



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

ELRC CAUSE NO. E058 OF 2021

SOPHIA WANJIRU MUCHIRI.....CLAIMANT

VERSUS

LAIKIPIA UNIVERSITY.....RESPONDENT

(BEFORE HON. JUSTICE DAVID NDERITU)

RULING

1. INTRODUCTION

1. In an amended notice of motion dated 12th November, 2021 the Claimant/Applicant prays for:-

1. THAT this application be certified as urgent and be heard *ex parte* in the first instance.

2. THAT pending the hearing and determination of this application interpartes this honourable court be pleased to issue a temporary order of injunction restraining the Respondent from reducing the monthly remuneration of Applicant by the sum of Kshs.115,000 or any other sum or at all.

3. THAT pending the hearing and determination of this case this honourable court be pleased to issue a mandatory injunction requiring the Respondent to pay the Applicant the sum of Kshs.805,000/= that it has unilaterally deducted from the remuneration of the Applicant from 1st March, 2021 to 30th September, 2021.

4. THAT pending the hearing and determination of this case this honourable court be pleased to issue a temporary injunction restraining the Respondent from reducing the monthly remuneration by the Applicant by the sum of Kshs.115,000/= or any other sum or at all.

5. THAT this costs of this application be provided for.

2. The application is expressed to be brought under Rule 17 (1), (3), and (5) of the Employment and Labour Court (Procedure) Rules, 2016.

3. By consent of Counsel for both parties the application was heard by way of written submissions and the Claimant's Counsel filed on 12th November, 2021 and the Respondent's on 30th November, 2021.

4. The application is supported by the affidavit of SOPHIA WANJIRU MUCHIRI, the Claimant, sworn on 21st October, 2021 with several annexures thereto.

5. The Respondent filed a replying affidavit sworn by Dr. Hezron Nyamwega on 3rd November, 2021 and the Claimant filed a further affidavit sworn by herself on 11th November, 2021.

II. CLAIMANT'S CASE

6. In the statement of claim dated 21st October, 2021 the Claimant is seeking the following reliefs:-

a) A declaration that the unilateral reduction of the Claimant's Remuneration in February 2021 was unlawful and unfair.

- b) A declaration that the unilateral reduction of the Claimant's Remuneration amounts to unfair labour practices.**
- c) An order reinstating with effect from 1st March, 2021 the sum of Kshs.115,000 per month unlawfully deducted from the Claimant's remuneration.**
- d) An Order prohibiting the Respondent from unilaterally changing terms of employment of the Claimant.**
- e) An Order that the Claimant's terms be retained as they were when she was the Finance Officer of the Respondent.**
- f) An order of injunction restraining the Respondent from unilaterally reducing the remuneration of the Claimant.**
- g) General Damages for unfair labour practices.**
- h) Interest on the withheld Remuneration and on damages at court rates.**
- i) Costs.**

7. The Claimant states that she was engaged as a Finance Officer by the Respondent vide a letter of appointment dated 16th May, 2011.

8. By a letter dated 12th November, 2018 the Respondent re-deployed the Claimant to act as Director, Resource mobilization and investment. The Claimant states that the Respondent was categorical that her terms of employment remained the same even upon the said re-deployment except for the designation.

9. The Claimant has displayed the two letters mentioned in paragraphs 7 and 8 above and in the later letter the Respondent wrote;-

“All other terms of employment remain the same.”

10. It is the Claimant's case that except for the designation or title that changed upon re-deployment all her other terms and conditions remained the same based on the assurance from the Respondent as quoted above.

11. The Claimant appealed against the re-deployment but the appeal was declined by the Respondent who went ahead and confirmed the Claimant in the position of Director, Resource Mobilization and Investments. The Claimant continued to enjoy the same remuneration as she did when she held the position of Finance Officer.

12. However, by a letter dated 25th February, 2021 the Board of Management of the Respondent communicated to the Claimant that they were withdrawing “Management allowances” that the Claimant had allegedly been drawing erroneously as a Director and that the affected payments amounting to Kshs.115,000/= per month were to be withdrawn with immediate effect.

13. The Claimant requested the Respondent to reconsider the said decision vide a letter dated 10th March, 2021 but the Respondent dismissed the request vide a letter dated 11th March, 2021. The Claimant's further appeal vide a letter dated 27th March, 2021 did not solicit any response from the Respondent as at the time this cause was filed in court.

14. It is upon the foregoing background that the Claimant has filed this cause and in the interim filed the amended Notice of Motion seeking the orders set out above.

III. RESPONDENT'S CASE

15. The facts as set above in Part II of this Judgment are not disputed by the Respondent in the replying affidavit and the written submissions except that the Respondent states that once the Claimant was re-deployed she ceased to be a member of the University Management Board and that the withdrawn or stopped payments were only payable to those who served in the Board of Management wherein the Claimant had allegedly ceased to serve upon re-deployment.

16. The Respondent argues that the withdrawn payments are allowances that are discretionary on the part of the Respondent and that the same are merely facilitative to members of the University management Board or such other officers as the Respondent may identify and as such they are not a right or part of the remuneration payable to the Claimant.

17. The Respondent further argues that if the orders sought are granted at this interim stage it will be prejudicial as the main cause will have been decided by way of an interim application.

18. The Respondent prays that the application be dismissed with costs.

IV. ISSUES FOR DETERMINATION

19. Flowing from all the materials filed from both parties including affidavits and annexures thereto, and the written submissions, this court has identified the following issues for determination;-

- a) Pending the hearing and determination of this cause should a temporary mandatory injunction issue requiring the Respondent to pay to the Claimant all monies deducted from the Claimant's pay from 1st March, 2021 at the rate of Kshs.115,000/= per month?
- b) Pending the hearing and determination of this cause should a temporary injunction issue restraining the Respondent from reducing the monthly remuneration of the Claimant by a sum of Kshs.115,000/= per month or any other sum or at all?
- c) Who meets the costs of this application?

V. MANDATORY INJUNCTION

20. The two orders for injunction as sought by the Claimant are for an interim period pending the hearing and determination of the main cause. It is important to note that the same orders are set out as the main prayers in the main cause. This calls for caution on this court not to pre-judge the main cause at this interlocutory stage.

21. The path on the principles upon which a temporary injunction may issue is well travelled. Geilla Vs Cassman Brown & Co. Ltd (1973) EA 358 is always a good starting point. There are two principles to consider; firstly whether the Applicant has a *prima facie* case with a probability of success; secondly that if the temporary injunction is withheld the Applicant will suffer irreparable loss, damage, or injury that cannot be compensated through an award of damages. If the court is still in doubt after considering the above two cumulative aspects then the court shall consider the balance of convenience.

VI. PRIMA FACIE CASE

22. In respect of prima case, it has been held that an Applicant should demonstrate to the court, based on the materials presented, that there is a legal right that has been infringed or is about to be infringed and that the court needs to issue orders to protect such a right. A *prima facie* case is clearly on a higher pedestal than an arguable case.

23. In granting a temporary injunction therefore, the court has to be satisfied that without an equally strong rebuttal from the other party the Applicant has a case with high chances of success. Counsel for the Claimant has relied on Mrao Ltd Vs First American Bank of Kenya Ltd & 2 others (2003) eKLR to support his argument on this issue as well as Nguruman LTD Vs Jan Bonde Nelson & 2 others (2003) KLR 125.

24. Counsel for the Respondent, besides relying on the above quoted cases, has also cited Robert Mugo wa Karanja Vs Eco Bank Kenya Limited & Another (2019) eKLR to drive home the Respondent's stand on *prima facie* case.

25. The issue between the parties is in respect of the sum of Kshs.115,000/= per month that was withdrawn from the pay of the Claimant with effect from March, 2021. According to the Respondent this amount had been erroneously paid to the Claimant from November, 2018 when the Claimant was redeployed from the position of the Finance Officer to that of Director, Resource Mobilization and Investment. It is a fact that it took the Respondent a period of over two years to identify and rectify the alleged erroneous payment.

26. The Claimant has argued that the sum of Kshs.115,000/= taken away is part of her remuneration and therefore her entitlement. In any event, the Claimant urges the Respondent undertook not to tamper with her terms and conditions of service following the re-employment. The undertaking by the Respondent is contained in the Respondent's letters dated 12th November, 2018 and 28th March, 2019.

27. In a letter dated 25th February, 2021 the Respondent indicated what deductions had been made from the pay of the Claimant amounting to Kshs.115,000/= per month. From that letter it is very clear that the Respondent unilaterally and without consulting the Claimant slashed the allowances payable to the Claimant, including commuting, entertainment, responsibility, and phone allowances without any explanation or support from any circular, regulation, or policy from the mother ministry or other authority.

28. It cannot be true, accurate, logical, reasonable, and or lawful that the Respondent as an employer and a public body has the sole discretion to unilaterally alter or change the terms and conditions of employment to the disadvantage of an employee without consulting the employee and without basing the same on sound legal grounds founded on legally binding policy, regulations, guidelines, or law.

29. In any event, and to a great disadvantage to the Claimant, the Respondent purported to effect deductions more than two years after the same had allegedly become due. That cannot be fair labour practice and the same offends Articles 42(1) and 2(a) and 47 of the Constitution of Kenya, and Sections 10(5) and 17 of the Employment Act.

30. There is no evidence to confirm that the Claimant was a member of the University management Board when she held the position of the Finance Officer and that she ceased to be such member upon re-deployment as the Director, Resource Mobilization and Investment.

31. Section 2 of the Employment Act defines "**remuneration**" as "**the total value of all payments in money or in kind, made or owing to an employee arising from the employment of that employee.**" Remuneration is one of those terms of a contract that cannot be changed or tampered with by the employer without consulting with the employee.

32. Clearly, the Claimant has established and demonstrated that she has a *prima facie* against the Respondent beyond just an arguable case. Without prejudging the main cause, this court is convinced and holds that the Claimant has a *prima facie* with a high probability of success.

VII. IRREPARABLE LOSS/DAMAGE/INJURY

33. On irreparable loss or damage the Claimant argues that since the deductions were effected she has relied on her savings that she states are about to be depleted. She argues that soon she will be unable to service her home mortgage or pay school fees for her two sons and a girl that she sponsors in High School. Those averments are contained in paragraphs 14, 15, 16, 17, 18 and 19 of the supporting affidavit.

34. On the other hand in paragraphs 14 and 16 of the replying affidavit the Respondent has dismissed the Claimant's averments and stated that the Respondent cannot be held responsible for the private decisions made by the Claimant. Without prejudice, this is a very arrogant response from the Respondent who seems/sounds completely out of touch with the plight of one of its employees.

35. The Black's Law Dictionary, Tenth Edition, defines irreparable loss as:- "**Damages that cannot be easily ascertained because there is no fixed pecuniary standard measurement.**" If the Claimant lost her home or was unable to educate the children mentioned the resultant damage cannot be quantified, for sure.

36. This court takes judicial notice of the fact that in the contemporary hard economic times a sum of Kshs.115,000/= per month makes a lot of difference in the quality of life to a household in Kenya.

37. This court finds and holds that the Claimant has established and demonstrated that if the mandatory injunctive order is withheld she will suffer or there is high likelihood of irreparable loss or damage and hence has satisfied the second principle.

VIII. BALANCE OF CONVENIENCE

38. On the issue of balance of convenience, it would have been almost unnecessary to consider this aspect as this court was already found in favour of the Claimant in respect of the other two principles of prima facie case and irreparable damage/loss. However, for completeness this court makes the following comments on this issue.

39. The Claimant is still an employee of the Respondent holding a senior position of Director, Resource Mobilization and Investment. She is in the Respondent's pay-roll and hence the Respondent can recover the monies paid if the counter-claim succeeds.

40. Further, based on the express promise made by the Respondent to the Claimant, that her terms and conditions of employment were not to be affected by the re-deployment, the Claimant had a founded legitimate expectation that she was to continue receiving the same remuneration in her new role. The Claimant was entitled to logically and reasonably fashion her social and economic lifestyle based on that legitimate expectation of uninterrupted and continuous pay of her remuneration to meet her expressed financial obligations.

41. In view of the finding in respect of the other two principles this court finds and holds that the balance of convenience is in favour of granting the interim injunctive orders.

42. What has so far been discussed above applies to an interim injunction of whatever nature, whether prohibitory or mandatory. However, as regards mandatory injunction there is an additional requirement. The Respondent has relied on **Kenya Power & Lighting Co. Ltd Vs Samuel Mandere Ogeto (2017) eKLR**, **Kenya Breweries Ltd & Another Vs Washington O. Okeya (2002) eKLR**, **Nation Media Group and 2 Others Vs John Harun Mwau (2014) eKLR**, among others, and on the other hand the Claimant has cited the **Kenya Breweries Case (Supra)**, **Kuria Manyore & Another Vs Consolidated Bank of Kenya & 2 others (2010) eKLR** on this issue.

43. The import of the above cited decisions is that a mandatory injunction can be granted at an interlocutory stage. However, there has to be special circumstances for example a case where the court is of the considered view that there is a clear case to remedy an apparent violation of the law or breach of clear legal rights.

44. This court has cited clear provisions of the Constitution and the statutory law which the Respondent is in apparent breach of. This court cannot sit back on the face of such apparent violation as that would amount to abdication of duty contrary to **Sections 1A, 1B, 3 and 3A of the Civil Procedure Act (Cap 21) and Section 3(1) and (2) of the Employment and Labour Relations Court Act.**

45. As noted elsewhere in this Judgment it took the Respondent over two years to detect and rectify the alleged erroneous payment to the Claimant. Equity does not aid the indolent but the vigilant.

46. The conscience of this court is clear that there are special circumstances in this cause to warrant granting of a mandatory injunction.

IX. TEMPORARY INJUNCTION

47. As noted in the foregoing part on mandatory injunction, the principles set out in **Geila Vs Casman Brown (Supra)** apply to both prohibitory and mandatory injunctions but as noted there is an additional requirement in granting of a mandatory injunction.

48. Having found that this is a proper case for issuance of mandatory injunction, this court holds that it is also a proper case for a prohibitory interim order to issue against the Respondent as prayed for in the application.

49. This court has found that the principles of prima facie case, irreparable loss/damage, and even the balance of convenience are all in favour of granting both mandatory and prohibitory injunctions as prayed for in the application.

X. COSTS

50. Costs follow the event as a general principle under **Section 27 of the Civil Procedure Act.** However, in view of the fact that the interim

orders granted herein are also the subject of the main cause, this Court orders that the costs of this application be in the cause.

XI. DISPOSAL

51. In disposal of the Amended Notice of Motion dated 12th November, 2021 this court issues the following orders:-

1. **THAT pending the hearing and determination of this cause a mandatory injunction be and is hereby issued ordering the Respondent to pay and remit to the Claimant all deductions made from her salary at the rate of Kshs.115,000/= per month from 1st March, 2021 up to and including February 2022.**
2. **THAT the said aggregate amount due in (1) above be paid on or before 30th March, 2022.**
3. **THAT pending the hearing and determination of the main cause a temporary injunction be and is hereby issued restraining the Respondent from reducing the monthly remuneration of the Claimant by the sum of Kshs.115,000/= per month, or any other sum, or at all.**
4. **THAT the costs of this application shall be in the cause.**

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 21ST DAY OF FEBRUARY, 2022.

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DAVID NDERITU

JUDGE