



Githinji v County Public Service Board, Embu County & another (Cause E024 of 2023) [2023] KEELRC 2775 (KLR) (3 November 2023) (Ruling)

Neutral citation: [2023] KEELRC 2775 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E024 OF 2023
ON MAKAU, J
NOVEMBER 3, 2023

BETWEEN

JEREMIAH NGARI GITHINJI CLAIMANT

AND

THE COUNTY PUBLIC SERVICE BOARD, EMBU COUNTY 1ST RESPONDENT

THE COUNTY GOVERNMENT OF EMBU 2ND RESPONDENT

RULING

1. This ruling relates to two applications. The first application is the claimant's notice of motion dated 15th August, 2023 seeking the following orders: -
 - a. That the Honourable court be pleased to certify this matter as urgent and hear prayer 2 *ex parte* in the 1st instance due to its urgency.
 - b. That this Honourable court be pleased to order that the Respondents do pay the claimant's June, 2023 and July, 2023 salaries pending the hearing and determination of this application interpartes.
 - c. That this Honourable court be pleased to issue a temporary injunction restraining the Respondents from withholding the payment of the claimant's salary as and when it falls due pending the hearing and determination of this suit.
 - d. That the costs of this Application be in the cause.
2. The motion is supported by the claimant's affidavit sworn on even date. The court granted interim orders on 22nd August, 2023 in terms of prayer 2 of the motion pending interpartes hearing. The motion is opposed by the respondent, *vide* Replying Affidavit sworn on 25th September 2023, by Ms. Amy Ruria, respondent's County Secretary.



3. The second application is the respondents' Notice of motion dated 25th September, 2023 seeking the following orders: -
 - a. This Application be certified as urgent and be heard instantly on account of such urgency.
 - b. This Honourable Court be pleased to stay its orders issued *ex parte* on 22nd August, 2023 allowing the Claimant/Respondent's Application dated 15th August, 2023 in terms of prayer 2 in the interim pending hearing and determination of this Application.
 - c. This Honourable Court be pleased to review, vary and or set aside its orders issued *ex-parte* on 22nd August, 2023 allowing the Claimant/Respondent's Application dated 15th August 2023 in terms of prayer 2 pending hearing and determination of the claimant's Application dated 15th August 2023 and the hearing and determination of the main claim.
 - d. This Honourable Court be pleased to review, vary and or set aside its orders made on 21st September 2023 directing the Applicant's herein to pay the claimant his salary for the months of June, July and August on or before the 30th of September 2023.
 - e. The costs of this application be in the cause.
4. The motion is supported by an affidavit sworn on 25th September, 2023 by Ms Amy Ruria, 2nd Respondent's County Secretary. The motion is opposed by the claimant vide Replying Affidavit sworn on 11th October, 2023.
5. The two applications were argued together on 17th October, 2023 by counsel for the two sides.

Claimant's case*

6. The claimant's case is that:-
 - a. By a letter dated 18th May, 2020 he was appointed as the Respondents County Attorney under a 3 years contract.
 - b. Subsequently, the *Office of the County Attorney Act* No.14 of 2020 was enacted and came into force on 27th July, 2020 and by dint of section 6 and 31 of the Act his term of office was extended from 3 to 6 years so as to lapse on 1st June, 2026.
 - c. The new terms of service were confirmed by an Advisory from the Kenya Law Reform Commission and a resolution by the 1st Respondent.
 - d. By virtue of Section 6 and 31 of the Act, he did not require any fresh appointment letter from the Governor since he was already serving.
 - e. He has continued in service but the respondents have withheld his salary since June, 2023.
 - f. The continued withholding of his salary is a violation of his rights under Article 28 of the *Constitution* as it exposes him to financial constraint, pecuniary embarrassment and psychological torture. Further his rights to fair labour practices and fair administrative action have been breached contrary to Article 41 and 47 of the *Constitution*.
 - g. The *Office of County Attorney Act* is self-sufficient and the mandatory retirement age in public service is nowhere provided in the Act.
 - h. Section 6 of the Act provides for a term of six years and the serving Attorneys automatically transitioned to the 6 years term if they held the necessary qualification like the claimant.



- i. The orders granted on 22nd August, 2023 were justified and should not be set aside.
 - j. The respondents are in contempt of the said orders and should be denied audience for being in contempt of court.
 - k. Finally, the application for review does not meet the threshold for review.
7. On the other hand, the respondents' case is that: -
- a. The orders under review was given without hearing the respondents and are premature. The orders were granted after concealment of material facts and misleading of the court by the claimant. Further the orders have the effect of determining the suit without hearing the parties.
 - b. The claimant's contract was to end on 31st May, 2023 and the proper procedure for extending the same under section 5 and 31 of the [Office of the County Attorney](#) was not followed.
 - c. The claimant attained the mandatory retirement age of 60 years in May, 2023 when his contract expired. Hence the extension of contract to the year 2026 offends the [Public Service Commission Act](#) with respect to mandatory retirement age of 60 years.
 - d. The claimant has not accessed the office or performed any duties of County Attorney since his contract ended on 31st May, 2023. The contract was not lawfully extended beyond May 2023 and therefore claim for salary for the period after May 2023 is illegal, null and void.
 - e. The alleged extension of claimant's contract was illegal and the Governor in office then protested against the same and the salary increment backdated to July 2020 was also illegal, fraudulent, misappropriation of public funds and unjust enrichment. Besides at the time when the alleged extension was done, the claimant was 59 years old.
 - f. The *ex parte* order should be set aside because if the salary is paid and his suit fails after trial it will be difficult to recover the same from the claimant.

Determination

8. The issues for determination fall from the substantive prayers in each application. The claimant's motion prays for interlocutory injunction to restrain the respondent from withholding his salary pending hearing and determination of the suit. The respondents' motion seeks review, variation or setting aside of the orders made by the court on 22nd August, 2023 and 21st September, 2023. The issues for determination are therefore: -
- a. Whether interlocutory injunction should be issued to restrain the respondents from withholding the claimant's salary pending hearing and determination of the suit.
 - b. Whether the interim orders made on 22nd August, 2023 and 21st September, 2023 should be reviewed, varied or set aside.

Injunction

9. The law regulating granting of interlocutory injunction has not changed since the decision in *Giella v Cassman Brown* (1973) EA 358. The Applicant has to:-
- a. Establish a *prima facie* case with probability of success.
 - b. Show that irreparable harm will be suffered if the order is withheld.



- c. If the court is in doubt, the application to be determined on a balance of convenience.

Prima facie case

10. The Court of Appeal defined *prima facie* case in *Mrao Limited v First American Bank of Kenya & 2 others* [2003] eKLR.

“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.”

11. Accordingly, an applicant for interlocutory injunction must prove to the court that his legal right has been breached or is about to be breached by the opposite party. In this case, the claimant has contended that his contract of service was renewed and terms enhanced by an operation of the law but the respondents are acting in breach of the contract by withholding his salary. He further contended that the actions by the respondents amounts to violation of his Constitutional right to be treated with dignity, right to fair labour practices and right to fair administrative action.
12. The respondents have denied that the claimant’s contract was renewed and maintained that he is not entitled to any salary after 31st May, 2023 when his contract lapsed. Further they contended that the claimant was 59 years in May, 2023 at the time of the alleged extension and therefore he was not entitled to any extension of the contract beyond the mandatory retirement age of 60 years.
13. Having considered the rival arguments, I must find that the claimant’s evidence weighs heavier than that of the respondents. I say so because the claimant has placed before the court evidence to prove that he was validly appointed by the 1st Respondent to Office of the County Attorney vide a letter dated 18th May, 2020.
14. Section 31 of the *Office of the County Attorney Act* provides that:-
- “(1) Upon the coming into effect of this Act, members of staff employed by the County Executive to perform the function of the Office under this Act shall-
- a. be deemed to be members of staff of the office in their respective capacities;
 - b. retain any rights accrued or accruing to them as such staff or contributors...
- (2) Despite the provisions of subsection (1), a person employed by the County Public Service board to perform the functions of the County Attorney, Solicitor or County Legal Counsel at the commencement of this Act shall continue to hold their respective positions in the office after the coming into effect of this Act only if they meet the qualifications specified in this Act.”
15. It has not been alleged that the claimant did not possess the qualifications specified in the Act for appointment to the Office of the County Attorney. The 1st respondent sought advise from the Kenya Law Reform Commission and was advised to implement the provisions of section 31 of the Act to the claimant’s contract. It made a resolution to that effect and advised the 1st respondent to effect the reviewed terms in the payroll. The payroll was amended as per section 31 of the Act and pay slip indicated a new retirement date.
16. It was submitted that the claimant was 59 years when the contract was extended by three years. The extension was deemed to be a violation of the retirement policy for public officers. However, I hold a different view because the County Attorney is not on permanent and pensionable but a State officer



for a contract term. He has the status of a County Executive member and therefore his/her term is not subject to the mandatory retirement age of 60 years. The appointment procedure and exit are such that they are not ordinary public officers in the County Public Service.

17. In view of the fact that the claimant was validly appointed as County Attorney by the County Board in May 2020, he benefited from section 31 of the new [Office of the County Attorney Act](#). His 3 year contract was extended to 6 years by operation of the law. I am therefore satisfied that the claimant has made out a prima facie case with probability of success.

Irreparable harm

18. The claimant has demonstrated that he has been denied salary and therefore exposed to financial embarrassment. His right to a dignified life has been violated and continues to be violated due to lack of funds. The respondents have admitted that since May, 2023 they have not paid the claimant his salary.
19. There is no doubt that after the trial the claimant can be compensated for breach of contract by payment of the withheld salary. However, the salary coming after the trial cannot adequately compensate for the suffering that may be occasioned by the violation of his right to dignity. Violation of human rights under the bill of rights cannot be reversed. Consequently, I am satisfied that irreparable harm will be suffered if injunction is declined.
20. Having found that a *prima facie* case with probability of success has been proved and that irreparable harm will be occasioned to the applicant if injunction is withheld, I allow the claimant's notice of motion as prayed.

Review, vary or set aside interim orders

21. The application by the respondent is that the interim orders were not justified and they were granted due to concealment of material facts. However, the said allegation is not a ground to warrant review, varying or setting aside the interim orders. I have already made a finding of fact that the material before the court is sufficient basis upon which to hold that the claimant's legal rights have been breached by the respondents. The rights are grounded on his contract of employment and section 31 of the [Office of the County Attorney Act](#). The respondents' notice of motion dated 25th September, 2023 is therefore dismissed for being misconceived, frivolous and misleading to the court.

Conclusion

22. I have found that the claimant's notice of motion dated 15th August, 2023 meets the legal threshold for grant of interlocutory injunction enunciated in *Giella v Cassman Brown* case, *supra* and it is allowed as prayed. I have further found that the respondents' notice of motion dated 25th September, 2023 lack merits and dismiss it with costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 3RD DAY OF NOVEMBER, 2023.

ONESMUS N MAKAU

JUDGE

Order

This ruling has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU



JUDGE

