



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 658 OF 2019**

*(Before Hon. Lady Justice Maureen Onyango)*

**SIVASHANMUGAN HARUR NEBUNCHEZHIAN.....CLAIMANT**

VERSUS

**CROWN SOLUTIONS LIMITED T/A CROWN HEALTHCARE.....1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF IMMIGRATION KENYA.....2<sup>ND</sup> RESPONDENT**

**RULING**

The Claimant's work permit was cancelled by the 2<sup>nd</sup> Respondent and he stands to be deported back to India despite having an active case in this Court. Aggrieved, he filed the Application dated 5<sup>th</sup> December 2019 seeking the following orders—

1. Spent.
2. That the Court be pleased to set aside the order of the 2<sup>nd</sup> Respondent cancelling the work permit of the Claimant/Applicant pending the hearing and determination of this application *inter partes*.
3. That the Court be pleased to issue an order restricting the 2<sup>nd</sup> Respondent from deporting the Claimant/Applicant pending the hearing and determination of **ELRC 658 of 2019**.
4. That the costs of this Application be borne by the Respondents.

Consequently, prayer number 2 was granted pending the hearing and determination of the Application. However, when the matter came before this Court for determination, it was noted that the Claimant had sought orders against the 2<sup>nd</sup> Respondent who had not been joined to these proceedings hence the orders sought were incapable of being granted. The Claimant was thus directed to enjoin the 2<sup>nd</sup> Respondent as a party before the Application dated 5<sup>th</sup> December 2019 could be considered.

This prompted the Claimant's Application dated 19<sup>th</sup> December 2019 seeking the following orders—

- a. Spent.
- b. That the Court be pleased to grant leave to the Applicant to enjoin the 2<sup>nd</sup> Respondent as a party to the Application dated 5<sup>th</sup> December 2019.
- c. That the Interim Orders issued by Wasilwa J. on 5<sup>th</sup> December 2019 be reinstated pending the hearing and determination of the Application *inter partes*.
- d. That the cost of this Application be provided for.

The Application is supported by the grounds set out therein and the Applicant's Supporting Affidavit sworn on 19<sup>th</sup> December 2019. The 1<sup>st</sup> Respondent has opposed the Application vide the Grounds of Opposition dated 21<sup>st</sup> January 2020.

### **The Applicant's Case**

The Applicant avers that the failure to seek leave to enjoin the 2<sup>nd</sup> Respondent was due to the Applicant's Advocate's inadvertent mistake hence should not be visited upon him.

The Applicant avers that he is likely to be deported back to India despite establishing a *prima facie* case of unfair termination case against the 1<sup>st</sup> Respondent since it instructed the 2<sup>nd</sup> Respondent to cancel his work permit.

As such, it is in the interest of justice that the orders sought be issued or the Applicant will suffer irreparable damage as he will be denied the opportunity to seek recourse for the unfair termination of his employment.

It is the Applicant's position that his presence during the hearing is crucial as he will be instrumental in assisting this Court in making a fair determination.

### **The 1<sup>st</sup> Respondent's Case**

The 1<sup>st</sup> Respondent has opposed the Application on the following grounds –

1. The orders sought in the Application of 5<sup>th</sup> December 2019 were obtained without leave of the Court to enjoin the 2<sup>nd</sup> Respondent and therefore were irregular, null and void and all orders emanating and/or ensuing therefrom were a nullity and ought to be vacated.
2. The orders are being sought too late in the day and the Claimant is guilty of laches.
3. The Application seeks to reinstate/extend irregularly obtained interim orders in the application of 5<sup>th</sup> December 2019.
4. The orders that were obtained by the Applicant in the application dated 5<sup>th</sup> December 2019 aforesaid are illegal and irregular on account of failure to seek leave of court to enjoin the 2<sup>nd</sup> Respondent and hence reinstating/extending them amounts to reinstating/extending an illegality or irregularity.
5. The Application by the Claimant is a gross abuse of the court process and is *mala fides* for seeking orders which ought to have been sought in the instant Application.
6. The amendments sought in the application will greatly prejudice the Respondents and occasion an injustice as they have been brought after the closure of pleadings.
7. The 2<sup>nd</sup> Respondent is not a proper party to this suit.
8. The Application is devoid of merit, misconceived, frivolous, vexatious and ought to be dismissed with costs.

### **The Applicant's Rejoinder**

In response to the 1<sup>st</sup> Respondent's Grounds of Opposition, the Applicant filed the Further Affidavit sworn on 6<sup>th</sup> February 2020 contending that the instant Application was filed to correct an inadvertent mistake to avert a miscarriage of justice hence did not prejudice the Respondents.

The Applicant further contends that there was no delay in filing the Application dated 5<sup>th</sup> December 2019 as it was made upon receipt of the 2<sup>nd</sup> Respondent's letter cancelling his work permit. Further, that leave of Court was properly sought in the Application dated 19<sup>th</sup> December 2019.

The Petitioner maintains that his applications are merited and properly before this Court and avers that the joinder of the 2<sup>nd</sup> Respondent to these proceedings is necessary for the injunctive orders to be enforceable.

The Application was disposed of by way of written submissions with both parties filing their submissions.

### **The Applicant's Submissions**

The Applicant submits that he has met the threshold for granting temporary injunction as set out in the case of **Giella v Cassman Brown & Company Limited [1973] EA 358, 360**. In particular, he has established a *prima facie* case with a probability of success as he has demonstrated that if the orders sought are not granted, he would be deported or arrested and thereby denied access to justice. That this would

occasion him irreparable damage which cannot be compensated by way of damages yet article 48 of the Constitution grants him the right to access justice. The balance of convenience therefore tilts in his favour.

### **The 1<sup>st</sup> Respondent's Submissions**

The 1<sup>st</sup> Respondent submits that the Applicant did not seek leave of Court to join the 2<sup>nd</sup> Respondent as required by order 1 rule 6 of the Civil Procedure Rules, as such the 2<sup>nd</sup> Respondent is not properly joined to this suit.

It is the 1<sup>st</sup> Respondent's submissions that the orders sought were irregularly obtained and cannot be cured with a subsequent application and relies on the case of **Ali Bin Khamis v Salim Bin Khamis Kirobe & Others [1956] 1 EA 195** where the Court held that where an order is made without service upon the person who is affected by it, the procedural cockups will not deter a Court from setting aside the said orders.

The 1<sup>st</sup> Respondent thus submits that the Application is devoid of merit, misconceived, frivolous, vexatious hence should be dismissed with costs.

### **Analysis and Determination**

I have carefully considered the application, the grounds of opposition, the evidence and the submissions filed by the parties and find the issues for determination before this Court are: –

- a. Whether leave should be granted to the Applicant to join the 2<sup>nd</sup> Respondent as a party to the Application.
- b. Whether the orders issued on 5<sup>th</sup> December 2019 should be reinstated.

### **Leave to Join the 2<sup>nd</sup> Respondent**

Order 1 rule 3 of the Civil Procedure Rules provides as follows –

**All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.**

The instant application was prompted by the directions issued before this Court on 19<sup>th</sup> December 2019 for the application to be considered. The 1<sup>st</sup> Respondent has not demonstrated the prejudice he stands to suffer if the orders sought are granted.

On the other hand, the Applicant stands to suffer irreparable damage as the orders sought in the application of 15<sup>th</sup> December 2019 will not be granted as they are unenforceable without joining the 2<sup>nd</sup> Respondent.

It is also noteworthy that the letter of 3<sup>rd</sup> December 2019 cancelling the Applicant's work permit was issued by the 2<sup>nd</sup> Respondent. Further, the said letter indicated that the Applicant's work permit had been cancelled upon the 1<sup>st</sup> Respondent's application. As such, his joinder to these proceedings is necessary as he is the one capable of enforcing the orders sought in the application of 5<sup>th</sup> December 2019. In the case of **Tang Gas Distributors Ltd v Said & Others [2014] EA 448**, which was cited with approval by the Court of Appeal in **J M K v M W M & another [2015] eKLR** it was stated that–

*“the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage.”*

I thus find merit in the application for joinder. I accordingly grant the same orders and hereby join the Director of Immigration as a party to this suit as prayed.

### **Reinstatement of the Orders Issued on 5<sup>th</sup> December 2019**

The Applicant seeks to have the orders issued on 5<sup>th</sup> December 2019, reinstated. The orders issued were to the effect that the cancelling of the Applicant's work permit was suspended pending the hearing and determination of this Application *inter parties*.

The Applicant has satisfied the conditions set out in the case of **Giella v Cassman Brown & Company Limited [Supra]**. The letter dated 3<sup>rd</sup> December 2019 annexed in his Further Affidavit demonstrates a *prima facie* case. Further, he has demonstrated that failure to grant the orders sought will occasion him irreparable harm because his deportation or arrest would deter him from prosecuting his case against the 1<sup>st</sup> Respondent thereby prejudicing him as he would not get justice for his unfair dismissal. For instance, he will not be present to actively follow up on his matter to ascertain that it is being prosecuted, or testify as a witness to prove the averments made in his claim.

As such, the balance of convenience tilts in his favour as the 1<sup>st</sup> Respondent has not demonstrated the prejudice it will suffer if the orders

sought are granted. **The orders of 5<sup>th</sup> December 2019 are therefore reinstated to the effect that the cancelling of the work permit of the Claimant/Applicant by the 2<sup>nd</sup> Respondent be and is hereby suspended pending the hearing and determination of this suit.**

The Applicant is directed to serve the 2<sup>nd</sup> Respondent in person. The costs of application shall be in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13<sup>TH</sup> DAY OF NOVEMBER 2020**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**