REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

SUIT NO. 57 OF 2018

DENNIS MUTHOMI KINYUA.....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 Claimant/Applicant seeks through his notice of motion for orders compelling the Respondents to pay all the outstanding salaries and allowances withheld pending the determination of the suit. The motion is supported by the Claimant's affidavit and grounds on the face of it. 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. Parties were to file submissions and this was done on 25th July 2018 by the Claimant and on 15th August 2018 by the Respondent.

2. It was the Claimant's submission that the 1st Respondent had no mandate to question the qualifications of the Claimant which is a preserve of the 2nd Respondent. It was asserted that the Claimant was appointed to his position upon competitive recruitment and he has not been suspended from employment neither has he been removed from the payroll of the 1st Respondent. It was argued that withholding his salary while he is still in the employ of the Respondent is both unfair and unlawful. The Claimant relied on the holding of Radido J. in the case of **Simon Waringa Namakhabwa *v* Mr. Ajanta (Chairman) & Samanani Azam t/a Hoggers Limited [2018] eKLR**. The learned judge held as follows:-

> ...
> *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. He submitted that even in the case of suspension, which is not the case presently before this court an employee is still entitled to his/her salary. He thus submitted that he is entitled to the orders sought in his notice of motion application.

3. In its submissions, the Respondents 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 also relied on and it was submitted that the Employment Act did not intend to take away the managerial prerogatives of employers. Reliance was placed on the cases of **Giella *v* Cassman Brown (1973) E.A. 358** on the principles for the grant of an injunction as well as the case 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. 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 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 dismissal of the Claimant's motion.

4. The case of **Mapis Investment (K) Ltd *v* Kenya Railways Corporation** was cited for the proposition that the court could not sanction the unenforceability of an illegal contract. The Respondents' position on this is entirely erroneous in the context of the case before me. The court is yet to hear the merits of the matter as to enable it to make a determination that the Claimant's contract is illegal 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. However, the Claimant has to surmount the threshold in **Giella *v* Cassman Brown** (*supra*). The principles that govern the grant of injunctive relief were well stated in the case of **East African Industries *v* Trufoods [1972] EA 420** which was cited with approval in the *locus classicus* on injunctions – **Giella *v* Cassman Brown**. The 3 guiding principles laid out in these cases 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. If indeed he is entitled to relief, per the decision in **Giella *v* Cassman Brown**, he will be entitled to damages in the premises he is successful. The long and short of this is that the threshold for the grant of the injunctive remedy has not been met in this case. The upshot of the foregoing is that the Claimant's notice of motion application is not fit for grant and the same is hereby dismissed but 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