.

58. Similarly, the Respondent avers that it had already filled the position of Product Specialist, Western Region and there was indeed nothing to stay.

59. In the upshot, having found that the applicant has failed to demonstrate the three requirements for the grant of a temporary injunction, the court is satisfied and holds that the applicant’s Notice of Motion dated May 22, 2023 is unmerited and it is accordingly dismissed.

60. Costs shall be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 21ST 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

