

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CASE NO. 325 OF 2017

BENSON MUNENE MBUGI.....CLAIMANT/APPLICANT

VERSUS

B.O.M KAHITHE SECONDARY SCHOOL.....1ST RESPONDENT

TEACHERS SERVICE COMMISSION.....2ND RESPONDENT

RULING

1. The Application before me is the Claimant's notice of motion application dated 22nd March 2018 brought under certificate of urgency. The Claimant has been surcharged for a sum of Kshs. 2,551,100/- which the 2nd Respondent has been faithfully deducting and the Claimant seeks to reverse the deduction as he was not offered an opportunity to be heard before the decision to surcharge was made. The Claimant asserts that the Respondents had by the time of moving court deducted Kshs. 131,800/- which he sought to be refunded while at the same time imposing an injunction against the Respondents barring them from surcharging the Claimant. The application was supported by the affidavit by the Claimant sworn on 22nd March 2018.

2. The 2nd Respondent was opposed filed grounds of opposition on 3rd May 2018 in which the 2nd Respondent stated that the Claimant had failed to adduce sufficient grounds to support his application and that he had withheld material facts pertinent to the issues of law and fact in this matter. The 1st Respondent was however not opposed to the motion.

3. The motion was urged on 4th June 2018. Mr. Ngigi for the Claimant/Applicant submitted that at the material times to the suit, the Claimant had been employed as a teacher and was the Principal at the 1st Respondent. It was his position that issues of financial mismanagement were raised and the Respondents gave a recommendation that he be surcharged for the mismanagement of funds. The 2nd Respondent recommended the surcharge of Kshs. 2,552,100/- which was to be deducted from the Claimant's salary. The Claimant's counsel submitted that his client had fulfilled the conditions in **Giella v Cassman Brown** and that he was not given a hearing contrary to Article 50 and that the action by the Respondents impinged Articles 47 and 236 of the Constitution as well. It was asserted that the Claimant had made out a *prima facie* case and will suffer prejudice if the 2nd Respondent continues the surcharge. He submitted that the Claimant will suffer irreparable loss if the deduction continues. The Claimant reiterated that in exercise of its mandate of exercising disciplinary control over teachers, the 2nd Respondent must adhere to the provisions of Articles 47, 50 and 236(a) the Constitution of Kenya.

4. The 2nd Respondent's counsel submitted that the Claimant had not adduced sufficient grounds to persuade the court to grant an interim injunction. He submitted that material facts had been withheld from the court and stated that a party who seeks relief as the Claimant did must have a valid underlying claim. He argued that the pleadings filed demonstrate that the Claimant was involved at every stage of the proceedings and that when the allegations were made they were laid before the Claimant. To discount the Claimant's assertions that the Claimant was not heard, he referred to the letters, minutes and replies the Claimant wrote in response and submitted that the Claimant's allegation that he was not heard must fail. He submitted that the Claimant had not moved to court timeously as the surcharge was initiated over 1½ years ago. On the balance of convenience, he submitted that the Government was not a man of straw and that if the Claimant was successful the Government would be able to pay. He argued that the converse was not true as the Claimant may be unable to refund the sums due should the court allow his motion now and later find he was culpable. The 2nd Respondent cited the cases of **Kitur v Standard Chartered Bank Lucy Wangui Gachara [2015] eKLR** and **Nguruman**. He took umbrage at the decision by the 1st Respondent's counsel not to oppose the Claimant's motion. He stated that the chief legal advisor to Government could not be seen to throw in the towel but should guide the process of protecting revenue.

5. The Claimant/Applicant's advocate submitted that the authorities cited by the 2nd Respondent were distinguishable and that the Claimant had made full disclosure. The Claimant submitted that the process was tainted by violations and breach of the constitutional provisions.

6. The application is one that seeks an interlocutory injunction. The parameters of the **Giella v Cassman Brown (1973) E.A. 358** case were stated to be as follows:- 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. In this case a surcharge is underway and the Claimant seeks to stop the continued deduction of the sum taken from him each month. The first test is *prima facie* case with a probability of success. The Claimant was accused of mismanagement of resources and he was asked to give an explanation, the explanation was made but not to the satisfaction of the employer. The Claimant went through a discipline process at his workplace which culminated in the surcharge. Without deciding the point on the claim on merits, the challenge to the surcharge is therefore in my view not a *prima facie* case. *Prima facie* case is a Latin expression meaning on its first encounter or at first sight. In common law jurisdictions such as ours, *prima facie* denotes evidence that, without rebuttal, suffices to prove a particular fact or proposition. On the second limb of the test is irreparable loss. In this case the deduction is effected by the 2nd Respondent a Constitutional Commission under Article 237. The amount recovered from the Claimant by the 2nd Respondent is not

irrecoverable. The loss can be repaired by a refund of the deductions made. In my view, the loss the Claimant is experiencing of funds deducted is not irreparable. The final limb of the test is when in doubt the court is to decide the matter on a balance of convenience. The balance of convenience is in favour of retaining the current position as the converse is not convenient. The Claimant may be unable to refund should the court find in favour of the Respondents.

7. The upshot of the foregoing is that the Claimant's motion does not meet the threshold for grant of an interlocutory injunction and therefore is disallowed. I dismiss the motion but make no order as to costs. Before I pen off, I would like to point out that the failure by the 1st Respondent's counsel to oppose the motion even by associating with the 2nd Respondent was a surprise as the 1st Respondent was the reason for the surcharge in the first place.

It is so ordered.

Dated and delivered at Nyeri this 11th day of July 2018

NZIOKI wa MAKAU

JUDGE