

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

SUIT NO. 160 OF 2018

FRIDAH KAGENDO MBAKA & 4 OTHERS.....CLAIMANTS

VERSUS

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

THARAKA NITHI COUNTY PUBLIC

SERVICE BOARD.....2ND RESPONDENT

RULING

1. The Claimants/Applicants seek through the Notice of Motion Applications dated 23rd April 2018 for interim reliefs in that the 1st Respondent to be ordered to pay salaries and allowances withheld by the 1st Respondent from June 2017 and pending the hearing and determination of the claim herein the court be pleased to order the 1st Respondent to continue paying each Claimant full salary for the position held and costs of the application be provided for. The Respondents are opposed to the grant of the orders sought in the notice of motion application and they filed grounds of opposition.

2. Parties were to file submissions in support and opposition of the motions. The Respondents filed their submissions on 31st May 2018 and the Claimants did not file any submissions as per the court record.

3. The Claimants motions seek relief in the form of unpaid salaries and allowances from June 2017. The Claimants have not received salaries for 10 consecutive months (as at the time of filing the motion in April 2018) and show cause letters were purportedly issued on 24th November 2017 seeking a response to the allegations therein to which the Claimants had responded. The Claimants assert that the 1st Respondent has no power to question or determine the Claimants' qualifications which is a function of the 2nd Respondent. It was argued that the Claimants had suffered immensely and the denial of their salaries withheld by the Respondents, being their only source of income, had occasioned hardship as they are still working for the 1st Respondent and not being paid for their services. The motion was also supported by the affidavit of Fridah Kagendo Mbaka.

4. In the submissions by the Respondents, it was argued that the Claimants had not controverted the facts deposed to by the Respondents and on the authority of **Standard Resource Group Ltd v Attorney General & 2 Others [2016] eKLR** submitted that the facts the Respondents had raised were to be taken as the factual position and that the facts were uncontested. In sum, the Respondents case was that the suit was bad in law as the object of the suit is to prevent an employer from exercising its managerial prerogatives to undertake internal disciplinary processes and investigations. The argument advanced is that it is not the practice of this court to interfere with the exercise of managerial prerogatives as held in the cases of **Alfred Nyungu Kimungui v Bomas of Kenya [2013] eKLR** and **Rebecca Anne Maina & 2 Others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR**. It was submitted that for the Claimants to succeed in this case they had to satisfy the tests laid out in the case of **Giella v Cassman Brown (1973) E.A. 358** on the principles for the grant of an injunction and further to the above have to establish a very clear or very strong case. Reliance was placed on the cases of **Kamau Muchuha v Ripples Ltd. Court of Appeal at Nairobi, Civil Application No. 126 of 1992** and **Shepherd Homes Ltd v Sandham (1971) Ch. 349** on mandatory injunction. It was argued that for the mandatory injunctions to be granted there must be clear and exceptional circumstances. In addition, on injunctions the Respondents relied on the cases of **National Bank of Kenya v Duncan Owuor Shakali, Civil Appeal No. 9 of 1997** and **Eric V. J. Makokha & 4 Others v Lawrence Sagini & 2 Others [1994] eKLR**. It was the Respondents position that the Claimants cases stand to fall on account of the rule in the case of **Mapis Investment (K) Ltd v Kenya Railways Corporation Court of Appeal at Nairobi Civil Appeal No. 14 of 2005** on the unenforceability of illegal contracts. The Respondent thus urged the Claimants' application dated 23rd April 2018 be dismissed with costs.

5. In regard to the unenforceability of an illegal contract, I am not persuaded that the rule in Mapis enunciated in the case **Mapis Investment (K) Ltd v Kenya Railways Corporation** applies here. This case is not on all fours as the case cited. The matters are yet to come to hearing for a determination as to the illegality or otherwise for the contracts. Regarding the injunctive relief sought by the Claimants, it is true that the grant of the orders sought is in essence be a grant of what is for all intents and purposes a mandatory injunction. To grant this remedy sought by the Claimants has ramifications that are far reaching and the threshold in **Giella v Cassman Brown (supra)** and the parameters for grant of a mandatory injunction as set out in the case of **Kamau Muchuha v Ripples Ltd. (supra)** has not been met. The Claimants have a remedy, should they be successful in the suit is that damages are available and can be paid satisfying the third limb of **Giella v Cassman Brown**. There is no exceptional circumstance as set out in the case of **Kamau Muchuha v Ripples** for the grant of the injunctive remedy sought. The reliefs the Claimants are entitled to including withheld salaries are amenable for grant at the time of judgment alongside an award of damages for the breach of contract under Section 49 of the Employment Act. As the Claimants motion seeking injunctive reliefs were unsuccessful the court will dismiss the Claimants application but order that each party is to bear their own costs.

It is so ordered.

Dated and delivered at Nyeri this 28th day of September 2018

Nzioki wa Makau

JUDGE