REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. E458 OF 2021

MONICA TINDI WAGA.....CLAIMANT

VERSUS

HEINRICH BOLL STIFTUNG.....RESPONDENT

RULING

1. The Claimant applicant seeks through the notice of motion application dated 8th June 2021 for the following orders:-

    1. *Spent*

    2. THAT pending the hearing and determination of this Application *inter partes*, an order of injunction do issue restraining the Respondent from proceeding with the recruitment process and/or recruiting any person to fill the position held by the Claimant at the Respondent, that is to say, Finance & Administration Coordinator.

    3. THAT pending the hearing and determination of the substantive suit herein, an order of injunction do issue restraining the Respondent from proceeding with the recruitment process and/or recruiting any person to fill the position held by the Claimant at the Respondent, that is to say, Finance & Administration Coordinator.

    4. Costs of this Application be provided for.

    The application was supported by the grounds on the face of the motion as well as the Claimant's affidavit sworn on the same day and which in short version assert the Respondent had unfairly and unlawfully terminated the Claimant's employment without advancing any reasons. The Respondent was stated to have not issued any warning letter or undertaken any disciplinary hearing before the termination of her employment. She asserts that the termination was at a time she was working at home and as she was recuperating from covid 19. She averred that the Respondent upon realising the illegality and unlawfulness of their action in dismissing the Claimant from employment have engaged her in talks for over 45 days disguised as an attempt to settle the matter but have instead taken her in circles with no end in sight. She thus sought reinstatement which the Respondent asserts would not be awarded as there is no possibility of having the case heard and determined in 3 years which is the lawful period for reinstatement. She thus urged the grant of the prayers sought as the she would suffer prejudice if the orders are not granted as prayed.

2. The Respondent was opposed and filed an affidavit sworn by Mr. Joachim Paul the Country Director of the Respondent who asserts that the motion is misplaced and cannot be granted in the circumstances as the orders seek to interfere with the core finance function of the Respondent. The Respondent asserts it is donor funded and draws its funding from the German government with its core activities being non-profit and charitable in nature and as the finance aspect is key the Respondent would be unable to fulfil its reporting obligation with respect to donors. He further deponed that the operations of the Respondent would be obstructed and even put at risk in the absence of a finance and administration coordinator. The Respondent thus sought the denial of the orders sought.

3. The motion was disposed of by way of written submissions. The Claimant applicant submitted that the Constitution of Kenya 2010 grants employees the right to fair labour practices by virtue of Article 41; a provision that solidified the protection in the Employment Act, 2007. She submitted that so solid is this protection that even where the contract of employment makes provision for termination of employment on notice, unless there is demonstration that such is by mutual consent or there is a good reason leading to the same, such notice for termination must be within the law. She relied on the case of **Stephen Mbugua Chege *v* Nairobi City Water & Sewerage Company [2017] eKLR** where the learned judge stated as follows:

> *"The reasons given must be interrogated as to their genuineness, validity and reasonableness. Where there is a whim of illegality, the court must stop all else and deal."*

4. The Claimant further submitted that at the center of her grievances is the claim that she was unlawfully and un-procedurally dismissed and the decision to dismiss her was taken unilaterally as no charges were framed against her neither was she granted opportunity to respond to any claims against her. Further, the Applicant reiterates the averments in her Further Affidavit, that the allegations of her impugned summary dismissal were raised for the first time in the Respondent's Replying Affidavit. It was submitted that true to her assertion, the Respondent has not adduced any documentation or any form of evidence thereof to assert otherwise. The Claimant submitted that the gravamen of the Respondent's response is to be found under Paragraphs 9 and 10 of its Replying Affidavit where it is deponed thus;

> *"9) THAT in the Month of April 2020, for instance, it was noted by the Respondents Headquarters from a financial report prepared by the Applicant, that she had doubled book in the Applicants accounting system...*
>
> *10) THAT the double booking incident necessitated the Applicant to revisit the 2019 bank reconciliation prepared by the Applicant to ensure the records were devoid of any other errors. This exercise revealed that the Applicant had misstated bank charges and expenses for three months in 2019...."*

5. The Claimant submitted that the argument fronted, as clearly discernible from the response, is that the Applicant's impugned summary dismissal is pegged on these two incidents purportedly discovered in April 2020, to wit, the double booking incident and the 2019 bank reconciliation incident. The Claimant submitted that it is noteworthy that her claim for unfair termination emanates from the Notice of Termination dated 15th April 2021 which was issued one year after the alleged discovery of "misconduct" and/or "poor performance" as put by the Respondent. She asserts that the annexures in the Respondent's affidavit are not sealed as required under the Oaths and Statutory Declarations Act and noting that procedural technicalities are not to impede justice she asserts this is not a mere procedural technicality but goes to the root of the evidence adduced. She seeks the expunging of the affidavit for failing to comply with the law. The Claimant further submits that she had satisfied the requirements for grant of injunctive relief per the principles enunciated in **Giella *v* Cassman Brown *&* Company Limited [1973] EA 358** where it was held that

> *(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.*

6. The Claimant submitted that the Rule relied on by the Respondent being Rule 17(5) of the Employment and Labour Relations Court (Procedure) Rules 2016 which provides as follows:

> *"In a suit where an injunction is sought, a claimant or applicant may at any time in the suit, apply to the Court for an interim or temporary injunction to restrain the respondent from committing a breach of contract or an injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right"*

Cannot override Section 12(3) of the Employment and Labour Relation

Court Act as this Court has the powers to, *inter alia*, grant prohibitory orders. The Claimant submitted that the orders she seeks are meant to restrain the Respondent from filling a vacancy and are therefore prohibitory in nature. It is further worth noting that the Section does not limit the powers of the court to issue prohibitory orders. The Claimant submitted that in the case of **Hedwig Nyalwal *v* Kenya Institute of Supplies Management [2020] KLR,** Onyango J. held

> *"For the foregoing reasons I find that the Claimant has established that he would suffer irreparable harm should the court not preserve his position as Chief Executive Officer of the Respondent as he* ***would not be reinstated unless the position is preserved"***

The Claimant thus urged the grant of the relief sought.

7. The Respondent on its part submits that the issues for determination in this motion are as follows:-

> i. Whether or not the Applicant has demonstrated sufficient grounds for award of the orders sought;
>
> ii. Whether or not the Honourable court should consider "without prejudice" correspondence attached to the Applicants application dated 8th June 2021.

As to whether or not the Applicant has demonstrated sufficient grounds for award of the orders sought, the Respondent cited Rule 17(5) of the Employment and Labour Relations Court (Procedure) Rules, 2016 which provides that:

> *"In a suit where an injunction is sought a claimant or applicant may in the suit, apply to the court for an interim or temporary injunction to restrain the respondent from committing a breach of contract or an injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right"*

8. The Respondent submitted that by dint of the above rule, an injunction can only be sought and granted if the applicant has sought an

injunction order in the suit. The Respondent submitted that an interim injunction subsists pending service of the application to all the parties while temporary or interlocutory injunction subsists pending trial. It argued that in either case, the drafters of Rule 17(5) of the Rules intended to bar a party who has not sought injunction in his suit from seeking interim interlocutory injunction. The Respondent submitted that the Applicant in her Statement of Claim has not sought orders for an injunction restraining the Respondent from the filing the position the Finance and Administration Coordinator and that owing to the omission by the Applicant, it is the Respondent view that she is not deserving of the orders sought in the current Application. The Respondent relied on the case of **Shadrack Musyoka *v* Middle East Bank Kenya Limited [2021] eKLR**, where the Court in discussing the above rule observed *inter alia*,

> *…..In this case the applicant has sought both temporary and permanent injunction in the instant motion and not in the suit. Consequently since the claimant herein has not sought injunction in his suit to restrain his employer from terminating his employment contract, I agree with the respondent's objection that the application herein is incompetent vis-a-vis Rule 17(5) of the ELRC Procedure Rules….*

9. The Respondent submitted that in considering whether or not the Applicant has demonstrated sufficient reason for grant of the orders sought in the current application, given the nature of the application the matter (grant of an injunction), the court should be guided by the principles established in the case of **Giella *v* Cassman Brown & Co Ltd [1973] EA 358** that is,: -

> *a) The Applicant must show a* prima facie *case with a probability of success. b) The Applicant will suffer irreparable injury, which would not be adequately compensated by an award of damages.*
>
> *c) If the Court is in doubt, it will decide the application on the balance of convenience.*

The Respondent submitted that there is no *prima facie* case. It was submitted that *prima facie* case was aptly defined by the Court in the case of **Mrao Ltd *v* First American Bank of Kenya Ltd & 2 Others [2003] eKLR** 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."*

The Respondent submitted that in the instant case there is no illustration by the Applicant on the face of the record that her case is likely to succeed and this remains a matter for consideration by the Court once all the evidence from the parities is taken. There was reliance on the case of **Thomas Ekamais Akuja *v* Turkana University College Council [2021] eKLR**, where the Court while relying in the case of **Rose Sang *v* Siginon Group Limited [2020] eKLR** observed that,

> *"……In the instant application, I find that it is not possible to determine if the applicant has a* prima facie *case as this would only become determinable after hearing evidence from both parties….."*

The Respondent submitted that in the present application the Applicant was negligent in the performance of her duties and when called upon to explain she gave unsatisfactory answers for the negligence and that despite the unsatisfactory answers the Respondent still attempted to amicably disengage with the Applicant. As to whether the Claimant has proved irreparable injury, the Respondent submitted that it was observed in the case of **Nguruman Limited *v* Jan Bonde Nielsen & 2 Others [2014] eKLR** which was relied upon in the case of **Stars & Garters Restaurant & Another *v* National Bank of Kenya Limited [2019] eKLR** that

> *On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."*

10. The Respondent submits that the Applicant has made a claim for these specific amounts as she knew the amounts would adequately compensate her should her termination be deemed unlawful. In this event the Applicant has illustrated that any loss she suffered or will suffer can be compensated and the fact that the Applicant has made a claim for specific amounts suggests that there is a standard by which her loss can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation will be an adequate remedy.

It is thus that the Respondents contention that the Applicant has failed to demonstrate that she will suffer irreparably in the event the orders sought are not granted. As to the balance of convenience the Respondent submitted that the Court should not grant the orders sought if the orders will result in such hardship that would cripple operations of the Respondent especially since the Applicant has indicated she can be compensated by damages. The Respondent submits that after the Claimant's departure it had to procure someone to occupy the role the Claimant occupied in acting capacity pending recruitment given the import nature of the role and for all intents and purposes, albeit in an acting capacity, the position is currently occupied. The Respondent is of the view that the balance of convenience tilts towards declining the orders sought.

11. The Respondent made submissions as to whether or not the Honourable Court should consider "without prejudice" correspondence attached to the Applicants application dated 8th June 2021. It submitted that the Applicant in the present application has attached correspondence exchanged with the Respondent relating to the matter herein. The correspondence was exchanged on a without prejudice basis. The bulk of the correspondence was exchanged when the parties were attempting to amicably settle the matter herein. The correspondence has been attached by the Applicant ostensibly to paint the Respondent in bad light. That the correspondence did not

constitute an offer that was accepted by the Applicant and later reneged upon by the Respondent, which is the only circumstances that would allow the applicant to rely on the without prejudice communication. The Respondent cited the case of **Guardian Bank Limited *v* Jambo Biscuits Kenya Limited [2014] eKLR** where the Court held:

> *"The 'without prejudice rule' is a rule governing the admissibility of evidence and is founded on the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. The rule rests on public policy and the convenient starting point of the inquiry is the nature of the underlying policy which is that parties should be encouraged so far possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should be encouraged freely and frankly to put their cards on the table and the public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability. The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. This rule is recognized as being based at least in part on public policy. Its other basis or foundation is in the express or implied agreement of the parties themselves that communications in the course of their negotiations should not be admissible in evidence if, despite the negotiations, a contested hearing ensures... It is therefore clear that as a general rule, communication between parties to a suit, made on "without prejudice" basis will not be admissible in evidence.*

The Respondent submitted that any without prejudice correspondence referred to or attached to the Applicants application dated 8th June 2021 should be disregarded and in view of the fore going reasons the Application dated 8th June 2021 has no merit and the Respondent thus prays for the same to be dismissed with costs.

12. The Claimant has sought interim relief which she has not sought in her memorandum of claim. In view of the fact that a party is bound by their pleadings, this is not a relief that she can successfully mount at this stage given that she has precluded it in her own claim. As the position is filled in acting capacity and the fact that this case will be heard and determined this year if there is reinstatement it shall be easy to order as such. The only success the motion has is to have the Court issue an order that the position previously held by the Claimant is not to be filled in substantive capacity pending the hearing and determination of this suit. Hearing of the case shall be fixed immediately after the delivery of this Ruling.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER 2021

Nzioki wa Makau

JUDGE