

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS
COURT OF KENYA AT NYERI

SUIT NO. 502 OF 2017

CALLEN GATUNE FRANCIS

alias CALLEN GATUNE KAMAU.....CLAIMANT

VERSUS

1. THARAKA NITHI COUNTY PUBLIC SERVICE BOARD

2. COUNTY GOVERNMENT OF THARAKA NITHI.....RESPONDENTS

RULING

1. The Claimant's/Applicant's notice of motion dated 27th November 2017 seeks to have the Claimant's salary for August and September 2017 to be paid as well her full salary for the months from October 2017 pending hearing and determination of the case. She supports the application by the grounds on the face of the motion and her own affidavit sworn in support. She asserts that she is entitled to salary while on compulsory leave as other employees had been paid their salaries. She states that she has a loan obligation and that she was denied her livelihood unfairly and is thus unable to provide for her family as well as herself. The affidavit in support delves a bit deeper into the same and provides her statement as proof of the non-payment as well as her payslips, her appointment and suspension letters.

2. The Respondents are opposed and filed Grounds of Opposition to the Claimant's notice of motion on 28th December 2017. In the grounds the Respondent asserts that the Claimant was a dishonest employee under whose watch the 1st Respondent's payroll contained 108 ghost workers obtaining salaries by false pretences from the 1st Respondent and that she was guilty of non-disclosure of the fact of her being charged alongside 2 other employees for abuse of office at Chuka Principal Magistrate's Court. It was stated that the Claimant was interdicted from the services of the 1st Respondent on 26th September 2017.

3. Parties opted to dispose the motion by way of written submissions and the Claimant/Applicant filed her submissions on 26th January 2018 while the Respondents filed submissions on 7th February 2018. In her submissions the Claimant argues that she is entitled to the relief sought as she was subjected to unfair labour practices contrary to Sections 43 and 45 of the Employment Act. She relied on the case of **Donald C. Avude v Kenya Forest Service [2015] eKLR** where the court had held that *withholding salary exposes the Claimant to financial embarrassment that cannot be remedied by the mere release of the withheld salary*. It was urged that on the strength of **Nyutu & Others v Gathoni & Others [1990] KLR 554** as quoted in **Esperre Kenya Limited v Sam Mureithi [2017] eKLR** it was the discretion of the court to grant or decline an injunction and the discretion is to be judicially exercised. She was of the view the order she sought were merited and that they should be granted.

4. The Respondents in their submissions argue that the Claimant failed to disclose material particulars, to wit, that she had been charged with a criminal offence and was interdicted by the 1st Respondent on the abuse of office charges being laid. The Respondent placed reliance on the case of **Giella v Cassman Brown [1973] EA 358** where the court stated the three tests to be satisfied before grant of injunctive relief. The Respondent submitted that the injunction sought by the Claimant was a mandatory injunction disguised as a interlocutory injunction. The Respondent argued that for the Claimant to succeed in her injunction application she must establish a clear and very strong case. The Respondent cited the cases of

Kamau Muchuha v Ripples Ltd Civil Appl. (Nai) No. 126 of 1992 where the Court held that *the matter before the court is not only an application for a mandatory injunction which, if granted, would amount to the grant of a major part of the relief claimed in the action. Such an application should be approached with caution and the relief granted only in a clear case* and the case of **Shepherd Homes Ltd v Sandham (1971) Ch. 349** where the court held that *a mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not be granted on motion*. To bolster these arguments the Respondent called in aid the case of **National Bank of Kenya v Duncan Owuor Shakali & Another, CA No. 9 of 1997** and **Eric V. J. Makokha & 4 Others v Lawrence Sagini & 2 Others [1994] eKLR**. The Respondent urged the court to dismiss the application stating that those who seek injunctions must be candid with the courts as held in the case of **Uhuru Highway Development Ltd. v Central Bank & 2 Others [1995] eKLR**. The Respondent asserts that the Court cannot take over managerial prerogatives at the workplace and cited the case of **Alfred Nyungu Kimungui v Bomas of Kenya [2013] eKLR** as well as the case of **Professor Gitile Naituli v University Council of Multimedia University College & Another Industrial Cause No. 1200 of 2012** (unreported). On the basis of the foregoing arguments and authorities, the Respondent asserts that the application is not fit for grant.

5. The principles governing the grant of interim relief are well set out. The Respondent in its submissions cited the case of **Giella v Cassman Brown (supra)** identified the parameters of injunctive relief. These are:

- a. First, the applicant must establish a *prima facie* case with a probability of success at the trial,
- b. Secondly, that an interlocutory injunction will not be granted unless the applicant will suffer irreparable injury that would not be adequately compensated in damages,
- c. Thirdly, if the court is in doubt it will decide the case on a balance of convenience.

6. The Claimant herein seeks salary for the months of August and September a relief that was granted on interim basis by Ongaya J. on hearing the Claimant *ex parte*. The only portion left alive in the application is the order for payment of salaries from October 2017 until the conclusion of the trial. The prayer is what appears to be a mandatory injunction set out as an interlocutory injunction. Granting the order would in effect dispose of the larger corpus of the suit. I am in agreement with the reasoning of the Court of Appeal the case of **Kamau Muchuha v Ripples Ltd (supra)** where the Judges of Appeal held that *the matter before the court is not only an application for a mandatory injunction which, if granted, would amount to the grant of a major part of the relief claimed in the action. Such an application should be approached with caution and the relief granted only in a clear case*. It would be remiss on the part of any Court to approach such an application without caution. In addition, under the principles for injunctive relief set out in the **Giella v Cassman Brown** case above, the loss that the Claimant would suffer should the court decline to grant the relief sought would be the payment of salaries for the time intervening between the time of her interdict and the conclusion of this case. That is one that can be compensated by an award of damages as the trial of the case will most likely take place before the expiry of 12 months from the date when the cause of action accrued in September 2017 and therefore the court could adequately compensate her should the determination be in her favour. On that score the application lacks in merit and the same is disallowed with costs to the Respondent.

It is so ordered.

Dated and delivered at Nyeri this 20th day of February 2018

Nzioki wa Makau

JUDGE