



Wangalwa v County Assemblies Forum (CAF) & 2 others (Employment and Labour Relations Petition E069 of 2023) [2023] KEELRC 2800 (KLR) (3 November 2023) (Ruling)

Neutral citation: [2023] KEELRC 2800 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E069 OF 2023
AN MWAURE, J
NOVEMBER 3, 2023**

BETWEEN

JUDITH ODUMA WANGALWA PETITIONER

AND

COUNTY ASSEMBLIES FORUM (CAF) 1ST RESPONDENT

PHILEMON SABULEI, CHAIRMAN - CAF 2ND RESPONDENT

CHEGE MWAURA, SEC GEN – CAF 3RD RESPONDENT

RULING

1. The Petitioner filed Notice of Motions dated 11th April 2023 seeking the following orders: -
 1. Spent
 2. Spent
 3. Spent
 4. Spent
 5. Spent
 6. Spent
 7. Spent
 8. That pending the hearing and determination of this Petition, the Honourable Court be pleased to issue and hereby issues an order suspending implementing of the interdiction letter dated 8th March 2023 written by the 2nd Respondent.



9. That pending hearing and determination of this Petition, the Honourable Court be pleased to issue and hereby issues an order suspending the decision of the Respondent vide the interdiction letter dated 8th March 2023, to send the Applicant on compulsory leave and allowing the Applicant's access to her workstation and resumption of her duties as Chief Executive Officer of the 1st Respondent.
10. That in the alternative and without prejudice to prayer number 3 above pending the hearing and determination of this Petition, the Honourable Court be pleased to issue and hereby issues an order reinstating the Petitioner to her employment with the 1st Respondent herein on similar terms and/or privileges without loss of any benefits and remuneration.
11. That in the alternative and without prejudice to the foregoing, pending the hearing and determination of this Petition and/ or suit, a conservatory order do issue that the Applicant continues to hold the position of Chief Executive Officer of the 1st Respondent.
12. That pending hearing and determination of this Petition, the Honourable Court be pleased to stay the proceedings and resolutions purportedly made by the Respondents during its Executive Committee Meeting held on 6th March 2023 interdicting the Applicant and sending the Applicant on compulsory leave.
13. That pending hearing and determination of this Petition, the Honourable Court be pleased to grant a conservatory order prohibiting/ restraining the Respondents, their servants, officials, representatives, and/or agents from advertising or having so advertise from acting thereupon, interviewing, recruiting or otherwise in any other manner replacing the Applicant in her position as the Chief Executive Officer of the 1st Respondent and the Respondent's restrained from interfering with the Applicant's contract of employment.
14. That pending hearing and determination of this Petition, a conservatory order be and is hereby issued, restraining the Respondents, their servants, officials, representative and/or agents from conducting or taking any steps to conduct disciplinary proceedings against the Applicant or having so taken such disciplinary proceedings against the Applicant be restrained from acting thereupon or otherwise in any other manner.
15. That the cost of this application be provided for.

Petitioner's Case

2. The Petitioner avers that she was interdicted and sent on compulsory leave vide a letter dated 8th March 2023 unlawfully, without due process and in violation of the rules of natural justice and Articles 41, 47, 50(1) and 236 of *the Constitution*.
3. The Petitioner avers that she was informed by the Respondent vide the aforesaid letter to prepare handover notes on all ongoing projects and assignments that she was undertaking.
4. The Petitioner avers that the Respondents have communicated to over 20 institutions in the devolution space that the Applicant has taken a leave of absence and proceeded to appoint an acting CEO to occupy her position.

1st and 2nd Respondents' Case

5. In opposition to the application, the Respondents filed a replying affidavit dated 26th April 2023.



6. The Respondents aver that the Petitioner/ Applicant wishes the court to believe that she is at risk of summary dismissal where in fact she has only been interdicted and these two matters are separate and have no correlation.
7. The Respondents aver that the interdiction serves to relieve the Applicant from her duties pending investigations into the allegations of gross misconduct raised against her in a duly constituted meeting of the Executive Committee of the 1st Respondent.
8. The Respondents aver that the investigations are part of the internal disciplinary process of the 1st Respondent and there is no malice on the 2nd Respondent sanctioning the internal disciplinary process; and the Applicant has failed to show the objective of the investigations is to replace her from office.
9. The Respondents aver that in response to the letter of interdiction, the Applicant vide a letter dated 6th March 2023 requested for grounds of interdiction to be substantiated and a Notice to Show Cause dated 12th April 2023 was sent to Applicant explaining the same and gave her 14 days to respond to the concerns raised in the Notice.
10. The Respondents aver that the Notice to Show Cause by the 1st Respondent triggered the Applicant to rush and file the instant petition and applications in a bid to interfere with the ongoing investigations of the 1st Respondent.

Petitioner/ Applicant's Submissions

11. The Petitioner submitted that it has satisfied the principles for an order of injunction to be granted as espoused in the case of *Giella V Cassman Brown and Co. Ltd* [1973] EA 358.
12. The Petitioner submits that she has raised an issue that can be tried by the court as the Respondent's decision to interdict and send her on compulsory leave was unfair and unlawful as the 1st Respondent's Human Resource Policy and Procedures Manual, 2019 has no provision for either interdiction or compulsory leave and such exercise of power by the Respondents was illegal.
13. The Petitioner submitted that she was never briefed nor made aware by the Respondents that the issue of her discipline was an agenda item during the 1st Respondent's executive committee meeting held on 6th March 2023 and the Respondents cannot purport to interdict the Applicant on the basis of a resolution made therein therefore the impugned decision is null and void.
14. The Petitioner submitted that prima facie, and on the material before this court, there is all indication that the Applicant's interdiction by the Respondents was not justified and bona fide and the intended disciplinary process is flawed and its outcome predetermined, as such there is a likelihood that the Applicant will be granted orders sought upon hearing of the main suit.
15. The Petitioner submitted that the Respondents having issued her a notice to show cause letter and invited her for a disciplinary hearing prays for an injunction restraining the Respondents from taking any further steps in the disciplinary process and the Respondents unlawfully terminated her employment which will leave the Applicant without source of livelihood.
16. The Petitioner submitted that the disciplinary process is marred with irregularities or stage managed towards her dismissal as demonstrated by the Respondent's actions, the court has the right to exercise its jurisdiction to intervene in such matters.



1st and 2nd Respondent's Submissions

17. The Respondents submitted that the court may only interfere with the internal disciplinary process of an employer if it is evidently flawed and in breach of the law and such interference will only be limited to putting the process to the right course as was held in the case of *MTM v KIE Limited & another* [2020] eKLR and which requirements the Applicant has failed to satisfy.
18. The Respondents submitted the Applicant faces several disciplinary matters in relation to her conduct as CEO of the 1st Respondent which were communicated vide the interdiction letter dated 8th March 2023; the said issues were further elaborated in the Notice to Show Cause dated 12th April 2023 duly served upon the Applicant.
19. The Respondents submitted that the 1st Respondent's executive committee had a mandate to issue the interdiction letter as Article 10(2) (c) of its Constitution gives the 1st Respondent's executive committee the power to recruit and supervise the CEO of the forum.
20. The Respondents submitted clause 13.2 of the Applicant's employment contract dated 10th May 2018 gives the 1st Respondent power to immediately suspend the Applicant for purposes of conducting investigations when claims of misconduct are raised.

Analysis and Determination

21. The main issue for determination is whether the Applicant has met the requirements for grant of conservatory orders
22. In *Law Society of Kenya v Chairman, Nairobi Metropolitan Area Council & 3 others; Mary Waithigieni Chege & 2 others (Interested Parties)* [2021] eKLR, the court observed:

“It is not in doubt that the grant of an injunction is at the discretion of the Court. In order to obtain injunctive relief, the Applicant has to meet the standard in *Giella v Cassman Brown Co. Ltd*, that is, 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. The test is to be applied using the three limbs. On the prima facie test it is probable that the Applicant could succeed in a quest to overturn the appointments. However, under the second test, an 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.”

23. This was reiterated in *Board of Management of Uhuru Secondary School vs. City County Director of Education & 2 Others* [2015] eKLR, where the principles for grant of conservatory orders were outlined in as follows:

- a. The need for the Applicant to demonstrate an arguable prima facie case with a likelihood of success and to show in the absence of the conservatory orders, he is likely to suffer prejudice.
- b. Whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the bill of rights.



- c. The Court should consider whether, if an interim conservatory order is not granted, the Petition or its substratum will be rendered nugatory.
 - d. Whether public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.”
24. The Petitioner has not demonstrated a prima facie case for the grant of conservatory orders. The Applicant herself said that she had been interdicted and was out on compulsory leave which the Respondents submitted is necessary as investigations are ongoing without interference. The said interdiction letter dated 8th March 2023 put petitioner on a 90 day suspension pending investigations for various indictments among them insubordination, failure to comply with the terms of her employment and reluctance to implement the decision of executive committee.
25. The Respondents aver that the Petitioner/Applicant continues to receive her salary when she is on compulsory leave and this has not been disputed by the Petitioner therefore the Petitioner is not likely to suffer any prejudice pending the hearing and determination of this suit.
26. In the Court of Appeal in the case of Charles Muturi Mwangi vs Invesco Insurance Co Ltd (2019) eKLR the court held:
- “even in cases where employees are employed under permanent and pensionable terms, suspension and interdiction pending investigations for alleged misconduct is ordinarily part of disciplinary process.”
27. The court finds the petitioner’s prayer to suspend interdiction and disciplinary process are not merited and considering she has not been terminated and is still earning her full salary. The application is not merited and is dismissed.
28. Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 3RD DAY OF NOVEMBER, 2023.

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

