

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

SUIT NO. 353 OF 2017

ALISON MUGAMBI MUCHEKE.....CLAIMANT/APPLICANT

VERSUS

THARAKA NITHI COUNTY GOVERNMENT.....1ST RESPONDENT

THARAKA NITHI COUNTY PUBLIC SERVICE BOARD....2ND RESPONDENT

RULING

1. The application before me is the Notice of Motion Application dated 30th September 2017. By it, the Claimant seeks to have stay of the Respondent's letter dated 8th September 2017 terminating his services on account of effluxion of time. The Claimant/Applicant sought interim injunctive orders restraining the Respondents whether by themselves, their servants, agents, employees or any one claiming through them from removing/sacking the Claimant from his post at Tharaka Nithi County. He also coupled his prayers for injunctive orders with a prayer for a mandatory injunctive order compelling the Respondents to continue paying salary to the Claimant as support staff supervisor. The motion was grounded on the grounds on the face of the motion as well as the Claimant's affidavit sworn in support of the motion. In the grounds, it was asserted that the Claimant's salary had been unpaid since August 2017 and that the notice of dismissal from service was unconstitutional, unlawful and irregular for violating and flouting the procedure provided for under the Constitution, the Employment Act and the County Government Act. The Respondents were opposed and they filed grounds of opposition and a replying affidavit sworn by Stephen Mitugo on 21st January 2018 and filed on 22nd January 2018. The grounds and affidavit, in brief, were to the effect that the application was barred by the maxim that he who comes to equity must do equity and also come with clean hands. It was also opposed on grounds that the Claimant cannot establish a *prima facie* case with a probability of success; he has no cause of action against the Respondents. The Respondents assert that the termination of the Claimant's services was lawful and that the suit by the Claimant was fraudulent and an abuse of the court process. It was asserted that the grant of mandatory injunctive relief was only permissible in exceptional and clear cases. Parties were to file submissions on the application. At the time of penning the ruling, no submissions had been filed for the Claimant.

2. The Claimant sought relief for his dismissal from service from the Respondents' employ. In the submissions filed by the Respondent, it was argued that the Claimant had no cause of action against the Respondent and that the Court could not reinstate the Claimant to his employment except in very clear cases. It was urged that the Claimant could not be reinstated as his contract expired on 18th August 2017 and that the principles for the grant of a mandatory injunction were not met. The Respondent cited the cases of **National Bank of Kenya v Duncan Owuor Shakali & Another CA No. 9 of 1997** and **Kamau Muchuha v Ripples Ltd [1993] eKLR**. The Respondent submitted that under the principles in **Giella v Cassman Brown (1973) E.A. 358** the Claimant had not satisfied the three tests laid down in the case. The Respondent submitted that the interlocutory injunction sought by the Claimant is a mandatory injunction disguised as an interlocutory injunction. The Respondent urged the court not to grant the injunction sought as to do would be drastic. Reliance was placed on the case of **Eric V. J. Makokha & 4 Others v Lawrence Sagini & 2 Others [1994] eKLR** where the court held that *the well settled rule that a breach of contract of personal service cannot be redressed by the equitable remedies of injunction and specific performance remains good law. The comparatively few cases in which declarations were made and injunctions granted are exceptions to the general run of the common law.* The Respondent submitted that the Claimant was guilty of non-disclosure of material facts and that the principle was well expounded on by Akiwumi JA in the case of **Uhuru Highway Decolopment Ltd v Central Bank & 2 Others Civil Appeal No. Nai 126 of 1995** where the learned judge stated that *it is perfectly well settled that a person who makes an ex parte application to the court – that is to say, in the absence of the person who will be affected by that which the court is asked to do is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, he cannot obtain any advantage from the proceedings and he will be deprived of any advantage that may have already obtained by him. That is perfectly plain and requires no authority to justify it.* The Respondent further submitted that the court should not take over managerial prerogatives and placed reliance on the cases of **Alfred Nyungu Kimungui v Bomas of Kenya [2013] eKLR** and **Professor Gitile Naituli Naituli v University Council Multimedia University College & Another [2013] eKLR** for the proposition. The Respondent argued that if the injunction is granted it will have the effect of determining the matter.

3. In the case of injunctions such as the one sought by the Claimant, there principles well established in precedent on the factors a court would consider. Chief among them are the matters the Respondent has pointed out under the various heads. The cases cited bear weight. In the case of **Giella v Cassman Brown**, the court directed its mind on the factors to consider while granting injunctive relief. The factors are well enumerated in the decision. The test in **Giella v Cassman Brown** is threefold and the case was restating the principles that had been laid out in the case of **E.A. Industries v Trufoods (1972) EA 420**, where the learned judge Spry V-P stated as follows:-

There is, I think, no real difference of opinion as to the law regarding interlocutory injunctions, although it may be expressed in different ways. A plaintiff has to show a *prima facie* case with a probability of success, and if the court is in doubt it will decide the application on the balance of convenience. An interlocutory injunction will not normally be granted unless the applicant for it might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages.

The test set out in these two leading cases on injunction is that there are three limbs that I have to consider. The first is whether there is a *prima facie* case with a probability of success; secondly, unless the injunction is granted there would be irreparable loss which would not be adequately compensated by an award of damages; and thirdly if the court is in doubt it would decide the application on a balance of convenience. To my mind the test for these three principles should be applied sequentially and once one of the limbs is satisfied there is no need for me to consider the other limbs. Before the court is the Claimant who seeks injunctive relief for termination from employment. In coming to court he sought reliefs that are captured in paragraphs a), b) and c) of his memorandum of claim. These prayers are for a declaration that the notice issued terminating his services is unfair, irregular and unprocedural, hence null and void; an order of injunction to restrain the Respondents from removing or sacking the Claimant from his position; in the alternative, if the Claimant is removed/sacked order for payment of all salaries, allowances and all other dues payable to the Claimant on the remainder of his term of employment and general damages for wrongful termination of employment. From the reading of the motion herein, any grant of the orders sought in the motion will be a determination of the claim at interlocutory stage. This is akin to a mandatory injunction. The principles for grant of a mandatory injunction are under Halsbury's Laws of England Vol. 24 (4th Edition) paragraph 848 as follows:-

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 normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or of the act done is simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff, such as where, on receipt of a notice that an injunction is about to be applied for, the defendant hurries on the work in respect of which the complaint is made so that when he receives notice of the interim injunction it is completed, a mandatory injunction will be granted on an interlocutory application.

4. The court need not delve into the findings in the cases on managerial prerogatives. It is clear that the court has the power to interfere in exceptional circumstances when a matter is grave and in need of urgent remedy. Some of the cases cited by the Respondent were before the advent of the Employment Act 2007 and therefore are out of sync with the law as obtains presently though at the time the decisions were made in the 90's the determination was good law as the common law principles applied. Be that as it may, in this case, the court is unable to grant the mandatory injunction as the case is not clear and one that the court can decide at once. There is clarity that will only be apparent after the hearing of the case on the merits on the various facets of the case. The Claimant's application is therefore not fit for grant and the same is dismissed with costs to the Respondents.

It is so ordered.

Dated and delivered at Nyeri this 25th day of April 2018

Nzioki wa Makau

JUDGE