



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION NUMBER 111 OF 2018**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 27, 28, 29,**

**41, 47, 48, 159, 162, 165, 258 AND 259 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF: ENFORCEMENT OF THE CONSTITUTIONAL RIGHTS**

**AND FREEDOMS AS ENSHRINED UNDER ARTICLES 27, 28, 29, 41, 47**

**AND 48 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF: THE CONSTITUTIONAL PRINCIPLES OF FAIRNESS,**

**REASONABLENESS AND LEGITIMATE EXPECTATION**

**AND**

**IN THE MATTER OF: SECTION 5, 26, 27, 40 AND 87 OF THE EMPLOYMENT ACT 2007**

**AND**

**IN THE MATTER OF: SECTION 3 AND 12 OF THE INDUSTRIAL COURT ACT, NO. 20 OF  
2011**

**AND**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA (SUPERVISORY**

**JURISDICTION) HIGH COURT PRACTICE AND PROCEDURE RULES, 2013**

**BETWEEN**

**WAMBATI SIMIYU MERIT.....PETITIONER**

-VERSUS-

MUSIC COPYRIGHT SOCIETY OF KENYA LIMITED....1ST RESPONDENT

LAZARUS MULI MUOKI.....2ND RESPONDENT

**RULING**

1. The Application before the Court is dated 11th October, 2018, seeking for Orders:

a) A temporary injunction do issue against the respondents by themselves, their servants and agents, restraining them from interfering with the peaceful performance of the applicant's duties as the Chief Executive Officer of the 1st Respondent, in accordance with the petitioner/applicant's terms and conditions of employment, pending the hearing and determination of this application.

b) A temporary injunction do issue against the respondents by themselves, their servants and agents, restraining them from interfering with the peaceful performance of the applicant's duties as the Chief Executive Officer of the 1st Respondent, in accordance with the petitioner/applicant's terms and conditions of employment, pending the hearing and determination of this petition.

c) Costs of this application be provided for.

2. The Application is premised on the grounds that:

i. The Petitioner/Applicant is and has been an employee of the 1st Respondent.

ii. The 2nd Respondent who is the acting chairperson of the Board of Management of the 1st Respondent is executing an elaborate but illegal scheme designed purposely petitioner/applicant from his employment without any legal justification or basis.

iii. The petitioner/applicant has no other source of livelihood but depends entirely on his salary to fend for himself and family.

iv. The 2nd Respondent herein has already started frustrating the petitioner/applicant by placing him under a never ending compulsory leave, initially for 60 days starting 11th May 2018 which ended on 10th July 2018, then there was a lapse without any communication and from nowhere a further 30 days leave days that ended 28th August 2018.

v. The 1st respondent has never called upon the applicant to respond to any specific allegations or called upon him to show cause why he should not be terminated from his employment.

vi. The Board whose term ended on 21st April 2018 is clearly on a witch hunt and is not communicating or handling any employment issue that they have against the applicant, but are determined to block his access to the office and his performance of his duties as a Chief Executive officer.

vii. The forced Compulsory leave given to the Applicant ended on 28th August and the 1st respondent has not communicated any finding of any process undertaken-if any- or recalled him to work subjecting him to constructive dismissal without basis.

viii. The Respondents herein have acted in total violation of Article 41 of the Constitution of Kenya and all legal provisions relating to fair labour practices as particularized in the employment Act with regard to leave and disciplinary procedures, to justify an illegal scheme to dismiss the petitioner/applicant.

ix. The Respondents herein has acted in total violation of the constitutional threshold set out under Article 10 of the constitution of Kenya in attempting to constructively terminate the petitioner/applicant's employment particularly the principle of good governance, transparency

and accountability.

x. It is in the interest of justice and fairness that this Application be certified as urgent and disposed of expeditiously.

3. The application is supported by the affidavit of the Petitioner wherein he reiterates the grounds on the face of the application and states that the Board whose term ended on 21st April, 2018, is on a witch hunt as they are not communicating the employment issue they have against him in total violation of Article 10 and 41 of the constitution.

4. In response to the application the Respondents filed grounds of opposition raising the issue that the applicant has not satisfied the test for grant of injunction as the application does not disclose a prima facie case, it has not been demonstrated that award of damages shall not suffice if the orders are not granted, the applicant is currently not in office and that the balance of convenience does not tilt in his favour.

5. The respondents further contended that the Applicant is asking Court for reinstatement which is not deserving through this application and if the orders are granted, it will occasion hardship to the 1st Respondent who has been struggling to meet its statutory obligations in relation to payment of salaries of its employees.

6. Finally, the respondent contended that the Applicant has not disclosed to the Court that negotiations have been initiated with a view to paying him his dues. That the issue of his employment is pending before a substantive board whose elections are scheduled for 28th November, 2018. In addition, they contended that the 1st Respondent, was denied a licence as a result of the Petitioner's conduct and as such the 1st Respondent has been unable to operate optimally.

### **Claimant's Submissions**

7. The Applicant submits that the principles set out in the case of **Giella Vs Cassman Brown & Company Ltd (1973) EA 358** for the granting of injunctions are applicable in the instant case. That he has a prima facie case in that he has a valid contract, which has not been terminated, he has been sent on leave whereas he has finished all his leave days, and that he has not been called for any disciplinary process nor has he been lawfully terminated. That he is still the CEO of the 1st Respondent and his case has high chances of success.

8. It is further submitted that the Applicant is suffering irreparable damage as he holds an important position in the 1st Respondent Company which is limited by guarantee and he cannot secure other employment without being asked why he left his previous employment.

9. The applicant further submits that the balance of convenience tilts in giving him a chance to continue working and earning his salary until he is lawfully terminated. He cites the case of **Parliamentary Service Commission V Christine Mwambua(2018)eKLR** where the Court of Appeal stated:

***“The remedy of reinstatement is discretionary. However, the Industrial Court is required to be guided by factors stipulated in section 49(4) of the EA which includes the practicability of reinstatement or re-engagement and the common law principle that specific performance in a contract of employment should not be ordered except in very exceptional circumstances. The Court should also balance the interest of the employee with the interest of the employer... The EA has enacted the common law principle that the remedy of reinstatement should not be given except in very exceptional circumstances.”***

10. In conclusion, it was urged that Article 41 protects the right to fair labour practices, to fair remuneration, and reasonable working conditions. It is submitted that no grounds have been cited by the Respondents to deny the Petitioner the orders sought.

### **Respondent's submissions**

11. On behalf of the Respondents it is submitted that a prima facie is more than an arguable case, that the Applicant must show an infringement of a right and the probability of success of the Applicant's case upon trial.

12. The Respondents submitted that the prayer for injunction restraining the Respondents from interfering with the performance of his duties. That this presupposes that the Applicant is still in office and that he has been performing his functions which are now being interfered with, which is not the case. They submitted that the petitioner has not been in office since May, 2018, when he was sent on compulsory leave.

13. The order of mandamus sought is also not tenable for the reason that the Respondent is a private association and not a public body and that in any event article 10 of the Constitution is not justiciable as a free standing provision and cannot be enforced in the absence of violation of a substantive provision.

14. It is also submitted that the equitable reliefs sought by the Applicant cannot be granted because his hands are soiled for failing to make material disclosures. They cited the case of ***Simon Njili Mwangi Vs Utumishi Investment Limited (2012)eKLR*** where the Court held:

***“The remedy of injunction is discretionary as well as equitable, accordingly, whoever comes to court to seek it must come to court with clean hands, must disclose all material facts and be candid with the Court. Failure to do so would automatically lead to the denial of the relief by the Court.”***

15. Finally the respondents have submitted that the remedy of reinstated is discretionary and is only granted in exceptional circumstances with each case being decided on its peculiar facts. They have cited the case of ***Kenya Airways Ltd Vs Aviation & Allied Workers Union Kenya & 3 others (2014)eKLR***, in support of this position. They have therefore urged the Court to dismiss the Application with costs.

### **Analysis and determination**

16. After carefully considering the pleading, motion, supporting affidavit, grounds of opposition and the rival submissions, I found no dispute in the fact that the Applicant is the CEO of the 1st Respondent, that he was sent on Compulsory leave in May, 2018 for 60 days which suspension was extended in July 2018, for a further 34 days up to 27th August, 2018 to enable the Board conduct investigations into his conduct and that, since the said 27th August, 2018, he has not received any findings of the said investigations and he has not been taken through a disciplinary process. Finally, it is not in dispute that the 1st respondent's Board's term expired in April, 2018, and they were to hold elections on 28.11.2018.

17. The petitioner now seeks for a court order which in essence reinstates him to his employment and restrain the respondents or their agents from interfering with his duties. The issue for determination is whether the applicant has met the threshold for grant of interlocutory injunction as set out by ***Giella Vs Cassman Brown & Company Ltd (1973) EA 358***, namely:

- a) The Applicant must show that he has a prima facie case with a probability of success; and
- b) That he stands to suffer irreparable damage.
- c) If the court is in doubt on the foregoing, it will decide the matter on the balance of convenience.

### **Prima facie case with chances of success.**

18. Prima facie was defined by the Court of Appeal in ***Mrao limited v First American Bank of Africa Ltd & 2 Others [2003]eKLR*** in the following words:

***“a prima facie case includes but is not limited to ‘ a genuine and arguable case’. 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.”***

19. From the said definition, it clear that the burden of prove on the applicant’s part is wider than just proving that he has an arguable case or one that raises triable issues. He must go further to prove infringement of legal a right and the probability of success upon trial. In this case the applicant is the CEO of the respondent and he has demonstrated that he was sent on compulsory leave for 60 days to pave the way for investigations into his conduct in relation to his performance of duty as an employee. The leave was debited from his 75 accumulated leave days.

20. The said leave was extended by a further 34 days to 27.8.2018 after which, no further communication was made to him concerning the alleged investigation. It is therefore correct to state that he has exhausted his annual leave days and he is no longer on a normal leave. His contract of employment does not provide for any other form leave nor does it entitle the employer to bar the claimant from reporting back to work indefinitely after exhausting his leave at and without following due process. For that reason, I find and hold that the respondents are acting in breach of the contract of service and as such, I do not need to belabour the point that the applicant has proved on a balance of probability that his right under the contract of service have been infringed by the respondents.

### **Irreparable harm**

21. After proving a prima facie case, the applicant must show that the case will be rendered nugatory and judicial time will be wasted if the substratum of the case is not secured. The applicant discharges the foregoing burden by proving that he will suffer irreparable harm if the injunction order is withheld. Irreparable harm is one which cannot be quantified in monetary terms or one which cannot adequately be compensated by damages.

22. After careful consideration of the evidence presented by the applicant vide his supporting affidavit, I am of the opinion that he has not shown that an award of damages would not suffice should the orders be denied. As an employee, any injury suffered before the final determination of the suit is capable of being quantified in monetary terms, and paid to him. Consequently, the application must fail.

### **Balance of convenience**

23. In view of the foregoing finding, I do not need to deal with the issue of balance of convenience because the principles of granting interlocutory injunction are cumulative. Suffice it say, however, that even where the applicant has proved a prima facie case and irreparable harm, the court is enjoined to consider the balance of convenience because the injunctions commonly sought by employees against their employers have the effect of reinstating the employee before trial or interfering with managerial prerogatives. In dealing with this issue, the court should evaluate the extent of the harm that would result to the contestants if the injunction is withheld or if it is granted.

24. I entirely agree with the English case of ***Films Rover International Ltd V Cannon Film Sales Ltd(1986) 3 ALL ER 772 at 780 – 781*** where it was held that, when dealing with grant of injunctive relief, the court should take whichever course that appears to carry the lower risk of injustice if it should turn out to have been ‘wrong’. In the present case, it is common knowledge that the Applicant was sent on compulsory leave for 94 days to pave way to investigations and thereafter the employer barred him from reporting back and as such, he now seeks reinstatement and protection from interference from the employer and her agents.

25. I further agree with this court’s opinion in ***Alfred Nyungu Kimungui V Bomas Of Kenya[2013]eKLR*** where Rika J held:

***“The Industrial Court should be cautious in exercising its jurisdiction, so as not to appear to take over and exercise managerial prerogatives at workplaces. Grant of interim orders that have the effect of limiting genuine exercise by management of its rights at the workplace, should be***

*avoided. Termination of employment, and initiation of disciplinary processes at the workplace, are presumed to be management prerogatives. The Court should be slow in intervening, particularly at interlocutory stages, otherwise the Court would be deemed to be directing the employers in regulation of their employees.”*

### **Conclusion and disposition**

26. I have found that the applicant has proved that his rights under his contract of service are being infringed by the indefinite compulsory leave imposed by the respondents. I have however also found that the applicant has not proved that he will suffer irreparable harm if the injunction order is withheld. Consequently, his Notice of motion 11.10.2018 is dismissed with no costs.

**Dated, Signed and Delivered in Open Court at Nairobi this 7th day of December, 2018**

**ONESMUS N. MAKAU**

**JUDGE**