



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**JUDICIAL REVIEW NO. 34 OF 2018**

*(Before Hon. Lady Justice Maureen Onyango)*

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI MANDAMUS**

**AND**

**IN THE MATTER OF THE STATE CORPORATIONS ACT**

**AND**

**IN THE MATTER OF THE EMPLOYMENT ACT, 2007**

**REPUBLIC.....APPLICANT**

*VERSUS*

**THE CABINET SECRETARY,**

**MINISTRY OF EAST AFRICAN COMMUNITY**

**AND REGIONAL DEVELOPMENT.....RESPONDENT/APPLICANT**

**AND**

**THE EWASO NGIRO**

**NORTH DEVELOPMENT AUTHORITY.....1<sup>ST</sup> INTERESTED PARTY**

**JOSIAH WILLY MULWA.....2<sup>ND</sup> INTERESTED PARTY**

**AND**

**OMAR MOHAMED SHEIKH.....EX PARTE APPLICANT**

*(Pursuant to leave granted by the Court on 9<sup>th</sup> November 2019)*

**RULING**

The Application before court is dated 11<sup>th</sup> December 2018. The respondent seeks a temporary injunction to stop the ex parte Applicant from accessing the 1<sup>st</sup> Interested Party's bank accounts, authorising payments, withdrawal of funds and operating the 1<sup>st</sup> Interested Party's bank accounts held at Kenya Commercial Bank Account No. xxxxxxxxxxxxxx Isiolo Branch pending the hearing and determination of the suit.

The Application is supported by the Affidavit of Ernest Mutinda Kioko who avers that he was informed by the Respondent/Applicant that the Ex parte Applicant was still withdrawing funds from the 1<sup>st</sup> Interested Party's bank accounts thus exposing the 1<sup>st</sup> Interested Party to financial risk as a result of mismanagement.

The Respondent is apprehensive that the Ex parte Applicant may misappropriate funds of the Respondent held in the aforementioned bank account which are in excess of 150 Million. The Respondent urges that the Court safeguards the 1<sup>st</sup> Respondent's funds which are from public coffers.

The Application is opposed. The Ex parte Applicant filed a Replying Affidavit dated 17<sup>th</sup> December 2018, wherein he states that he was not sent on compulsory leave as the Minister has no authority to send him on compulsory leave. That the power to send him on leave lies with the Board which Board had recommended that his term be renewed.

The Ex parte Applicant avers that the allegation that he is withdrawing funds from the 1<sup>st</sup> Interested Party's accounts is hearsay and the Court should disregard the same. That an Advocate should not descend into the arena of facts as that is contrary to Order 19 of the Civil Procedure Rules and The Advocates Practice Rules. He relies on the case of *Francis Kimutai Bii V Kasuku K Ltd (2016) eKLR* to buttress this position.

The ex parte Applicant avers that all that has been tendered as evidence of financial impropriety is a cheque annexed as EMK 1 which appears to have been drawn for the purpose of this application. That the said cheque was not a withdrawal but a payment to the Standard Group Limited for the annexures OMS 3(a) and (b) and the same is not evidence of withdrawing funds from the Interested Party's Bank Account.

The Applicant/Respondent prays for the Application to be dismissed with costs for being brought with an ulterior motive and for the Supporting Affidavit to be struck out.

### **Issues for Determination**

1. Whether the Respondent/Applicant is entitled to the order of injunction sought.
2. Whether the Affidavit in support of the Application should be struck out

The principles for grant of injunctive orders are set out in the case of *Giella Vs Cassman Brown & Company Ltd (1973) EA 358*. Applicant must show that he has a *prima facie* case with probability of success and that he stands to suffer irreparable damage. If the court is in doubt, it will decide the matter on a balance of convenience.

### **Prima facie case**

The Respondent/Applicant premises the application on the ground that the Claimant is withdrawing funds from the 1<sup>st</sup> Interested Party's bank Accounts and to this effect it has annexed a cheque drawn in favour of Standard Group Limited.

In the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] eKLR* the Court of Appeal endeavoured to define a Prima facie case as follows:

*“So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter...”*

*... prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.”*

In the instant case the Respondent/Applicant has not set out sufficient evidence to prove the alleged misappropriation of funds. It has not been shown that the ex parte Applicant drew or signed the cheque or that he was benefiting from the cheque to the Standard Group PLC or that the payment was not in respect of money lawfully owed to the beneficiary thereof. No documents have been attached to explain the purpose for which the cheque was drawn.

Secondly the deponent of the affidavit in which the copy of cheque is exhibited has not stated who gave him the cheque or who gave him the information about the cheque.

I do not find any demonstrated risk of misuse of funds by the ex parte applicant or any evidence of mismanagement by the ex parte Applicant.

It is on the basis of the foregoing that I find that the respondent has not demonstrated a *prima facie* case warranting the grant of the orders sought.

### **Irreparable Damage**

The Respondent/Applicant did not swear an affidavit to demonstrate how it will suffer irreparable damage should the orders not be granted. The Application is supported by the affidavit of Counsel for the Respondent/Applicant wherein it is alleged that funds from public coffers are being mismanaged but no further evidence of misappropriation has been set before the Court. There is no demonstrated risk of irreparable damage.

## **Balance of Convenience**

In the case of ***Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR*** it was held:

*“The court should issue an injunction where the balance of convenience is in favour of the plaintiff and not where the balance is in favour of the opposite party. The meaning of balance of convenience in favour of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favour of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.”*

There is no material before the court that any inconvenience would be caused or suffered by the Respondent/Applicant that would be greater than that which may be caused to the Ex parte Applicant by the court granting the order sought.

As to the propriety of the Affidavit in support of the Motion dated 11<sup>th</sup> December 2018, the Ex parte Applicant submits it contains contested matters of fact that would call for the Advocate to be a witness and thus the Affidavit should be struck out. The Ex parte Applicant relies on the case of ***Regina Waithira Mwangi Gitau vs Boniface Nthenge (2015) eKLR*** in which this issue was discussed as hereunder;

*“On issue number one, the established principle of law is that advocates should not enter into the arena of the dispute by swearing affidavit on contentious matters of fact. By swearing an affidavit on contentious issues, an advocate thus makes himself a viable witness for cross examination on the case which he is handling merely as an agent which practice is irregular. In ***Simon Isaac Nguni Vs. Overseas Courier Services (K) Ltd 1998 eKLR*** and ***Kisya Investments Ltd & Others Vs Kenya Finance Corporation Ltd***, it was held that –*

*“..... it is not competent for a party's advocate to depose to evidentiary fact at any stage of the suit.”*

*In addition, Rule 9 of the Advocates Practice Rules prohibits advocates from appearing as an advocate in a case wherein he might be required to give evidence either by affidavit or even orally. By swearing an affidavit on behalf of his client where issues are contentious, an advocate's affidavit creates a legal muddle with untold consequences.*

*However, where an affidavit by an advocate raises issues of law and fact which are within his knowledge having been an advocate handling the suit on behalf of the party on whose behalf the affidavit is sworn there is absolutely no mistake or error in the affidavit that can render it defective.”*

Further, the advocate avers in the affidavit that he is acting on information whose sources he has not disclosed. His averments in the affidavit thus amount to hearsay as submitted by Counsel for the Ex parte Applicant.

I am persuaded that the supporting affidavit by Ernest Mutinda Kioko counsel for the Applicant/Respondent offends both the provisions of Rule 9 of the Advocates Practice Rules and the Rules of Evidence. I accordingly strike it out.

The result is that the application fails and is accordingly dismissed.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20<sup>TH</sup> DAY OF DECEMBER 2018**

**MAUREEN ONYANGO**

**JUDGE**