



REPUBLIC OF KENYA



KENYA LAW
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Oketch & 157 others v Gems National Academy & 2 others; Regis Runda Academy Limited (Interested Party) (Cause E432 of 2023) [2023] KEELRC 3443 (KLR) (21 November 2023) (Ruling)

Neutral citation: [2023] KEELRC 3443 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E432 OF 2023
NZIOKI WA MAKAU, J
NOVEMBER 21, 2023**

BETWEEN

ODUOR SAMUEL OKETCH & 157 OTHERS & 157 OTHERS & 157 OTHERS & 157 OTHERS CLAIMANT

AND

GEMS NATIONAL ACADEMY & 2 OTHERS & 2 OTHERS & 2 OTHERS & 2 OTHERS RESPONDENT

AND

REGIS RUNDA ACADEMY LIMITED INTERESTED PARTY

RULING

1. The Claimants/Applicants filed a Notice of Motion dated 29th May 2023 seeking to be heard for orders:
 - a. Spent.
 - b. That an order of temporary injunction be and is hereby granted restraining the 1st, 2nd and 3rd Respondents either by themselves, their servants assign, agents or any person claiming under them from terminating or purporting to terminate employment contracts existing between the Applicants and the 1st Respondent, Regis School, Runda until this application is heard and determined.
 - c. That an order of temporary injunction be and is hereby granted restraining the 1st, 2nd and 3rd Respondents either by themselves, their servants assign, agents or any person claiming under them from changing the management of Regis School, Runda, transferring ownership, offering for sale or in any other



manner disposing of the 1st Respondent to the Interested Party or any other party until the Claim filed herewith is heard and determined.

- d. That an order of temporary injunction be and is hereby granted restraining the 1st, 2nd and 3rd Respondents to settle the issue of the outstanding debts including discharging the Applicants from any third-party claims and undertakings including but not limited to The Kenya Revenue Authority, National Hospital Insurance Fund and National Social Security Fund, before full transfer of Regis School, Runda business to the Interested Party or any other management.
 - e. That an order be and is hereby granted to compel the 1st, 2nd and 3rd Respondents to pay the Applicants their outstanding salaries and benefits.
2. The Application was based on the grounds set out therein and supported by the Affidavit of Mr. Wycliffe Timbwa, the 6th Applicant, on behalf of the Co-Applicants. Mr. Timbwa averred that the Applicants are employees of the 1st Respondent who were transferred to the said school from GEMS Cambridge International School-Nairobi that is owned by the Respondent, upon its untimely closure in 2019. That the Applicants are bound by employment contracts with the 1st Respondent which is owned by the 3rd Respondent, who failed to settle accrued dues and benefits for the concerned employees when the aforementioned school closed in 2019. That around the same time, the 2nd Respondent concluded the acquisition of Hillcrest International School in Nairobi whereto and a majority of the employees serving at GEMS Cambridge International School-Nairobi were transferred. That the few remaining employees were then arbitrarily transferred to the 1st Respondent School without an opportunity of dialogue on amicable terms of engagement and who were yet to receive terminal dues owed to them by the 3rd Respondent.
 3. The 6th Applicant further averred that in November 2021, the 2nd Respondent made a come-back as Director, heading the 1st Respondent although there was 'grapevine communication' that the 2nd Respondent had transferred a share of its ownership stake in the 1st Respondent to the 3rd Respondent. That the same was done without any official communication to the staff, including the Applicants herein, and key stakeholders and to date, some staff members considered the 3rd Respondent to be only a management level employee of the 1st and 2nd Respondents as he was at GEMS Cambridge International School-Nairobi. He averred that the Applicants were aggrieved by the lack of dialogue and transparency by the 3rd Respondent on the absence of guarantees for payment of dues accrued up to the point of 'alleged change of transfer of ownership'. That they have a right to be worried because the situation meant potential loss of their substantially accrued employment benefits and dues. It was the 6th Applicant's averment that there had also been significant delays in payment of salaries and statutory obligations became the norm to the prejudice of the Applicants, in violation of their rights to receive pay within the statutory and contractual timelines. That they had in fact only been paid regularly in four (4) instances out of the 12 calendar months of 2022 and despaired with agony in the realization that the 3rd Respondent had deserted his obligations under contract with the Applicants. That moreover, in October and November 2022, the 1st Respondent was unable to meet its obligations to pay staff salaries and other statutory obligations arising out of it including PAYE, NHIF, NSSF, HELB and NITA remittances. That the Applicants' salaries were paid very late in November 2022 after the intervention of the School Landlord – the Interested Party herein and that the same incident occurred in December 2022.



4. The 6th Applicant averred that in January 2023, the 2nd Respondent notified the Applicants that the 1st Respondent and the Interested Party, an affiliate of the School Landlord, had signed an Interim Licence Agreement allowing the latter to operate the school for a period of time. That as part of the Agreement stated that all liabilities were to remain the responsibility of the 1st and 3rd Respondents, there was no surety of payment of all accrued dues up until 31st December 2022 to the Applicants herein. He notified the Court that in January 2023, the parties herein had also signed Contract Addendums in tripartite form i.e. with the 1st Respondent and Interested Party and with letters acknowledging the accrued dues. That considering the intermittent payment of their salaries and having depleted their savings and even forced to borrow, the Applicants had no option but to accept the contract addendums without any guarantee from the 1st and 3rd Respondents that their accrued employment benefits up to 31st December 2022 were secure and would be paid. It was his stance that a recent call for a forensic audit into the financial affairs and other affairs of Regis School-Runda had created significant apprehension about the school's financial stability and continued existence since their contract addendums do not extend protection to their accrued employment benefits to the Interested Party as their current school operator. The Applicants were thus seeking intervention of this Court to protect the said substantial employment benefits against the Respondents pending any purported change of ownership.
5. The Interested Party (hereinafter "the I.P.") filed a sworn Replying Affidavit sworn 7th July 2023 by Mr. Peter Mburu Burugu, a shareholder and director in the I.P and also a non-shareholder director in Runda Gardens Development Limited, which is the majority shareholder and thus the holding company of the I.P. Mr. Burugu averred that the Holding Company is a former landlord of the 1st and 2nd Respondents under the terms of a Development and Lease Agreement dated 26th June 2018 (hereinafter "the DLA"), supplemented by a Lease dated 27th August 2019 in respect of its property L.R. No. 11681/10 (Original No. 11681/3/7). He further averred that the Holding Company had developed and maintains school buildings and infrastructure on the said land and that it had leased the said buildings and infrastructure to the 1st and 2nd Respondents under the terms of the DLA and the aforementioned Lease Agreement. That the Lease had however been terminated on account of breaches by the 1st and 2nd Respondents. It was Mr. Burugu's averment that he was only aware of some of the facts deposed in the Affidavit of the 6th Applicant because the Holding Company had advanced loans to the 1st Respondent to settle staff salaries for October, November and December 2022. That the same was meant to salvage Regis School Runda from collapse due to the 1st and 2nd Respondents' financial challenges in operating the said school. He notified the Court that as the said loans had not been paid, the Holding Company had resorted to pursuing its available legal remedies in recovery thereof, through separate legal proceedings. He admitted that the I.P had indeed not assumed any liabilities incurred by the 1st and 2nd Respondents prior to 1st January 2023, which is the date of the one-year Licence Agreement granted to it by the 1st Respondent to operate Regis School Runda. Whereas he admitted that the I.P entered into tri-partite one-year Contract Addendums with the 1st Respondent and specific individual staff of the 1st and 2nd Respondents handed over to it for purposes of running Regis School Runda during the licence period, he averred that the I.P was a stranger to the assertions deposed by the 6th Applicants on the circumstances leading to their signing of the said addendums. Mr. Burugu averred that whereas the Applicants were seeking injunctive orders to restrain the Respondents from changing the management of Regis School Runda, transferring ownership, offering for sale etc, they had not produced any evidence proving that intention. He asserted that save for the one-year Licence for the academic year 2023, there was no other agreement, arrangement or understanding between the Respondents and the I.P company for the acquisition of the 1st Respondent or the business of Regis School Runda. He notified the Court that the 1st Respondent was also contesting termination of their Lease Agreement with the I.P company and had filed suit at the Nairobi Environment and



Land Court (ELC) seeking specific performance of the terminated lease in ELCC No. E095 of 2023. He reiterated that because of the foregoing circumstances and contentious litigation commenced against each other, there were no intentions amongst the Respondents and the I.P company to enter any agreements for the transfer of Regis School Runda as a business to the I.P company or the Holding Company. Mr. Burugu additionally affirmed that the Holding Company and the I.P company had the right to operate a school of their own premises, or to lease the premises to any other school operator, without recourse to any of the Respondents, who have no legal ownership rights in the said companies' land and school premises.

6. Claimants/Applicants' Submissions

The Applicants submitted that it is trite law under Kenyan law that an employee cannot have their employment transferred to another employer without the employee's consent. That where there is a change of ownership of the shares of a target company, the employment relationship is not affected since the employees continue to be employed by the same legal entity, albeit with new owners in place. They further submitted that where a merger or acquisition results in the transfer of the assets of a company to acquirer (including the obligation to transfer employees), then a redundancy event is deemed to occur and the target company is required to pay the employees redundancy dues. That in practice, employees are offered new employment with the acquirer and the affected employees are given the option of waiving their redundancy dues in consideration of the acquirer recognizing their previous years of continuous service with the target company. That however where an employee rejects that option, they are entitled to be paid redundancy dues calculated at the rate of 15 days for each completed year of service. The Applicants argued that with respect to other employment dues such as accrued salary, leave days earned and not taken and any overtime entitlements, the target company is, in practice, obligated to satisfy the same before the acquisition is completed if the transaction will result in a transfer of employees. They invited the Court to resonate with the decision in the Indian case of *McLeod Russel India Limited v Regional Provident Fund Commissioner of Jalpaiguri and Others* 2014 (9) SCR 162 in which the Supreme Court of India held that the transferee business entity will be held liable in case of a default by the transferor entity in respect of social security benefits, even if the parties executed an agreement stating that the transferor entity will be held liable. It was the Applicants' submission that in their case, they were still in the dark in as far as who is to bear liability in the event the Acquisition between the Respondents and the I.P is concluded. That even though they were grateful that the I.P had accepted to work with them, the question of who bears liability as concerns backdated benefits still remains moot thus their seeking the intervention of the Court for an Order of a temporary suspension of the acquisition process. They submitted that they had satisfied the grounds as laid down in the case of *Giella v Cassman Brown* [1973] EA 358 and as was reiterated in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR (CA No.77 of 2012) wherein the Court of Appeal held that an applicant in an interlocutory injunction application has to satisfy the triple requirements i.e. establish a prima facie case, demonstrate irreparable injury if a temporary injunction is not granted and allay any doubts by showing that the balance of convenience is in his favour. According to the Applicants, they have a prima facie case as espoused in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR in which the Court of Appeal stated that: a prima facie case is one "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." They further submitted that they had already been absorbed by the I.P company before the outstanding issue of backdated salary was resolved and that having such a serious issue left in limbo may greatly prejudice them in future. The Applicants



urged this Court to be persuaded with the reasoning in the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR that defined the concept of balance of convenience as follows:

“...The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, 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. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. 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.”

7. The Applicants invited this Court to order that a temporary order of injunction be issued against the Respondents for them to halt the conclusion of the acquisition exercise pending the hearing and determination of this suit.

8. Interested Party’s Submissions

On the conditions imposed on the grant of interlocutory injunctions as laid down in *Giella v Cassman Brown Company Limited* [1973] E.A 358, the I.P submitted that the first consideration of a prima facie case was explained in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR as succinctly quoted by the Applicants hereinabove. The I.P submitted that the 6th Applicant had admitted and averred in the Applicants’ Supporting Affidavit that the I.P was not privy to the commencement of the contractual relationship between the Claimants and the Respondents. That there was also no evidence adduced to show that the I.P was privy to the allegations that the Applicants were transferred to Regis School Runda without an opportunity for dialogue, which acts Mr. Timbwa deponed were committed by the Respondents. It submitted that the Claimants had presumed that the Respondents and the I.P were engaged in a transaction for the sale and transfer of Regis School Runda to the I.P but which presumptions had clearly been rebutted and explained in the Replying Affidavit of Mr. Burugu. The I.P concluded that the Applicants had thus failed to establish a prima facie case to meet the threshold for the grant of injunctive orders as against it and that prayers 3 and 4 of the Motion herein ought therefore not issue against the I.P. It further submitted that there being no prima facie case against it, consideration of the other conditions stipulated in *Giella v Cassman Brown (supra)* would be moot. It urged this Court to dismiss the Motion dated 29th May 2023 against the Interested Party with costs to it.

9. The Respondent did not file any Response and Submissions in respect of the instant Application despite this Court’s directions on 20th September 2023.

10. The Applicants herein seek injunctive orders. In order to succeed, they had to satisfy the triple requirements – establish a *prima facie* case, demonstrate irreparable injury if a temporary injunction is not granted and allay any doubts by showing that the balance of convenience is in his favour. According to the Applicants, they have a prima facie case as espoused in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR in which the Court of Appeal stated that: a prima facie case is one “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.” The affidavit of Mr. Burugu juxtaposed against the averments of Mr. Wycliffe Timbwa, the 6th Applicant, it is clear that the Claimants had presumed that the Respondents and the I.P were engaged in a transaction for the sale and transfer of Regis



School Runda to the I.P. These presumptions had clearly been rebutted and explained in the Replying Affidavit of Mr. Burugu. The I.P correctly concluded that on the strength of *Giella v Cassman Brown* (*supra*) the Applicants have miserably failed to establish a prima facie case to meet the threshold for the grant of injunctive orders. As it would be moot to consider the other 2 limbs in *Giella v Cassman Brown* (*supra*) once the prima facie limb is found to be wanting, the Court dismisses the Applicants application with costs to the Interested Party.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF NOVEMBER 2023

NZIOKI WA MAKAU

JUDGE

