



**Kimani & another v Cretum Properties Limited (Cause 177 & 178 of 2021  
(Consolidated)) [2022] KEELRC 1745 (KLR) (12 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1745 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 177 & 178 OF 2021 (CONSOLIDATED)**

**L NDOLO, J**

**MAY 12, 2022**

**BETWEEN**

**CAROLINE WAITHIRA KIMANI ..... 1<sup>ST</sup> CLAIMANT**

**DANIELA ATIENO ..... 2<sup>ND</sup> CLAIMANT**

**AND**

**CRETUM PROPERTIES LIMITED ..... RESPONDENT**

**RULING**

1. By their parallel applications dated February 19, 2021, the 1<sup>st</sup> and 2<sup>nd</sup> claimants seek the following orders:
  - a. A mandatory injunction compelling the respondent to release to the claimants salary arrears and pension contributions as per the respondent's retirement benefits scheme plus deducted but unremitted pension contributions;
  - b. A prohibitory injunction restraining the respondent from disposing of any of its properties and particularly land parcels numbers Shawa/Gicheha Block 2/1849 in Nakuru, Shawa/Gicheha Block 2/1822 in Nakuru and Plot No 45 which was hived off from Mavoko Town Block 3/81978 located in Machakos, all of which form part of the parcels that were purchased by the claimants.
2. The applications are supported by the claimants' own affidavits and are premised on the following grounds:
  - a. The respondent, in violation of the Constitution and the law, frustrated the claimants occasioning them to resign from employment;
  - b. The claimants were therefore constructively terminated from their employment unlawfully and unfairly;



- c. As a result of the respondent's illegal actions, the claimants have been subjected to servitude, mental torture and anguish;
  - d. The respondent is in the process of winding up its business and operations and the claimants, if not cushioned by an order of the court, shall suffer irreparable loss; they will not be included as part of the creditors in the event of a winding up; they will therefore permanently lose their claim for unfair and unlawful termination of their employment as well as Kshs 1,100,000 loaned to the company by an association of employees;
  - e. It is in the interest of justice that the claimants' applications be allowed as prayed.
3. The respondent's response is by way of a replying affidavit sworn by its chairman, Mburu Mungai on April 22, 2021. He depones that the properties alleged to be a subject of this suit, were disposed of a long time ago.
  4. Mungai contests the jurisdiction of this court to deal with the claimants' claims and states that the claims fall within the realm of the Environment and Land Court and the Magistrates' Courts under the MELC. He adds that no sale agreements have been attached and the claims are thus null and void.
  5. Mungai admits that the claimants were employees of the respondent but accuses them of gross misconduct by involving themselves as directors/shareholders in a company carrying on similar business as the respondent, information they concealed from the respondent.
  6. Mungai states that the respondent, upon realising that the claimants were participants in a company that was in competition with the respondent, the board issued letters to all employees cautioning them to improve on their performance. He adds that the claimants chose to resign of their own free will once confronted with the issue of conflict of interest and non-performance. The claimants' claims of constructive dismissal are denied.
  7. The claimants are further accused of misusing their positions to perpetrate theft of the respondent's funds. Mungai depones that a forensic audit had revealed theft of Kshs 30,307,618, attributed to loss of funds by various employees, including the claimants.
  8. In addition, Mungai accuses the claimants of masterminding mass exit of the respondent's staff.
  9. Regarding the claimants' claims for retirement benefits, Mungai states that the respondent did not run any retirement benefits scheme. He further denies that the claimants are owed any salary arrears or outstanding leave pay.
  10. Mungai adds that the claimants received numerous benefits from the respondent company, including opportunity to buy several parcels of land at discounted prices.
  11. On the issue of purchase of land, the respondent maintains that the claimants have unpaid balances on the purchase price, hence the incomplete land allocation process.
  12. From the pleadings and submissions filed by the parties, the following issues emerge for determination in the parallel applications:
    - a. Whether this court has jurisdiction to entertain the applications;
    - b. Whether the claimants have made out a case for grant of the orders sought in the said applications.
  13. Regarding the issue of jurisdiction, the respondent states that because the claimants' prayers touch on land, then this court lacks jurisdiction to deal with the twin applications. In its written submissions



dated December 3, 2021, the respondent makes reference to section 12 of the *Employment and Labour Relations Court Act*.

14. The jurisdiction of this court is anchored in article 162(2)(a) of the *Constitution* which provides as follows:

162(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-

- a. employment and labour relations and
- b. ...;

15. Section 12(1) (a) of the *Employment and Labour Relations Court Act*, which the respondent relies on states:

12(1) The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with article 162(2) of the *Constitution* and the provisions of this

Act or any other written law which extends jurisdiction to the court relating to employment and labour relations including-

- a. disputes relating to or arising out of employment between an employer and an employee;
- b. ...;

16. This court determined the question as to what constitutes a dispute ‘relating to or arising out of employment between an employer and an employee’ in its decision in *Abraham Nyambane Atsiago v Barclays Bank of Kenya* [2013] eKLR and stated thus:

“The question then is what constitutes a dispute relating to or arising out of employment between an employer and an employee. Is it confined to issues that are ordinarily found in employment contracts or does it extend to all matters emanating from the employment relationship?

By its nature, the employment relationship generates a multiplicity of rights and obligations, some of which are not to be found in the express provisions of the employment contract. In my view, all these fall under employment and labour relations as intended by the law makers. To rule otherwise would be to create a situation where an employer or an employee traverses different courts to enforce different rights arising from the employment relationship. That in my view could not have been the intention of the legislators.”

17. Flowing from the foregoing, it follows that if the dominant cause of action arises from employment, the jurisdiction of this court to entertain auxiliary matters is firmly grounded.

18. In the present case, it is evident that the issue of the subject parcels of land is so closely intertwined with the claimants’ employment with the respondent as to form part of the employment dispute before the court.

19. I will therefore assume jurisdiction and proceed to determine the claimants’ applications on merit.

20. The prayers sought by the claimants fall within the purview of interlocutory injunctions. In their written submissions dated November 10, 2021, the claimants referred to the decision in *Nguruman*



Limited v Jan Bonde Nielsen & 2 others [2014] eKLR where the conditions for granting of such an order as established in Giella v Cassman Brown & Company Ltd (1973) EA 358 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 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...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 a *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.”

21. The definition of a *prima facie* case was rendered by the Court of Appeal in its decision in Mrao v First American Bank of Kenya Limited & 2 others (2003) KLR 125 as follows:

“A *prima facie* case in a civil application includes but is not confined to a ‘genuine and arguable case.’ 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. A *prima facie* case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”

22. The claimants’ plea for both mandatory and prohibitory interlocutory injunctions is premised on a myriad of allegations of fact that are highly contested. The court would therefore need to make an inquiry regarding these allegations in order to determine the rights and obligations accruing from the relationship between the parties. At any rate, it seems to me that by presenting these motions, the claimants are in fact prosecuting their main claims at the interlocutory stage.
23. On the whole, I find that the claimants have not established a *prima facie* case to warrant grant of the prayers sought. That said, I do not need to consider the conditions on ‘irreparable damage’ and ‘balance of convenience’.
24. The claimants’ twin applications dated February 19, 2021 are therefore declined with costs in the cause. The interim orders granted on March 11, 2021 are vacated.
25. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 12<sup>TH</sup> DAY OF MAY 2022**

**LINNET NDOLO**



**JUDGE**

Appearance:

Mr. Okoth for the Claimants

Mr. Thimba for the Respondent

