



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. E372 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

ROBERT NIXON SHITAMBANGA.....CLAIMANT

VERSUS

SUNNY PROCESSOR LIMITED.....RESPONDENT

RULING

The Applicant filed a Notice of Motion dated 9th August 2020 seeking the following orders:

1. Spent.
2. That this Court be pleased to issue an order of injunction restraining the Respondent herein from effecting termination of the Claimant.
3. That the Court be pleased to order lifting the Claimant's suspension.
4. That the Court be pleased to issue an order of injunction restraining the Respondent or their agents from victimising, harassing and suspending the Claimant pending the hearing and determination of this Application.

The application is premised on grounds that:

- a. On 3rd August 2020, the Kenya Plantation and Agricultural Workers Union delivered a letter dated 27th July, 2020 to the Respondent which stated that the Applicant has been appointed as the interim shop steward in the elections held on 26th July, 2020.
- b. After delivery of the letter, the Respondent's Director Kushel V. Patel warned the Applicant that due to his involvement in union activities he would not be in the Respondent's company for long, his employment would be terminated.
- c. On 5th August, 2020 the Respondent issued the Applicant with a disciplinary invitation notice for a scheduled hearing on 11th August, 2020.
- d. The Claimant has been suspended by the Respondent and charges in the disciplinary notice are trampled charges of an incident that allegedly took place on 12th March, 2020.

The application is supported by the applicant's affidavit sworn on 9th August, 2020 in which he reiterates the averments set out in the grounds of the application.

The Respondent filed Grounds of Opposition dated 21st August, 2020 stating that:-

1. The Applicant's Notice of Motion is premature, misconceived, bad in law, an abuse of court process and totally devoid of merit.
2. The application is premised on provisions of the Constitution and the Labour Relations Act that are not applicable to the circumstances and facts of the present matter.

3. The Applicant was issued with 2 warning letters in March and April for a major offence which he continued to commit and failed to remedy and which led to the Respondent issuing him with a show cause letter. The show cause letter issued to the Applicant has nothing to do with the election and appointment of the Applicant as Interim Shop Steward but with his conduct at the work place.

4. The Applicant has not demonstrated what injury, damage and or loss he is likely to suffer if the prayers sought in his application dated 9th August, 2020 are not granted.

5. The applicant is not entitled to the orders sought as in the unlikely event that this Court finds the Respondent liable for any wrong doing damages will be an adequate remedy.

The Respondent also filed a Verifying Affidavit sworn by Kushel Vallabhass Devji Patel on even date. The affiant deposes that a warning letter dated 16th March, 2020 was issued to the Applicant for publication of photographs he had taken within the Respondent's premises near various machines which he posted on his company Facebook page "*Rosai Electronics Limited*".

He further deposes that on 12th March, 2020 the Applicant was issued with a show cause letter regarding conflict of interest and posing photographs on social media containing sensitive information relating to the Respondent. That instead of accepting the same and preparing for hearing, the Applicant burst into the board room where the affiant was working and began shouting at him that he would invite media houses.

He avers that the Respondent withdrew the show cause letter on account of the intimidation by the Applicant and instead issued a warning letter dated 16th March 2020. He deposes that it is not true for the Applicant to claim that he was victimised yet it is him who harassed the affiant.

He avers that the Applicant refused to pull down the offending photographs and on 5th August, 2020 he was issued with a show cause letter by the General Manager and suspended with full pay until 11th August, 2020 when the disciplinary hearing was to take place. However, the Applicant on 10th August, 2020 wrote an email with a doctor's note that he could not attend the hearing the following day and requested that the hearing be postponed to 14th August, 2020.

He contends that the Respondent's General Manager wrote to the Claimant proposing that the meeting be rescheduled on 17th August 2020. He contends that he was not within the Respondent's premises on 3rd August, 2020 when the Respondent received a letter notifying it of the Applicant's appointment as a shop steward and that he had no contact with the Applicant between the time of notification and the time of the show cause letter.

The Applicant filed a Replying Affidavit to the Respondent's Grounds of Opposition sworn on 18th September, 2020. He deposes that there is need for this Court to stop the Respondent from interfering with his right of association by intimidating, harassing or terminating him on account of his election as interim shop steward.

He contends that there can never be adequate compensation for interference with an employee's right to participate in lawful union activities.

Applicant's submissions

The Applicant submitted that being a shop steward he is the voice of the Kenya Plantation and Agricultural Workers Union at the shop floor level. He submitted that employers must not victimise shop stewards and the relevant union must be involved in dealing with disciplinary matters.

He submitted that the Respondent has failed to demonstrate that the Union was consulted when it subjected him to a disciplinary hearing. He argued that the Respondent's intention is to terminate his employment so as to frustrate union activities.

He argued that he is entitled to the orders sought and that there can never be adequate compensation for interference with an employee's right to participate in lawful union activities. He submitted that the Respondent should be condemned to pay costs.

Respondent's Submissions

The Respondent submitted that the powers of the court in an interlocutory injunction is discretionary and urged the Court to exercise its discretion on the basis of the applicable law and evidence before it.

It submitted that the principles governing the grant of interlocutory injunctions are set out in **Geilla v Cassman Brown & Co. Limited [1973] E.A.** It was its submission that the applicant has **not met the said requirements.**

It argued that a prima facie case was defined in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] eKLR** as one which, based on the material presented to a Court or a tribunal, it would conclude that there exists a right which has apparently been infringed. It submitted that the Applicant's allegations that the Respondent's Director warned him that he would not work for long due to his union activities are falsehoods.

It submitted that the Applicant's affidavits are contradictory as he states in his supporting affidavit that he was warned of his involvement in union activities after delivery of the letter and in his Replying Affidavit he deposes that Mr. Kushel threatened him that he would lose his job

in mid-June.

It relied on the case of **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR** where the Court held that

“...the very foundation of the jurisdiction to issue orders of injunction vests in the probability of irreparable injury, the inadequacy of pecuniary compensation and the prevention of the multiplicity of suits and where facts are not shown to bring the case within these conditions the relief of injunction is not available.”

It submitted that the Applicant has not demonstrated what injury, damage or loss he is likely to suffer if the orders sought in his application are not granted. It reiterated that damages would be an adequate remedy in the unlikely event that the Court finds fault on its part.

It submitted that it was simply following the law under section 41 of the Employment Act and if the Applicant is aggrieved by due process, the law equally provides him with avenues to seek redress.

In conclusion, it reiterated that the Applicant has not met the threshold in **Giella v Cassman Brown case**. It urged the court to dismiss the application with costs and set the main suit for hearing at the earliest subject to the Court's convenience.

Analysis and Determination

As submitted by the Respondent, the principles for grant of an injunctive order were set out in **Giella v Cassman Brown case** where the Court held:

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.”

The Applicant's contention is that on 5th August, 2020 he was issued with a notice to appear for a disciplinary hearing on 11th August, 2020. It is his case that this was a result of his union activities and that the charges against him were in respect of an incident that allegedly took place on 12th March, 2020. The Respondent on its part avers that the Applicant did not attend the scheduled hearing and that the Applicant has not met the threshold for grant of an injunction.

In the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] eKLR** the Court of Appeal defined a Prima facie case as follows:

“So what is a prima facie case? 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 explanation or rebuttal from the latter...”

... prima facie case is more than an arguable case. It is not sufficient to raise issues. 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.”

In the instant case, the Applicant has demonstrated that by letter dated 27th July 2020, the Respondent was notified of his appointment as interim shop steward in elections held on 26th July 2020, which letter was delivered to the Respondent on 3rd August 2020. That on 5th August 2020 he was issued with a letter inviting him to a disciplinary hearing on 11th August 2020. The charges related to a matter that had occurred on 10th and 12th March 2020 and had been issued with a warning letter dated 16th March 2020 and a letter from the Respondent dated 9th April 2020 which the claimant had satisfactorily explained by letter dated 11th April 2020.

It cannot be by coincidence that these issues would be revived by an invitation to a disciplinary hearing on 5th August just two days after receiving the letter from the Union to the effect that the Applicant had been elected as a Shop Steward.

I find that the Applicant has established a prima facie case that requires examination by the Court being that he is being persecuted for his union activities. I find that unless the orders sought are granted, the Applicant is not only likely to have his right to freedom of association and right to join and participate in union activities infringed but is also likely to lose his job on grounds that after the hearing hereof, may be found to be invalid.

For the foregoing reason, I find the application meritorious and make the following orders: -

- 1. That the Respondent be and is hereby restrained from victimising, harassing and suspending the Claimant on grounds of union activities pending hearing and determination of this case.**
- 2. That the letter suspending the Claimant from service is suspended pending hearing and determination of this suit.**
- 3. That the Respondent do engage the Kenya Plantation and Agricultural Workers Union with a view to amicable settlement of this matter in view of the Claimant's position as shop steward in the union failing which parties to move court for hearing of the main suit expeditiously.**

4. The costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 1ST DAY OF DECEMBER 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 15th March 2020 and subsequent directions of 21st 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