



**G.N.Mutuura v Embu Water and Sanitation Company Limited (Cause E005 of 2022) [2022] KEELRC 3954 (KLR) (16 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3954 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
CAUSE E005 OF 2022  
DKN MARETE, J  
SEPTEMBER 16, 2022**

**BETWEEN**

**FELIX G.N.MUTUURA ..... CLAIMANT**

**AND**

**EMBU WATER AND SANITATION COMPANY LIMITED ..... RESPONDENT**

**RULING**

1. This is an application by way of Notice of Motion dated March 4, 2022. It comes out as follows;
  1. That Honourable Court be pleased to certify this application as very urgent and dispense with service of the same on the claimant in the first instance.
  2. That pending the inter partes hearing of this Application, this Honourable Court be pleased to set aside, discharge and/or vary the interim injunctive orders issued herein on February 8, 2022.
  3. That pending the inter partes hearing of this Application the claimant be restrained from accessing, entering and/or being on the premises of the Respondent, interfering, hampering and/or meddling with the Respondent's day to day operations.
  4. That pending the inter partes hearing of this application, the claimant herein be restrained from disrupting, disturbing or creating any form of annoyance or nuisance to any of the Respondent's employees.
  5. That pending the inter partes hearing and determination of this Application, this Honourable Court be pleased to set aside, discharge and/or vary the interim injunctive orders issued herein on February 8, 2022.
  6. That pending the inter partes hearing and determination of this Application the claimant be restrained from accessing, entering and/or being on the premises of the Respondent , interfering , hampering and/or meddling with the Respondent's day to day operations.



7. That pending the inter partes hearing and determination of this Application, the claimant herein be restrained from disrupting, disturbing or creating any form of annoyance or nuisance to any of the Respondent's employees.
  8. That pending the hearing and determination of the suit herein, this Honourable court be pleased to give such further orders and/or directions that it deems necessary, equitable, fair and just in light of the circumstances of the case.
  9. That the costs of this application be provided for.
- It, in part comes out thus;
10. The claimant was first employed as the head of technical services and subsequently rose to the position of Managing Director of the Respondent.
  11. On October 15, 2021, the Claimant herein was issued with a suspension letter from the Board of Management of the Company. On October 18, 2021, the claimant herein responded to the suspension letter.
  12. On October 26, 2021 The Board of management summoned the claimant before them and he accepted the invitation.
  13. On October 26, 2021, the claimant was issued with a show cause as to why the Disciplinary measures should not be taken against him on allegations of gross misconduct.
  14. On October 29, 2021, the claimant herein responded to the show cause letter and requested all documents concerning the allegations leveled against him.
  15. On November 3, 2021, the Respondent supplied him with all the documents as requested.
  16. On November 9, 2021, the claimant replied to show cause letter and denied the allegations.
  17. On December 9, 2021, the committee made a report and submitted it to the Board with the recommendations that the services of the claimant be terminated. The said report was adopted by the entire Board.
  18. On December 9, 2021, the claimant herein was summarily dismissed and issued with a termination letter due to gross misconduct.
  19. The claimant final dues have been paid and there is nothing owed to the Company. He has since left the Company.
  20. The claimant has tried to cause chaos by conniving with the former chair to return him back to employment without the knowledge and authorization of the board and also using backdoor tactics.
  21. The Respondent is in a state of paralysis as it is unable to carry out its functions or to recruit a new managing director due to the court orders currently in place. The disturbance is causing grave detriment to the Respondent and also affecting the smooth running and operations of the company that offers services to the general public.
  22. The Application herein is well merited in law and the orders sought ought to be granted by this Honourable Court.



2. The Respondent /Applicant provides the following as a chronology of events leading to the termination of the claimant's employment;
  - i. The claimant was first employed as the head of technical services and subsequently rose to the position of Managing Director of the Respondent. (Annexed herein and marked as SN-1 are copies of the letter of appointment found at pages 1-18)
  - ii. On October 15, 2021, the Claimant herein was issued with a suspension letter from the Board of Management of the Company (Annexed herein and marked as SN-2 is a copy of the said letter at pages 19-23)
  - iii. On October 18, 2021, the claimant herein responded to the suspension letter dated March 15, 2021. (Annexed herein and marked as SN-3 is a copy of the suspension letter at page 24)
  - iv. On October 26, 2021, the Board of Management summoned the claimant before them and he accepted the invitation.
  - v. On October 26, 2021, the claimant was issued with a show cause as to why the Disciplinary measures should not be taken against him on allegations of gross misconduct.(Annexed herein and marked as SN-4 is the letter to show cause at pages 26-28)
  - vi. On October 29, 2021, the claimant herein responded to the show cause letter and requested all documents concerning the allegations leveled against him. (Annexed herein and marked as SN-5 is a copy of the said response at page 29 of the Respondent's Bundle)
  - vii. On November 3, 2021, we responded and supplied him with all the documents as requested by the claimant herein. (Annexed herein and marked as SN-5 is the forwarding letter and supporting documents pages 30-194).
  - viii. On November 9, 2021, the claimant replied to show cause letter and denied the allegations.(see pages 15-28 of the claimant's Bundle)
  - ix. On December 9, 2021, the committee made a report and submitted it to the Board with the recommendations that the services of the claimant be terminated. The said report was adopted by the entire Board.(Annexed herein and marked as SN-7 is a copy of the report of the ad hoc committee at pages 255-256)
  - x. On December 9, 2021, the claimant herein was summarily dismissed and issued with a termination letter due to gross conduct.( Annexed herein and marked as SN-8 is a copy of the letter of summary dismissal at pages 255-256)
  - xi. That I am aware that the claimant final sued have been paid and there is nothing owed to the Company. He has since left the Company.( Annexed herein and marked as SN-9 is a proof of payment of dues at pages 702-704)
3. The Claimant/Respondent in opposition to this application submits that his only requirements in the circumstances is to fit within precincts of *Giella vs Cassman Brown and Co. Ltd [1973] EA 358*, which illustrates the conventional criteria for the issue of injunctions.



4. It is his case and submission that he squarely falls into this, bearing in mind the nature and circumstances of his termination of employment and the relief sought hereof. He submits to a plethora of originating and grievances against the respondent and further contends that in such circumstances, damages would not be an adequate remedy or relief. He would suffer irreparable loss if the situation is not preserved.
5. Secondly, the Claimant/Respondent argues and submits that the position in contest is being held by a staffer in an acting capacity and the company running normally and the interim injunction is not in any way injurious to its mainstay. The balance of convenience is therefore in his favour.
6. The Applicant/Respondents case and submission is that the orders sought by the claimant have inflicted on the Respondent great prejudice, suffering and have brought its services and operations to a standstill. She supports the application by relying on the following submissions on issues of law;

5. It is trite law and well settled that any application seeking grant of an injunction must satisfy the cumulative test in *Giella v Cassman Brown 7 Company Limited [1973] E.A.*, 358 which are as follows;

- a. An applicant must show a prima facie case with a probability of success.
- b. An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury that cannot be compensated in damages.

When the court is in doubt, it will decide the application on the balance of probabilities.”

6. The Respondent/Applicant further seeks to rely on the authority of [Nguruman Limited v Jan Bonde Nielsen & 2 Others](#) [2014] eKLR, where the court held thus;

“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 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... if the applicant established a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied 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 my appear at that stage.... 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.”

7. Again, she posits and submits that a prima facie case in civil cases was defined by Bosire, JA (as he then was) in *Mrao Ltd v First American Bank of Kenya Ltd and 2 others* [2003] KLR 125, where he stated *inter alia* that;

“I would say that in civil cases it is a case in 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 examination or rebuttal from the latter.”

8. The Respondent/Applicant in furtherance of her case for grant of orders sought in the application further submits as follows;

23. It is the Respondent company’s submission that the claimant has not met the threshold for grant of the restraining orders sought. Further, the Respondent company has met the threshold for injunctions sought against the Claimant.

28. The Respondent is in a state of paralysis as it is unable to carry its functions or to recruit a new managing director due to the court orders. the disturbance is causing grave detriment to the Respondent and also affecting the smooth running and operations of the company that offers services to the general public.

42. The Respondent company submits that it has met the threshold for order sought in its Notice of Motion dated 4th March 2022. The Claimant has not met the cumulative test for grant of the injunctive orders sought in its Notice of Motion Application dated February 3, 2022. Consequently, the Respondent company prays that its Notice of Motion Application dated March 4, 2022 is granted as prayed and that the claimant’s notice of Motion Application dated February 3, 2022 be dismissed with costs to it.

9. This application tilts in favour of the Claimant/Respondent. This is because he has demonstrated a case of unlawful termination of employment on a balance of probabilities. The Applicant’s claim and thesis of non-disclosure of material facts is not demonstrated.

10. The Claimant/Respondents has met the threshold of grant of an injunction as enunciated in the celebrated authority of *Giella v Cassman Brown* above cited. He has in the least established a prima facie case with a probability of success. What may be in issue is the second limb which is a demonstration of irreparable injury which cannot be compensated by damages.

11. In this scenario, this court has to rely on the third and last limb of this authority; a test on a balance of convenience. It is our finding that this favours the Claimants/Respondents and a case for retention of the interim orders.

12. Interim orders of injunction are intended to preserve the subject matter pending hearing and determination of the application and possibly suit. These should not ordinarily be countered by applications for removal and setting aside of the same. Again, setting aside can only be had in extreme circumstances and on strict and unadulterated merit which is not the case here.

13. I am therefore inclined to dismiss the application with costs to the claimant/Respondent.

**DATED AND DELIVERED AT NYERI THIS 16<sup>TH</sup> DAY OF SEPTEMBER 2022.**



**D.K.NJAGI MARETE**

**JUDGE**

Appearances

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1. Mr. Cohen Amany and Khadijah instructed by Ahmednasir Abdullahi Advocates for the Respondent/  
Applicant.

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2. Mr. Waweru Macharia instructed by Macharia Waweru & Company Advocates for the Claimants/  
Respondents.

