



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT KISUMU**  
**CAUSE NO. 135 OF 2017**

*(Before Hon. Lady Justice Maureen Onyango)*

**PAUL KIPROP CHEPRUTO.....CLAIMANT**

*VERSUS*

**THE UNIVERSITY COUNCIL**

**MOI UNIVERSITY.....1<sup>ST</sup> RESPONDENT**

**PROF. J. KINYAMARIO.....2<sup>ND</sup> RESPONDENT**

**MOI UNIVERSITY.....3<sup>RD</sup> RESPONDENT**

**LABAN P. AYIRO.....4<sup>TH</sup> RESPONDENT**

**RULING**

Vide an application dated 3<sup>rd</sup> April 2017 the claimant seeks the following orders –

1. That the application be certified as urgent and be heard on priority basis.
2. That pending the *inter partes* hearing and determination of the application herein, the court be pleased to issue a temporary order suspending the implementation of the 4<sup>th</sup> respondent's letter dated 22<sup>nd</sup> March 2017 *in toto* dismissing the applicant/claimant from the Office of the Deputy Vice Chancellor Administration, Planning and Development and rendering his position vacant and revoking his salary.
3. That pending the *inter partes* hearing and determination of the application herein, the court be pleased to issue a temporary order suspending the implementation of the 4<sup>th</sup> respondent's letter dated 22<sup>nd</sup> March 2017 *in toto* terminating and or dismissing the claimant from the Office of the Deputy Vice Chancellor Administration, Planning and Development and as a lecturer at the university and revoking all his salary and benefits.
4. That the applicant/claimant be hereby reinstated back to his office and station of employment as the Deputy Vice Chancellor, Administration, Planning and Development and as a continuing lecturer holding tenure pending the hearing and determination of his appeal to the 3<sup>rd</sup> respondent.
5. That the applicant/claimant be hereby reinstated back to his office and station of employment as the Deputy Vice Chancellor, Administration, Planning and Development and as a continuing lecturer holding tenure pending the hearing and determination of this suit.
6. That the court be pleased to bar any other advertising and or appointment of any persons as the Deputy Vice Chancellor, Administration, Planning and Development pending the hearing and determination of this suit.
7. That the 1<sup>st</sup> and 2<sup>nd</sup> respondents be henceforth restrained either by themselves, their agents or servants from interfering with the claimant/applicant in his discharge of duties otherwise than is provided by law.

8. That the applicant/claimant continues enjoying all rights and privileges as prescribed under his office.

9. That the costs of this application be provided for.

The grounds in support of the application which are reiterated in the affidavit in support of the application are that the applicant's employment as Deputy Vice Chancellor was terminated on 24<sup>th</sup> February 2017 but the letter of termination was not served on him until 14<sup>th</sup> March 2017 at 12.23 p.m. He avers that the termination was without cause, that he appealed against the termination and at the time of filing the application on 4<sup>th</sup> April 2017 he was still waiting for a response on the appeal.

It is his averment that the termination of his employment was in violation of Article 10 and 232 of the constitution and further violated Article 27 read with Section 51(1), (2) and (3) of the Employment Act, Article 25(c) and 50(2)(a), (b) and (c) as read with Section 4(2) of the Act.

He avers that there was prior intention by the respondents to have him thrown out of gainful employment before the close of his term. He avers that the 1<sup>st</sup> respondent's Board has been replaced with a new membership in whom he has no confidence and fears that he will not get an impartial and fair determination of his appeal.

The respondent opposes the application and filed a replying affidavit of HELLEN J. C. YEGO, the Acting Registrar, Human Resource, sworn on 16<sup>th</sup> May 2017. She deposes that the respondent followed due process in reaching the decision to terminate the employment of the claimant. She deposes that the claimant was first issued with a notice to show cause which he responded to on 24<sup>th</sup> August 2016. The claimant was then sent on compulsory leave to facilitate investigations and was suspended by letter dated 13<sup>th</sup> October 2016 and the reasons for suspension explained in the letter of suspension.

By letter dated 6<sup>th</sup> December 2016 the claimant was notified of the disciplinary hearing of his case which was held on 27<sup>th</sup> January 2017 in the presence of the claimant and his counsel. The Staff Disciplinary Committee met on 2<sup>nd</sup> February 2017 and passed a verdict to terminate the employment of the claimant and the letter of termination dated 24<sup>th</sup> February was issued to the claimant. The letter advised the claimant of his right of appeal within 14 days from date of receipt thereof and not from the date of the letter as alleged by the claimant.

Ms Yego deposes that the claimant appealed and at the time of filing the present suit on 4<sup>th</sup> April 2017 the appeal was pending for hearing and determination. It is on these grounds that the respondents state that the suit is premature as the claimant has not exhausted the internal machinery. It is further the respondents' position that reinstatement is a substantive remedy that cannot be granted before hearing and determination of the substantive claim. It is the respondent's averment that the suit is brought by the claimant in bad faith and is an abuse of court process.

The respondents pray that the application be dismissed with costs.

### Submissions

Parties argued the application by way of written submissions. It is the claimant's submissions that the claimant has fulfilled the requirements of **GIELLA -V- CASSMAN BROWN LIMITED** as he has demonstrated that he has a prima facie case with a probability of success and will suffer irreparably unless the orders sought are granted and that there is no adequate compensation in damages. It is further submitted that the balance of convenience is in favour of the claimant.

In the claimant's list of authorities he cites the case of **GIELLA -V- CASSMAN BROWN LIMITED and RE KESHAVLAL PUNJA PARBAT SHAH (1955) 22 EACA 381**. However the cases attached to the submissions are **HENRY N. GICHURU -V- MINISTER FOR HEALTH & THE KENYA NATIONAL HOSPITAL BOARD [2002] eKLR** and **JOSEPH KIPONDA -V- INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSIONS & ANOTHER [2013] eKLR**.

It is not clear if this is a mistake or was done by the claimant intentionally.

The respondents in their submissions state that the claimant has filed an appeal against his dismissal which is pending for hearing, that the claimant should exhaust all available internal mechanisms before coming to this court and that the claimant was informed of his right of appeal in the letter of termination. It is submitted that the respondents having complied with fair procedure the claimant is not entitled to the orders sought.

The respondents submit that in the case of **MRAO LIMITED -V- FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS [2003]**, the Court of Appeal applied the case of **GIELLA** and settled the law on conditions for interlocutory injunction, holding that powers of court in an application for interlocutory injunction is discretionary.

It is submitted that the claimant has not demonstrated a prima facie case with probability of success, that there is no exceptional circumstances that have been proved by the claimant and the balance of convenience favours the respondents. The respondents rely on the case of **FRANCIS MWENDWA TITUS -V- KENYA PIPELINE COMPANY LIMITED [2017]**. The case of **PAMELA WANGUI KIAMA -V- COUNTY PUBLIC SERVICE BOARD OF NYANDARUA & 2 OTHERS [2014] eKLR** and the case of **ANTHONY MUTIA MWANDIA -V- KENYA CIVIL AVIATION AUTHORITY & ANOTHER**. In all the cases the court declined to grant interlocutory orders and directed that the issue of reinstatement be considered at the hearing of the main claim.

### Determination

I have considered the pleadings and the submissions. I have also considered the authorities cited and the law.

Reinstatement as a remedy is provided for in Section 49(3) as read with Section 50 of the Employment Act as follows –

**49(3) Where in the opinion of a labour officer an employee’s summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to—**

- a. reinstate the employee and treat the employee in all respects as if the employee’s employment had not been terminated; or**
- b. re-engage the employee in work comparable to that in which the employee was employed prior to his dismissal, or other reasonably suitable work, at the same wage.**

#### **50. Courts to be guided**

**In determining a complaint or suit under this Act involving wrongful dismissal or unfair termination of the employment of an employee, the Industrial Court shall be guided by the provisions of section 49.**

Subsection 49(4) sets out the factors the court must take into account before ordering reinstatement which are –

**(4) A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following—**

- a. the wishes of the employee;**
- b. the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and**
- c. the practicability of recommending reinstatement or re-engagement;**
- d. the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;**
- e. the employee’s length of service with the employer;**
- f. the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;**
- g. the opportunities available to the employee for securing comparable or suitable employment with another employer;**
- h. the value of any severance payable by law;**
- i. the right to press claims or any unpaid wages, expenses or other claims owing to the employee;**
- j. any expenses reasonably incurred by the employee as a consequence of the termination;**
- k. any conduct of the employee which to any extent caused or contributed to the termination;**
- l. any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and**
- m. any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee.**

The opening of subsection 49 (4) “...where in the opinion of a Labour Officer an employee’s...termination of employment was **unfair**...”

The forgoing would imply that before ordering reinstatement the court must first establish that the termination of employment was unfair. And then in considering whether or not to order reinstatement after establishing that the termination was unfair, the court would take into account the factors set out in subsection 49 (4).

I have considered the prayers in the memorandum of claim. The prayers in the claim are as follows –

1. A declaration order that the 2<sup>nd</sup> respondent vitiated the claimant’s rights as set out by law.
2. Orders of *certiorari* do issue to quash the letter of termination and letter of dismissal issued against the claimant dated 24<sup>th</sup>

February 2017 and 22<sup>nd</sup> March 2017.

3. An order of prohibition do issue against the 1<sup>st</sup> and 2<sup>nd</sup> respondent from in any way proceedings against the claimant other than as by law provided.
4. A declaration that the claimant's suspension from employment was illegal and unfair *ab initio*.
5. An order of *mandamus* to issue compelling the 1<sup>st</sup> and 2<sup>nd</sup> respondent to reinstate the claimant and treat the claimant in all respects as if his employment had not been interfered with suspended or otherwise sent on compulsory leave.
6. An order compelling the 1<sup>st</sup> and or 3<sup>rd</sup> respondent to continue remunerating the claimant as before pending the hearing and determination of this suit.
7. An order compelling the 1<sup>st</sup> and 2<sup>nd</sup> respondent to make public the interview results and report by the Human Resource and Governance Committee of Council meeting held on 6<sup>th</sup> October 2016.
8. An order compelling the 3<sup>rd</sup> respondent to service all outstanding loans due by the claimant.
9. An order compelling the 3<sup>rd</sup> respondent to compensate the claimant for his 27 years of service.
10. An order of compensation do issue for violation of the claimant's rights and an inquiry as to quantum be gone into.
11. An award of general damages for breach of legitimate expectations.
12. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents to bear costs of this suit with interest thereof from the date of the judgment.
13. Any other order and/or relief this court may deem fit and just to make and/or grant.

The claimant's employment was terminated before he filed suit and one of his prayers is to quash the termination letter. He has also prayed for compensation and damages for breach. This means that the claimant is aware that the orders likely to be granted should he succeed in the claim may be either a reinstatement or an award of damages and compensation. He is thus aware that reinstatement is not guaranteed.

An injunction is defined in Black's Law Dictionary 9<sup>th</sup> Edition as –

“A court order commanding or preventing an action.

A judicial process or mandate operating in personam by which, upon certain established principles of equity, a party is required to do or refrain from doing a particular thing.

A writ framed according to the circumstances of the case, commanding an act which the court regards as essential to justice, or restraining an act which it esteems contrary to equity and good conscience; as a remedial writ which courts issue for the purpose of enforcing their equity jurisdiction; and as a writ issuing by the order and under the seal of a court of equity."

In the claimant's case the employment had already been terminated by the time he filed suit and he is therefore seeking a mandatory injunction of reinstatement to return him to work. On the other hand **GIELLA -V- CASSMAN BROWN** which he has relied on anticipates a prohibitive injunction to stop that which has not taken place or to prevent an action that has not been taken from being taken.

It is my opinion that for the two grounds set out above, one being that the court must first satisfy itself that there was unfair termination before it can order reinstatement if deserved and the other being that the termination has already taken place and the decision in Giella is not applicable, the application by the claimant must fail.

The upshot is that the application is dismissed. Costs shall be in the cause.

**DATED AND SIGNED AT NAIROBI ON THIS 4<sup>TH</sup> DAY OF JUNE 2018**

**MAUREEN ONYANGO**

**JUDGE**

**DATED AND DELIVERED AT KISUMU ON THIS 5<sup>TH</sup> DAY OF JULY 2018**

**MATHEWS NDERI NDUMA**

**JUDGE**