



Eldotec Consultancy Services Ltd v Otieno & another (Cause E019 of 2023) [2023] KEELRC 3301 (KLR) (7 December 2023) (Ruling)

Neutral citation: [2023] KEELRC 3301 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE E019 OF 2023
MA ONYANGO, J
DECEMBER 7, 2023**

BETWEEN

ELDOTEC CONSULTANCY SERVICES LTD CLAIMANT

AND

OLIVER JESEE OTIENO 1ST RESPONDENT

STIMA DT SACCO SOCIETY LTD 2ND RESPONDENT

RULING

1. By a notice of motion dated August 2, 2023, the claimant/applicant herein seeks the following orders:
 - i. Spent
 - ii. That pending the hearing and determination of this application, the 1st and 2nd Respondents do and be hereby ordered to deposit the sum of Kshs 409,359.44 in a joint interest earning account in the name of the claimant and the 1st and 2nd respondents.
 - iii. In the alternative and without prejudice to the above, pending the hearing and determination of this Application, the 1st and 2nd Respondents do and be hereby ordered to deposit the sum of Kshs 409,359.44 in court.
 - iv. That pending the hearing and determination of this suit, the 1st and 2nd Respondents do and be hereby ordered to deposit the sum of Kshs 409,359.44 in a joint interest earning account in the name of the Claimant and the 1st and 2nd Respondent.
 - v. In the alternative and without prejudice to the above, pending the hearing and determination of this suit, the 1st and 2nd Respondents do and be hereby ordered to deposit the sum of Kshs 409,359.44 in court.



- vi. That the honourable court do issue any such or further orders as it may deem just and reasonable to do so
- vii. That the main claim herein be heard and determined on a priority basis.
- viii. That the costs of the application be provided for.
2. The application is supported by the grounds on the face of it and by the affidavit of the claimant's employee experience advisor, Irene Ongachi sworn on August 1, 2023.
3. The deponent avers that the 1st respondent was offered employment by the claimant as a manager-compliance support *vide* an employment contract dated September 29, 2016 and that at the time material to this suit, his salary was Kshs 85,433 per month less statutory deductions.
4. She deposes that the 1st Respondent's employment came to an end through mutual separation pursuant to which parties herein signed an agreement dated May 17, 2023.
5. According to the applicant, the terms of the separation agreement were that the 1st respondent was to be paid salary up to 2nd June 2023, being 26 weeks salary as notice pay and 7.75 days as leave days earned and not utilized. Further, as per the separation agreement, the 1st respondent was entitled to Kshs 304,084.11.
6. It is the applicant's position that through an inadvertent error there was a gross miscalculation of the terminal dues payable to the 1st respondent with the effect that he was paid Kshs 962,924.33 which amount amounted to an overpayment of Kshs 409,359.44.
7. It is contended that the 1st Respondent was issued a final pay slip which he had accepted without notifying the Claimant of the gross error in the final dues payable and that the overpayment amounting to nearly twelve (12) months of the 1st Respondent's monthly salary was undeniably significant.
8. The Applicant avers that upon realizing the error in payment, it wrote to the 2nd Respondent by way of an email requesting a recall of the funds that had been sent to the 1st Respondent's account and that the 2nd Respondent thereafter froze the 1st Respondent's account pending resolution of the overpayment issue.
9. The Applicant contends that despite it exercising diligence in informing the 2nd Respondent of the said error, and the 2nd Respondent undertaking to secure the funds, the 2nd Respondent has since utilized some of the overpaid funds to settle debts owing to it on the account of the 1st Respondent.
10. It is the Applicant's case that it is in the interest of justice that the overpaid sum of Kshs 409,359.44 should be secured. That should the 1st Respondent be allowed to utilize these funds the entire claim will be rendered nugatory and an academic exercise.
11. The Application is opposed. The 1st respondent filed his replying affidavit sworn on September 14, 2023 in which he avers that the instant application is devoid of merit, frivolous and vexatious and has been brought in bad faith with the sole intention to frustrate and humiliate him.
12. He states that indeed an employer-employee relationship existed between the claimant and himself where he worked with the claimant from September 2016 to May 17, 2023 when his employment contract was terminated on May 17, 2023.
13. The 1st Respondent states that he was invited to an online meeting with 9 others who were also laid off and was informed that his services would be terminated immediately. That he was further informed



- that he would be paid for 2 weeks as unpaid leave and in addition, he would be paid other leave days not taken, salary up to June 2nd 2023 and 26 weeks' pay being the release package.
14. He further states that he was informed that a mutual separation agreement had already been prepared and that it would be forwarded to him. That the payments promised would only be paid upon execution of the agreement.
 15. The 1st Respondent states that since the payment of the release package was conditional on execution of the agreement, it cannot be said to have been a mutual separation. That thereafter, the 1st Respondent wrote to the Claimant requesting them to review the agreement upwards and increase the release package to enable him adapt to the current situation.
 16. He maintains that the Claimant later responded agreeing to extend the medical cover to him. Further, that the Claimant orally agreed to give the 1st Respondent together with the 9 colleagues a better offer by offering 52 weeks instead of 26 weeks that had been offered earlier.
 17. The 1st Respondent states that the Claimant did not prepare an addendum agreement in light of this new agreement but that it promised that the payment would reflect the new oral agreement.
 18. He avers that when he returned office equipment and cleared with Claimant, he was given his pay slip which reflected the new oral agreement.
 19. He further avers that the Human Resource Manager explained to the 1st Respondent that the Claimant had decided to revise and offer the 1st Respondent a better package and took him through each item totaling to Kshs 962,924.93.
 20. Additionally, the 1st Respondent refuted claims that there was gross miscalculation of his dues and maintained that the payment of Kshs 962,924.33 was deliberate and intentional.
 21. He avers that this suit is an afterthought and an attempt by the Claimant to get the court to review the terms of the agreement between it and the 1st Respondent and that this court does not have powers to vary the said terms.
 22. It is the 1st Respondent's contention that the instant application is overtaken by events as he no longer has funds in his account and cannot raise the said amount as he is currently jobless.
 23. According to the 1st Respondent, the Claimant breached the contract between him and itself by revealing the terms of the contract to the 2nd Respondent, who in turn illegally deducted his monies to the tune of Kshs 908,792.46 immediately the cheque was deposited and used it to clear his outstanding loan leaving the 1st Respondent with Kshs 51,000.
 24. He maintains that the Claimant has come to court with unclean hands after already disclosing the terms of the contract thereby breaching the confidentiality agreement and further seeking to freeze his account without court orders.
 25. The court was thus urged to dismiss the instant application with costs.
 26. The application was served upon the 2nd Respondent on 27th September 2023 and an affidavit of service sworn by the Counsel on record for the Claimant, Nicholas Weru was duly filed on 9th October 2023.
 27. The 2nd Respondent did not enter appearance and nor did it file a defence to the Statement of Claim. It also did not file a response to the application herein.



Determination

28. I have considered the application, the affidavits both in support of, and in opposition to, the application. I find that the only issue arising for determination is whether a preservation order of Kshs 409,359.44 should issue.
29. The principles guiding the grant of interlocutory injunction were set in the classical case of *Giella v Cassman Brown & Co Ltd* [1973] EA.
30. In the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR the principles were restated as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd v Afraba Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the Respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the Respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the Respondent, if it is granted.”

31. I have considered the rival affidavits in a bid to establish whether the monies alleged to have been overpaid to the 1st Respondent, being Kshs 409,359.44 is under threat.
32. The Applicant avers a substantial loss will be occasioned to the Claimant if the orders sought are not granted because there is a real risk that the overpaid sum may be utilized before this matter commences.
33. The 1st Respondent on its part avers that the application has been overtaken by events as the 2nd Respondent already deducted the said monies albeit allegedly illegally to the tune of Kshs 908,792.46 immediately the cheque was deposited and used to clear his outstanding loan.
34. Regrettably, the 2nd Respondent did not respond to the application so as to shed light on the exact position as regards the said monies deposited into the account held by the 1st Respondent’s in its institution.



35. Be that as it may, the court at this point is unable to ascertain the status of the 1st Respondent's account with respect to the money deposited by the Claimant.
36. It is therefore my considered opinion that there is need to preserve the said monies pending the determination of the main suit, so that the parties herein can ventilate the issue of the status of the 1st Respondent account by viva voce evidence before the court can make a final determination.
37. In conclusion, I make a finding that this application is merited and allow it in terms of prayer (iv) only. I accordingly order that:

Pending the hearing and determination of this suit, the 1st and 2nd Respondents do and are hereby ordered to jointly and severally deposit the sum of Kshs 409,359.44 in a joint interest earning account in the name of the Claimant and the 1st and 2nd Respondents.

38. Costs shall be in the cause.

DATED, DELIVERED AND SIGNED AT ELDORET THIS 7TH DAY OF DECEMBER, 2023.

M. ONYANGO

JUDGE

