Kirui v Ekaterra Tea Kenya PLC (Employment and Labour Relations Cause E013 of 2023) [2023] KEELRC 3378 (KLR) (19 December 2023) (Ruling)

Neutral citation: [2023] KEELRC 3378 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO

EMPLOYMENT AND LABOUR RELATIONS CAUSE E013 OF 2023

HS WASILWA, J

DECEMBER 19, 2023

BETWEEN

GEOFFREY KIRUI ..... CLAIMANT

AND

EKATERRA TEA KENYA PLC ..... RESPONDENT

RULING

1. This Ruling is in respect of the claimant/ Applicant's Notice of motion dated 9th August, 2023, filed pursuant to rule 17(1)(3)(4)&(5) of the *Employment and Labour Relations Court (Procedure) Rules, 2016* and all other enabling provisions of the law seeking for the following Orders;-

    1. Spent.

    2. That pending the inter-partes hearing and determination of this Application, this Honorable Court be pleased to issue conservatory orders staying the implementation of the Respondent's letter of termination of employment contract dated May 8, 2023 and dismissing the applicant from employment and the applicant be immediately reinstated with no loss of seniority, privileges, salaries, allowances and benefits.

    3. That pending the inter-partes hearing and determination of this Application, this Honourable Court be and is hereby pleased to restrain the Respondent by way of temporary injunction from permanently terminating the employment of the applicant directly or indirectly either by itself, it's employees, it's servants, and/or agents.

    4. That pending the hearing and determination of the claim herein, this Honorable Court be pleased to grant an order of temporary injunction restraining the Respondent from replacing and/or declaring a vacancy in the position held by the Claimant/Applicant.

5. That pending the inter partes hearing and determination of the substantive claim, this Honorable Court be pleased to issue conservatory orders staying the implementation of the Respondent's letter of termination of employment contract dated 8th May 2023 and dismissing the applicant from employment and the applicant be immediately reinstated with no loss of seniority, privileges, salaries, allowances and benefits.

6. That the Respondent be condemned to pay costs of this application.

2. The Application is based on the grounds stated on the face of the Application and supporting affidavit of the Applicant deposed upon on the August 9, 2023.

3. The Applicants avers that he was terminated by the Respondent *vide* the letter of termination dated May 8, 2023.

4. Prior to this termination, the applicant states that he worked faithfully and carried out his duties in accordance with the employment contract for 26 years.

5. Throughout his employment, no disciplinary issues were raised against him, neither has he ever been warned on any employment issues.

6. He contends that the termination was unfair because he was terminated as a sacrificial lamb. Also that he was not subjected to proper disciplinary process, nor allowed ample time to prepare and defend himself.

7. He stated that the circumstances leading to his dismissal is that on the April 29, 2023, the Applicant received Notice to show cause, why disciplinary actions should not be taken against him on the grounds that the applicant had breached the company's policy on respect, Dignity and fair treatment.

8. That he was given until May 2, 2023 to respond to the notice which he did on the May 2, 2023. He was then summarily dismissed from employment on May 8, 2023 on the basis of breach of company policy on avoiding conflict of interest as well as under section 44(3) of the *Employment Act*.

9. Subsequently, he was told to vacate the company house by May 12, 2023 and not to step foot in any of the Respondent's establishments.

10. He states that he appealed against the decision of the Respondent by the letter of May 14, 2023, however the Respondent upheld its earlier decision as communicated in the letter of May 23, 2023.

11. He avers that the action of the Respondent was motivated by apparent malice, bad faith and ill-will against the applicant contrary to the provision of the law.

12. The applicant is apprehensive that unless this Honourable Court urgently determines this application and the main claim filed herewith, the Respondent will proceed to unfairly terminate and/or dismiss him albeit pre-maturely and without any consideration.

13. The Application is opposed by the Respondent who filed a replying affidavit deposed upon on September 21, 2023 by Lydia Musili , the Respondent's general counsel.

14. The affiant stated that the orders sought to be granted by this Honourable Court were overtaken by events long before the filing of the present Application and the issuance of the orders sought will be in vain.

15. She stated that the Applicant was summarily dismissed on May 8, 2023 for breach of the Respondent's Code Policy on avoiding Conflicts of Interest by sexually harassing various junior employees during the tenure of his employment. A fact which the Applicant admitted during a disciplinary hearing.

Further that the Applicant admitted to having made unwelcomed sexual advances to a former intern. Therefore, that the reason for termination was well established.

16. On right of appeal, the deponent stated that the Applicant exercised his right of appeal against its decision on May 14, 2023 but that the grounds of appeal were unsatisfactory and the decision to uphold the dismissal was communicated to him on May 23, 2023. Therefore, that the applicant ceased to be an employee of the Respondent as of May 2023. In addition, that the Applicant no longer resides on the Respondent's premises following his dismissal. Thus the conservatory and injunctive orders sought are spent.

17. She stated that orders 1 and 5, which also seek the immediate reinstatement of the Applicant, would amount to mandatory/final orders that should not be granted at an interlocutory stage. She added that the circumstances surrounding the Applicant's summary dismissal, which will form the basis of his prayer for reinstatement, are matters that can only be fully discerned through the production of evidence at a plenary hearing.

18. Notwithstanding the above, the affiant stated that she verily believe that the Applicant is not entitled to the orders sought on the grounds that the Application does not meet the requisite legal threshold for both temporary and mandatory injunctions, because; no *prima facie* case with a probability of success has been laid out, no action to be restrained as the Applicant's employment contract was terminated on May 8, 2023 and the fact that the Applicant has not demonstrated the irreparable injury he stands to suffer which cannot be compensated by way of damages.

19. She stated that the Applicant does not stand to suffer any prejudice in the circumstances, rather that if the orders sought are granted, they will have an effect of frustrating the operations of the Respondent. Further that the Applicant has also not pleaded any special circumstances to establish a basis for the mandatory injunctive orders sought at an interlocutory stage.

20. Directions were taken for the application to be canvassed by written submission with the Applicant filling on September 15, 2023 and the Respondent on the October 16, 2023.

Applicant's Submissions

21. The Applicant submitted on one issues; Whether the application for temporary injunction pending the hearing and determination of the substantive claim is merited?

22. He submitted that the principles for grant of orders of temporary injunction pending determination of a suit were set in the celebrated decision of the Court in the case of *Giella v Cassman Brown & Company Limited* [1973] EA to include:

    (a) An applicant must show a *prima facie* case with a probability of success;

    (b) 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; and

    (c) If the court is in doubt, it will decide the application on the balance of convenience.

23. He defined what amounts to prima facie case by citing the case of *Mrao Limited v _ First American Bank and others* 2003 eKLR that stated that:

> "*prima facie* case is a case in which on the material presented to the court or 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."

24. Accordingly, that the Respondent violated his rights under sections 41, 43 and 45 of the *Employment Act* by terminating his employment in the absence of valid reason and a sufficient opportunity to mount a proper defense. On that basis, he argues that a prima facie case has been established capable of success at the main trial since proceeding and effecting the recruitment of a substantive officer to take over his positing, would render it impracticable to reinstate him to his position.

25. Regarding irreparable harm, he submitted that the applicant will suffer irreparable injury in the event the injunctive reliefs sought are not granted. Particularly, because no justifiable reason was advanced to warrant immediate and abrupt termination of his employment, no official or active complaint was being acted upon and he was never granted a sufficient opportunity to mount a substantial defense against any of the allegations.

26. Due to the abrupt termination of his employment, the stated that he has suffered immense distress, agony, mental torture, assassination of character, humiliation, great loss, damage and financial embarrassment. To support his argument, he relied on the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR where the court stated:

> " 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 case 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"

27. Similarly, that the applicant is likely to suffer injury which cannot be compensated by award of costs and thus the balance of convenience lies in granting the orders prayed because the applicant was not dismissed out of any wrong on his part and has not been able to secure an alternative employment at all.

28. To further support their case they cited the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (*supra*) where the Court proceeded to stated that;-

> " 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 Plaintiffs, the inconvenience caused to the Plaintiff would be more significant than that which would be caused to the Defendants if an injunction is granted but the Suit is ultimately dismissed. Although it is called a balance of convenience, it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them will be greater than that which may be caused to the Defendants. Inconvenience be equal, it is the Plaintiff who will suffer." "In other words, the Plaintiff has to show 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".

29. They also relied on the case of *Amir Suleiman v Amboseli Resort Limited* [2004] eKLR, where the learned judge offered further elaboration on what is meant by "balance of convenience" and stated:

> " The court, in responding to prayers for interlocutory injunctive reliefs, should always opt for the lower rather than, the higher risk of injustice."

30. Based on the foregoing, the Applicant submitted that he has legitimate expectation that he will be effectively reinstated as there existed no valid and fair reasons for his dismissal and the same is patently irregular and a violation of his constitutional labour rights.

31. He concluded that unless the Respondent is compelled by an interim order of this court, the substantive claim would be rendered nugatory and an academic exercise.

Respondent's Submissions.

32. The Respondent submitted from the onset that the Claimant's Application has been overtaken by events, having ceased to be an employee of the Respondent, thus prayers 2, 3 and 5 seeking inter alia to stop the Claimant's dismissal have been overtaken by events and determining the said prayers, and any orders issued therefrom would be in vain.

33. He submitted further on the prayers for reinstatement and stated that an order for reinstatement cannot be issued at an interlocutory stage, rather that it can only be granted under section 49 (3) (a) of the *Employment Act* 2007 after proof of unfair termination as stated in the case of *Alfred Nyungu Kimungui v. Bomas of Kenya* [2013]eKLR, *Dorothy Vivian Atieno Ogutu C/O Bruce Advocates v Mumias Sugar Company Ltd* [2015] eKLR and *Rose Sang v Siginon Group Limited* (2020) eKLR .

34. He argued that the grant of the order for reinstatement before a full appreciation of the facts of the case would not only deny the Respondent of its right to a fair hearing, but would also present a real security risk to whistleblowers who gave evidence in the disciplinary process and the affected female employees at the Respondent's premises.

35. On the conditions for grant of an injunction, the Respondent submitted that there are established clear legal principles that govern the grant of injunctive orders as set out in the case of *Giella v Cassman Brown* 1973 E.A 358. These include; establishment of a *prima facie* case, proof of loss that cannot be compensated by an award of damages, and a demonstration that the balance of convenience would favour the grant of the orders sought. None of these elements have been met by the Claimant.

36. He elaborated that; Firstly, no prima facie case with a probability of success has been laid out. There is no action to be restrained as the Applicant's employment contract was terminated on 8th May 2023 and that injunctions are not issued where the event allegedly causing injury has already taken place as was held in *Nyote Muhia v Lydiah Wairimu Kagodo & 2 others* [2019] eKLR.

37. On the second condition, it was submitted that the Claimant has also failed to demonstrate any irreparable injury he stands to suffer by the exercise of the Respondent's managerial prerogative to hire an employee to replace him, which has already taken place. He added that available remedies for unlawful termination of employment, if proved, can reasonably be compensated by an award of damages.

38. It was reiterated that the order seeking to curtail the Respondent's managerial prerogative in staff administration should not be entertained by this Honourable Court, particularly at an interlocutory

stage. To support this, he cited the case of *Rose Sang v. Siginon Group Limited* (*supra*) where the Court held that:

> " The *Employment Act* does not intend that Courts take away managerial prerogatives from employers. To give the interim order would have the effect of stifling the management prerogative in staff administration. It would mean the employer does not have any more say in the contract of employment it has authored. This would be contrary to the intention of the *Employment Act*, which seeks to merely protect the weaker of the bargaining partners, not deprive the employer the power to run its business altogether."

39. The Respondent also invited this Court to consider the significance of the order sought and argued that the Claimant has not demonstrated how the roles of that position of Divisional manager, which he held are to be fulfilled if the position is left vacant pending the hearing and determination of the suit. He argued that the prayers, the Applicant seek will merely frustrate the operations of the Respondent. In this they cited the case of *Rose Sang y. Siginon Group Limited* (*supra*) where the Honourable Lady Justice Maureen Onyango had this to say when presented with a similar prayer:

> " On the third limb of balance of convenience, the applicant occupied the position of Group Human Resource Manager. This is no doubt, a very Senior Position in an organization. The applicant has not demonstrated how the roles of that position would be fulfilled if it left vacant to await the final determination of the suit she has filed. In the opinion of the court, there is no reason for not reinstating the claimant to her original position if she persuades the court that she is entitled to the orders. It would then be the problem of the Respondent to deal with the person who would then be occupying position. I thus find that the balance of convenience tilts in favour of the not granting the orders sought."

40. On the balance of convenience, it was argued that the Claimant has not demonstrated that he is entitled to the orders sought. Further, the Respondent maintained that it had all the reasons to believe that the Claimant had sexually harassed junior female employees during the tenure of his employment, as such the granting of the orders sought at an interlocutory stage would jeopardize the safety of the said employees. They thus urged this Court to take the course that seems likely to cause the least irremediable prejudice to the parties herein. In any case that the applicant has not pleaded any special circumstances to establish a basis for the mandatory injunctive orders sought at an interlocutory stage.

41. With regard to the conservatory orders sought, the Respondent cited the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR, where the Supreme Court held that;

> " Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies as well as to uphold the adjudicatory authority of the Court, in the public interest, Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the Applicant's case for orders of stay."

42. Accordingly, it was submitted that the issues sought to be canvassed before this Honourable Court are matters in personam. There is no public interest element arising from the former employment relationship between the parties for the Court to consider the award of conservatory orders. Nonetheless, that the Claimant has still failed to prove the prospects of irreparable harm that cannot be compensated by an award of damages.

43. In the circumstances, the Respondent urged this Court to disallow the prayers sought for conservatory orders and allow the parties to proceed to a full hearing.

44. I have considered the averments of the parties herein. The applicant seeks orders to reverse a termination which has already been done.

45. To warrant the grant of such orders, the applicant needs to establish he has a prima facie case with a probability of success.

46. The applicant has not established this aspect as he just set out the application without setting out valid reasons.

47. The orders sought if granted will give final orders which have already been sought in the claim.

48. I therefore find the application has no merit and is dismissed accordingly.

49. Costs in the cause.

RULING DELIVERED VIRTUALLY THIS 19TH DAY OF DECEMBER, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Langat holding brief for Kipkoech for Claimant/Applicant – present

Onyango for Respondent – present

Court Assistant – Fred