REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

SUIT NO. 56 OF 2018

DAVE GITONGA KAURA.....CLAIMANT

VERSUS

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

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

RULING

1. The Claimant/Applicant seeks through the Notice of Motion Application dated 19th June 2018 the salaries withheld from September 2017 to date. The Respondent is opposed to the grant of the orders sought in the notice of motion by the Claimant. Directions were given for the disposal of the motion through written submissions.

2. Parties were to file submissions and this was done on 25th July 2018 by the Claimant and on 15th August 2018 by the Respondent. It was the Claimant's submission that the 1st Respondent had no mandate to question the qualifications of the Claimant having been appointed by the 2nd Respondent upon competitive recruitment. He asserts that he had not been suspended from employment or shown to have been removed from the payroll of the 1st Respondent and that withholding his salary while he is still in the employ of the Respondent is unfair and unlawful. Reliance was placed on the case of **Simon Waringa Namakhabwa *v* Mr. Ajanta (Chairman) & Samanani Azam t/a Hoggers Limited [2018] eKLR** where Radido J. held that:-

> **…**an employee is entitled as of right to earn wages and therefore by not paying the Claimant the salary for March 2013, the Respondent was in breach of contract.

The Claimant submitted that the withholding of his salary was unconscionable, illegal, null and void. It was submitted that even in the case of suspension, which is not the case before the court, an employee is still entitled to his/her salary. The Claimant thus submitted he was entitled to the orders sought.

3. In the submissions by the Respondents, it was argued that the Claimant was deemed to have admitted the assertions by the Respondents as he had not filed an affidavit to controvert what the Respondents had averred. Reliance was placed on the decision of **Standard Resource Group Ltd *v* Attorney General & 2 Others [2016] eKLR** for this proposition. The Respondent submitted that it was the practice of this court not to interfere with the exercise of the managerial prerogative as was held in the case 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 under Section 75 of the County Governments Act 2012 the 1st Respondent has power to review and revoke promotions and initiate corrective action including disciplinary process and that under Section 86 of the Act the 2nd Respondent can delegate its functions to the head human resources department, the county secretary and the chief officer of the 1st Respondent and others and therefore the internal disciplinary processes initiated against the employee is lawful. The Ruling of Rika J. in **Prof. Gitile Naituli *v* University Council Multimedia University College & Another Cause No. 1200 of 2012** was relied upon and the Respondent submitted that the Employment Act did not intend to take away the managerial prerogatives of employers. **Giella *v* Cassman Brown (1973) E.A. 358** was cited on the considerations for the grant of an injunction as were 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 injunctions. It was argued that for a mandatory injunction to be granted there must be clear and exceptional circumstances. 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** were also cited to bolster the arguments on injunctions. It was the Respondents position that the Claimant's case falls under the rule in **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 court to dismiss the Claimant's motion.

4. What the Claimant raised is a prayer for injunctive relief and the principles for grant or denial are therefore pertinent. The Respondent cited various cases in opposition of the motion. Of particular import is the case of **Mapis Investment (K) Ltd *v* Kenya Railways Corporation** which was cited for the proposition that the court could not sanction the unenforceability of an illegal contract. That is true. However, the Respondents' position on this is entirely erroneous in the context of the matter before me. The court is yet to hear the merits of the matter as to enable it to make a determination either way on the illegality or otherwise of the Claimant's contract so as to bring the enforcement of that contract within the purview of the rule in Mapis. The Claimant moved court for relief relating to his contract of service with the Respondent. That is a matter that is pending before the court. The Claimant has to surmount the threshold in **Giella *v* Cassman Brown** (*supra*). The principles that govern the grant of injunctive relief are well stated in the case of **East African Industries *v* Trufoods [1972] EA 420** which was cited with approval in the case of **Giella *v* Cassman Brown** the *locus classicus* on injunctive relief. The 3 guiding principles laid out in the case are that an applicant who seeks a temporary injunction must show; firstly, a *prima facie* case with a probability of success; secondly, that failure to grant the temporary injunction sought would expose such an applicant to irreparable injury which injury

would not be adequately compensated by an award of damages; and thirdly, that where a court is in doubt, it would decide the application on a balance of convenience. Put another way, the three-part test is that there must be an assessment of the merits of the case. I have to be satisfied that the claim is not frivolous and that there is at least a reasonable chance of success at trial. Secondly, the applicants must show that they would suffer irreparable harm in the context of the nature of the harm to be suffered not by the magnitude. Thirdly, if in doubt, I should use the balance of convenience, meaning that I have to assess who would suffer greater harm than the other and whoever would suffer greater harm would benefit as the scale would tilt in their favour. The Claimant was ostensibly dismissed after the show cause in November 2017. Whereas there is proof that a dispute exists, if indeed he is entitled to relief, per the decision in **Giella *v* Cassman Brown**, he will be entitled to damages in the premises should the threshold for the grant of the injunctive remedy not be met. The Claimant has been unable to demonstrate that the loss would not be remedied by an award of damages. In sum, the Claimant's motion is unfit for grant and the order that commends itself for me to make is one dismissing the motion albeit with no order as to costs.

It is so ordered.

Dated and delivered at Meru this 5th day of October 2018

Nzioki wa Makau

JUDGE