



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 443 OF 2019

JAMES AGANYO MOKAYA.....CLAIMANT

-VERSUS-

TEACHERS SERVICE COMMISSION.....RESPONDENT

RULING

1. The application before the court is the claimant's Notice of Motion dated 3.7.2019. It is brought under section 1, 1A, 3, 3A and 6 3(e) of the Civil Procedure Act and Order 51 of the Civil Procedure Rules. It seeks for an injunction to restrain the respondent from transferring the claimant from Nairobi County to Kwale County.

2. The application is supported by the claimant's own affidavit sworn on 2.7.2019 and it is premised on the grounds set out on the body of the motion. In brief, the applicant's case is that the transfer to Kwale County is malicious and lacks consideration of his medical issue and his family; that the transfer was perpetuated by malice arising out of personal difference between him and the respondent's Deputy Director of Security; that initially he was transferred to Kiambu and while preparing to move, the transfer was cancelled within 4 days and replaced with the impugned transfer to Kwale County; that he is a single parent with school going children including a 7 year old girl who cannot be left alone in Nairobi; and that he has a medical condition that requires close supervision by doctor for 6 months from June 2019. He therefore argued that transfer be stopped because if effected immediately it would prejudice his treatment and his young child.

3. In his affidavit he was emphatic that the reason for his transfer was done after he failed to heed to the demands by the Deputy Director Security to release file number 554432 for Margaret Nganga Njeri against the record management policies. He maintains that the transfer is punitive, malicious and essentially amounts to unfair labour practices.

4. The respondent opposed the application by the Replying Affidavit sworn by Mr. Simeon Obura, Acting Senior Deputy Director (Human Resource Development) on 19.7.2019. In brief, the respondents case is that the application does not meet the threshold for granting interlocutory injunction; that she employed the claimant on 21.4.2015 as a Human Resources Officer; that on 10.5.2019 she transferred him to Kiambu County but later re-routed him to Kwale County owing to administrative considerations, that include staff balance and rationalization; that the claimant refused and or neglected to report to the new station and appealed. That the appeal was rejected after which he resulted to unprecedented requests for sick offs and finally petitioned this court to overturn the transfer.

5. The respondent further avers that she has the constitutional mandate to manage her staff including transferring the claimant to a new station and it would be usurpation of that mandate if the court grants the injunctions sought. She therefore urged the court not to interfere with her administrative decision because it was done in conformity with law and her policies and prayed for the application to be dismissed with costs.

6. The main issue for determination arising from the motion and the rival affidavits is whether the application meets the threshold for granting interlocutory injunction.

Analysis and determination

7. The threshold for granting interlocutory injunction as espoused by *Giella v Cassman Brown [1973]EA 358* is that the applicant must first present a prima facie case with a probability of success; second he must show that if the order is withheld, he stands to suffer irreparable harm, and third if the court is in doubt, to decide the request on a balance of convenience. The question that arises is whether the applicant has answered the said questions in the affirmative.

Whether the applicant has presented a Prima facie case

8. A prima facie case was defined by the Court of Appeal in *Mrao Ltd v Firt Amercian Bank of Kenya Ltd & 2 others [2003]KLR 125* as

follows”

“In civil cases, a prima facie case 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 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.”

9. In *Nguruman Ltd v Jan Bonde Nielsen & 2 others [2014]eKLR* the Court of Appeal held that in considering whether or not a prima facie case been established:-

“The Court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for injunction has a right, which has been or threatened with violation... This therefore mean that the court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.”

10. In this case, the applicant contends that his transfer from Nairobi to Kiambu then Kwale was not for genuine reason but maliciously done to punish him for personal differences with the Deputy Director of security over for rejecting to release a file to him in breach of record management policies. The said contention has not been rebutted by the said Deputy Director of Security by way of an Affidavit. Even the Replying Affidavit by the Acting Senior Deputy Director HR and Development, Mr. Simeon Omare did not respond to the alleged personal dispute between the claimant and the Deputy Director of Security.

11. Under Article 41 of the constitution, every worker has the right to fair labour practices. Such right extends to fair treatment in relation to transfer of the worker from one station to another with more consideration to employees with families and health issues. It is not fair labour practice for a public officer to chest thumb that all authority to hire and fire or to transfer and deploy under the law or policy belongs to him. Every authority must now be viewed through the lense of Article 10 of the Constitution which states that:-

“10(1) the national values and principles of governance in this Article binds all state organs, state officers, public officers and all persons whenever any of them ;

(a) applies or interprets this constitution;

(b) enacts, applies or interpretes my law; or

(c) Makes or implements public policy decisions.

(2) The national values and principles of governance include:-

(a) ...

(b) Human dignity equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;

(c) good governance...”

12. In addition to the foregoing, Article 236 of the constitution protects a public office from victimization and unfair punishment for doing his job in accordance with the law. The Article provide that:-

“A public officer shall not be:-

(a) Victimized or discriminated against for having performed the functions of the office in accordance with this constitution or any other law; or

(b) Dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.”

13. The claimants contention is that his right to the said protection of the law was violated or is about to be violated by being subjected to a punitive transfer for performing his work according to the law and the employers record management policies. That contention has not be denied or rebutted and all what the respondent has alleged is that the transfer conforms with the law and policy. On the face of the material presented to this court, I return that the applicant has proved a prima facie case with a probability of success upon trial.

14. The claimant averred that the transfer is primitive and for reasons not related to his work or conduct. He further contended that he has a medical condition that requires close monitoring by his doctor who is based in Nairobi. In addition, he is a single parent taking care of a seven year old school going girl. He contended that the transfer in the middle of the year would prejudice him on the said two pressing matters.

15. The respondent submitted that the applicant will not suffer any irreparable damage if injunction order is denied. She further contended that the order being sought is final by its nature and it should not be granted before trial.

16. In the *Nguruman Limited Case* aforesaid, the Court of Appeal held 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. 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 if that injury is actual substantial and demonstrable..”

17. In the present case transferring a sick employee to a station more than 500 kilometer away without adequate notice is a hell of inconveniences especially if the employee is holding a certificate of incapacity from medial specialist requiring close medical attention. It is even more worse if the employee is a single parent with 7 year old daughter attending school in the City of Nairobi and would require him to transfer the child to a new school 500 kilometers away in the middle of the year. The inconveniences and the suffering that are to be occasioned to such a public officer is life threatening, inhuman, degrading and irreversible. Transferring a public office far away from specialist medical service, to either die or survive, or regardless of whether the officer has family does not fall within the four walls of the Article 10 and 236 of the constitution and must now be buried and forgotten.

18. In addition, the purpose of the interlocutory injunction is to preserve the substratum of the case. In this case, the applicant has established a prima facie case, and the only way to preserve it, is to stop the impugned transfer. Otherwise, if the transfer is effected, there will be no suit for trial. Accordingly, I return that this is a special case that orders sought must be granted even if to the respondent it appears like a final order.

Whether balance of convenience favours granting the orders

19. The evidence on record favours granting of the order sought. As already observed, failure to grant the order would mean that the transfer takes effect and the suit becomes moot. That in my view, would be a serious miscarriage of justice in the face of the said constitutional provisions that protect public officers like the applicant.

20. In the end, the court finds that the applicant has met the threshold for granting injunction, and I proceed to allow the application dated 3/7/2019 with costs.

Dated, Signed and Delivered in Open Court at Nairobi this 20th day of December, 2019.

ONESMUS N. MAKAU

JUDGE