



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 2299 OF 2016

(Before Hon. Lady Justice Hellen S. Wasilwa on 31st July, 2017)

EVANS JWC

NGIBUINI.....CLAIMANT

VERSUS

**NATIONAL WATER CONSERVATION AND PIPELINE CORPORATION.....1ST
RESPONDENT**

**THE BOARD, NATIONAL WATER CONSERVATION AND PIPELINE CORPORATION...2ND
RESPONDENT**

RULING

1. Before the court is a Notice of Motion dated 11th November 2016 filed through the firm of Kamunya & Company Advocates and brought under Section 12(3) (i) and (ii) of the Employment and Labour Relations Court, 2011 and all other enabling provisions of law for orders seeking the following orders:-

- 1. That this application be certified urgent and the same be heard ex-parte in the first instance.***
- 2. That this Honourable Court do issue a temporary injunction restraining the Respondents from recruiting, employing, hiring and filing the Claimant’s position of a General Manager Finance pending the hearing and determination of this application.***
- 3. That this Honorable Court do issue an interim order prohibiting the Respondents from interfering with the Claimant’s terms of service as contained in the letter dated 15th December 2014.***
- 4. That Honorable Court do issue an order compelling the Respondents to withdraw letter Ref. NWCPC/HRA/SFIL/3214(64) dated 22nd September, 2016.***
- 5. That this Honorable Court do issue an injunction restraining the Respondents from recruiting, employing, hiring and/or filing the Claimant’s positions of General Manager Finance pending the hearing and determination of this matter.***
- 6. That the Costs of this motion be provided for.***

2. Which application is supported by the annexed affidavit off Evans JWC Ngibuni and based upon the grounds that:-

a. The Claimant is the 1st Respondent's General Manager, Finance on permanent and pensionable terms of service as evidenced in the letter dated 15th December 2014;

b. The Claimant has to date not attained the retirement age of 60 years;

c. That the 1st Respondent sent via email, letter ref. NWCPC/HRA/SFIL/3214/(64) dated 22nd September 2016 titled "END OF CONTRACTUAL TENURE AS THE GENERAL MANAGER, FINANCE" purporting that the Claimant is employed on contractual terms of service and the same is allegedly scheduled to terminate on 1st January 2017;

d. The Claimant has never been accorded an opportunity to be heard and nor was he informed of the 2nd Respondents alleged decision to re-convert his term of service from permanent and pensionable to contractual as by law required. It is clear that the adverse decision contravenes Article 47 of the Constitution of Kenya and the provisions of the Fair Administrative Action Act;

e. In the 14th October 2016 copy of the Daily Nation newspaper, the Respondents advertised the Claimant's position of General Manager, Finance as vacant and are now in the process of recruiting a person to fill the same;

f. The period between 11th March 2014 and 19th March 2015, totaling over 14 months the Claimant did not occupy the position of General Manager Finance, since he had been appointed by the 2nd Respondent as the 1st Respondent's Acting Managing Director;

g. The 2nd Respondent's Chairman, one, Hon Julius Kones has a personal vendetta against the Claimant;

h. The Claimant stands to suffer irreparable loss and damages should the interim relief sought not be granted;

i. The Respondent shall not suffer any loss or damage should the interim orders sought be granted; and

j. The hearing and determination of the Claimant's claim shall be rendered nugatory should the interim orders sought be granted; and

3. The Respondents have filed a Replying Affidavit dated on the 9th of December 2016 deposed to by Andrew M Wanyonyi the Acting Managing Director of the 1st Respondent's organization.

4. He avers that he was appointed Managing Director of 1st Respondent on the 4th February 2016.

5. He avers that the Claimant was employed by the Respondent as the Chief Internal Auditor on the 30th May 2012 and in the year 2014 was appointed as the General Manager, finance for a contractual period of three (3) years starting from 2nd January 2014 and ending on 1st January 2017, the terms therein were clear without any ambiguity or confusion and its terms stand up to date. The term cannot be extended.

6. He avers that the 1st Respondent was justified in advertising for a position that would be vacant on the 1st of January 2017.

7. He avers that the letter of appointment contains the following clear terms:

i. The contractual nature of the engagement between the 1st Respondent and the Claimant.

ii. The right of either party to terminate the said contract by issuing a three-month notice to the other party.

iii. The appointee had a reserved right of making written application six (6) months before expiry of his contract period expressing his desire to be reappointed in the same position.

8. He avers that in the Claimant's tenure as Acting Managing Director, in April of 2015, he failed to advise a board committee meeting on the procedures and protocols to be followed in deliberation of important matters of the institution and other state organs and further, he irregularly, arbitrarily and unlawfully altered terms of employment of persons in the organization from temporary to permanent and pensionable.

9. He avers that the terms of the contract changed after an alleged meeting with two other who benefited from the change of terms that is Solomon Assava and Justus Wabuyabo which was done without adherence to procedure, or guidance from the Claimant.

10. He avers that board minutes from that meeting were never handed over.

11. He avers that there were several unlawful and illegal payment of salaries and allowances to several parties made on the wrong advise or representation by the Claimant for four months form December 2014 to March 2015 when they were reversed by a special board meeting on the 6th of February 2015.

12. He avers that the Claimant had previously been informed of his term and applicable gratuity which did not raise an issue until there was communication by the 1st Respondent of its intention to advertise for the post of General Manager.

13. He avers that the Claimant has been paid all his dues and nothing remains outstanding.

14. He avers that the issues raised herein are matters that can only be canvassed in a substantial hearing by taking evidence under oath and not by affidavit.

15. The 2nd Respondent has filed a Replying Affidavit dated 9th December 2016 deponed to by Walubengo Waningilo a Director of the 1st Respondent.

16. He avers that the Claimant has accused the Chair of the Board of Directors as having undue influence in the matter and being behind his woes.

17. He avers that the claimant is facing corruption charges of economic crimes in EACC in Nairobi CMS ACC No 21 of 2015 in three counts on charges of contravention of the provision of the Public Procurement and Disposal Act 2005 and the Anti-Corruption and Economic Crimes Act 2003 the chairman of the 2nd Respondent does not have control over the Anti-Corruption Organization, his name was read out by the President in parliament together with others and the chairman cannot then be said to have had any influence.

18. He avers that the Court will investigate on his culpability and make its decision, so the claimant should then wait out the process and bear the cross of the allegations made against him.

19. He avers that the contractual obligation has its terms clearly spelt out and the Claimant was fully aware of this fact.

20. The Claimant has filed a Further Affidavit dated 17th January 2017, where he avers that Andrew M Wanyonyi who claims to be the 1st Respondent's Acting Managing Director who swore the 1st Respondents Replying Affidavit is a salaried employee of the Trans Nzoia County presently on

suspension. He has not to his knowledge been appointed by the Cabinet Secretary to that position nor has any evidence to support the same been produced.

21. He avers that he did not wield a lot of power as alleged in the Andrew Wanyonyi affidavit nor did he appoint a secretary to take minutes, but he used the services of Justus Wabahuyu who is a Certified Secretary and the General Manager, Corporate and Legal Services of the 1st Respondent who is more than qualified to do the job. It was his office that managed the Board Calendar and Board Register in which all confirmed Board Minutes.

22. He avers that the board meeting held on the 12th May 2014, which reviewed the terms and conditions of service of staff was long overdue, it was discussed and a report was prepared which was referred to the Finance Committee for the financial implications.

23. The same information was conveyed to the Board on its 26th meeting on the 16th of May 2014 where the matter was differed pending government communication. He avers that a further meeting on 12th September 2014 adopted the recommendations made authorizing conversion of the 1st Respondents General Manager terms and conditions of service from contract to permanent and pensionable. He states that he is eligible to benefit from these terms as well as the others as they are all below the retirement age and duly qualified via the Respondents Regulation 2.2.1

24. He avers that the attendance of Mr. Solomon Assava to the meetings was to answer questions of the chairman of the Board Committee.

25. He further states that his services to the Respondent were transferred from the Ministry of Finance office of internal Auditor General, Treasury where he was permanent and pensionable, he states that there is no justification denying him similar terms and refers to his former code of conduct at paragraph 2:22:5 which provides that:

“an employee serving on a non – permanent terms of service will not be allowed to transfer his/her services to another organization and will be required to resign if he wishes to take up employment with another organization.”

26. He avers that on the 6th of February 2015 a Special Board Meeting was conveyed whose purpose was to interview and appoint the Managing Director and General Managers Construction and Electro Mechanical, Planning and Design and the board cannot hold a special board then order reversal of terms issues without it being a substantive agenda. Further, the decision of the reversal was never communicated to him as required by law.

27. He avers that the termination then given to him is unlawful as it relates to alleged expiry of a non-existent contract of employment, is clearly not valid and that the procedure adopted by the Respondents is also unlawful. Moreover, he was not given a hearing as required by law.

28. The 1st Respondent has filed a Replying Affidavit in response to the Further Affidavit dated 3rd February 2017 deposed to by Andrew Wanyonyi. He avers that the attachments of the Claimant where he alleges he was power broker or king maker in Trans Nzoia are not credible as the source of the information is Citizen Weekly a tabloid paper that is not reliable.

29. He avers that he was properly appointed as the Acting Managing Director to the 1st Respondents Corporation is misplaced without any justification as he was appointed by the Cabinet Secretary, Ministry of Water and Irrigation under the provisions of the Water Act.

30. He further avers that he was never on suspension from Transzoia County Government and all other allegations made by the Claimant are also false.

31. He reiterates to the contents of his earlier affidavit.

32. The applicants have filed written submissions dated 10th February 2017 where he refers the court to the settled case of **Giella vs. Cassman Brown Limited [1973] EA 358** as the general conditions that a party seeking injunctions must meet.

33. He submits that he has a prima facie case with the probability of success as stipulated in the presented fact. He has not been treated fairly nor were the procedures stipulated by the law followed in making the decisions of the Respondent. His right to fair labor practices and fair administration as guaranteed by Article 41 and 47 of the Constitution of Kenya have been violated.

34. He submits that he will suffer irreparable damage which cannot be compensated by an award of damages should the orders sought not be granted. The Applicant is employed on Permanent and Pensionable terms service meaning that he was to be in employment until he was 60 years. He transferred his services to the Respondent knowing that the terms of service with the Respondent would be similar. He cannot sustain his family unless he has employment.

35. To this end, he cites the case of **Risper Otieno Mtula vs. Mumias Sugar Company Limited [2014] eKLR** where it was held that:

“Employers have more oftenrelied on the principle of Giella vs. Cassman Brown that the applicant can be adequately be compensated through damages. In certain cases, however, damages can never adequately compensate a party who has been wronged as damages may come albeit too late. If internal disciplinary processes cannot be adhered to, then the employee is left to wait for the unfairness to disclose late in the day when the damage is grave.”

36. He urges the court to find as has been stated above.

37. As to balance of convenience, he submits that the same clearly favors him as the conservatory orders if not granted he will have ceased being in the employment of the Respondent and given his advanced age, it is unlikely that he will get new employment and will then remain unemployed until the hearing and determination of the case.

38. He urges the court to find that the application has merit and orders sought be granted.

39. The Respondents have filed submissions dated 21st February 2017. They seek to rely on the case of **Giella vs Cassman Brown [1973] EA 358** which gives conditions for the grant of an interlocutory injunction.

40. They submit that the Respondents does not have the kind of case which warrants the orders of injunction sought for the following reasons:

i. From the facts given, the Claimant was an employee of the 1st Respondent as a General Manager under contract.

ii. It is clear that when the Claimant’s terms of service were altered, he received payment from the 1st Respondent founded on the altered terms for a period of six months that is from September 2014 to March 2015. It is clear to him that his terms were altered.

iii. There is a resolution signed by members of the 2nd Respondent which effects reverted the terms of employment of the General Managers to the original and the only recourse if any is that of damages.

iv. That the Human Resource and General Purpose Committee Recommendations is irregular as it was not itemized in the committee agenda for the day appears to have been done due to undue influence. The agenda came as a suggestion from Mr. Cloephas Kaseya, seconded by Mr. Evans Ngabuini the Claimant who was also secretary in the said meeting in his capacity as the

Managing Director.

v. *The manner in which the recommendation was done in the Human Resource and General Purpose Committee was irregular and questionable as it stated “further recommendations on review of terms and conditions of service and staff.*

vi. *The review was subject to Finance Committee recommendations and further communication from the Government which was not the case, it is only the temporary Director Representing the parent Ministry who cause the members to revisit the issue of review of the terms of service.*

vii. *The full board meeting held on the 6th February 2015 noted with concern that the alteration of the terms of service was irregular done that:*

a. There was no communication from Government.

b. There was no policy paper prepared and presented to the board for approval in support of such which are drastic.

c. The finance committee was to also make their recommendation in view of the financial implication of the alteration of the terms service of which no report was done.

41. On the issue the illegal administrative action, they submit that the Claimant is not being dismissed as it is his term which has come to an end. They submit that he was aware of the Board meetings as he was the convener and the agenda of the meeting. He was also made aware of the decision as it was properly communicated through an internal memo.

42. In the Mombasa Industrial Cause No 296 of 2013 between Augustine Odiambo Abiero vs. K K Security Ltd [2014] eKLR in page two:

“it is trite that estoppel refers to a bar that prevents one from asserting a claim or a right that contradicts what he has said or done before. Equitable estoppel is a defensive doctrine preventing one party from taking unfair advantage of another when through a false representation of facts or conduct, the person to be estopped has induced another person to act in certain way that resulted to substantial prejudice....”

43. They submit that the Claimant is far from raising a credible and substantial case worthy the granting of injunctive orders sought out herein and relief cannot be genuinely and rightly be available to him and the application must fail in view of the principles set out in the case of Giella vs Cassman Brown.

44. They submit that it will also be unfortunate to grant orders for injunction or any order of equitable relief where the conduct of the person claiming is questionable. This was held in the Court of Appeal case No 165 of 1993 Allan Njuguna t/a Mwereria Mbao Stores vs. Veronica Nyambura Karuga and 2 Others (unreported) which establishes a principle that the law should not aid and assist the fraudsters, evil doers and tricksters and wrong doers to benefit from their deed:

“it is unacceptable that a court should allow itself, to be a party to an unlawful act by ignoring it and rather make an order to the benefit of wrong doer or those claiming through him.”

45. The submit that the Claimant influenced and engineered the process of irregularity converting his employment terms to permanent and pensionable and similarly caused a letter to be written by his subordinate/junior to notify him of the change of employment terms.

46. To this end they rely on the case of Festus Ogada Hans Mollin [2009] eKLR, Civil Appeal 100 of 2007 (RSC Omolo SEO Bosire EO Okubasu JJA) where the Court observed that the Privy Council also quoted the words of Lindley LJ in the English case of Scott V Brown Doering, McNab & Co (3) [1892] QB 724 in which the learned Judge authoritatively stated:

“ex Trupi Causa no Qritur action”

This is old and well known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences. No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. it matters not whether the defendant has pleaded illegality or whether he has not. If the services adduced by the plaintiff proved the illegality, the Court ought not assist him”

A L Smith LJ in the same case at page 734 clarified the matter thus:

“if a Plaintiff cannot maintain his case of action without showing as part of such cause of action, that he was guilty of illegality, then the courts will not assist him in case of action.”

47. They also submit that the Claimant will not suffer prejudice because:-

a. The Claimant transferred his services from one department of the government to another i.e. from the treasury to the National Water Conservation and Pipeline Corporation.

b. The Claimant is currently under interdiction because of criminal case number 21 of 2015 and once the case is concluded and he is absolved of any wrongdoing the same government can cause him to be deployed.

c. The Claimant even if his contract is held to have been permanent and pensionable can be adequately and sufficiently compensated in monetary terms and in such case no injunction should issue.

d. The Claimant in his Memorandum in support of claim adequately covers his pleas before the Court in that he has sought damages until his retirement age in sixty years. The Claimant cannot breathe cold and hot at the same time by holding the 1st Respondent Corporation at ransom not to engage another person when he has been out of service for more than two years and when his return is doubtful.

e. It would not be fair also to hold the Respondent at ransom when it is up to the finding of the Court to the validity of the concerted contract which is highly questionable.

48. As to the third part of the principles set out in the case of **Giella vs Cassman Brown** that if the Court is in doubt, it will decide an application on a balance of convenience and that in this case where there is a remedy and one can say there is a clear cut out case there is no need of invoking the principle of balance of convenience.

49. They urge the Court to dismiss the application.

50. I have considered the averments before me from both parties. The main issue to determine at this stage is to establish whether the claimant Applicant has established a prima facie case with a probability of success to warrant issuance of orders sought.

51. In determining this aspect, I am guided by the well laid down principles in **Giella vs. Casman Brown** which settled that – before the Court can grant Injunctive reliefs, it must establish that:-

1. An Applicant must show a prima facie case with a probability of success.

2. The Applicant must show that he will suffer irreparable injury which cannot be adequately compensated in damages.

3. If the Court is in doubt, it will decide an application on the balance of convenience.

52. In considering these aspects, it is clear that there are matters of contention on whether or not the Claimant's term was contractual or permanent and the process in which it was commuted to either one or the other. To determine this aspect, this will have to consider viva voce evidence of the parties and I do not find it possible to determine this aspect on account of affidavits presented before me.

53. Secondary, the Claimant has already been terminated and it is the position of this Court that an order of reinstatement cannot be issued at the interlocutory stage without according parties an opportunity to be heard unless in very clear circumstances.

54. I am unable therefore to issue an order prohibiting the Respondents from interfering with the Claimant's terms of service as contained in the letter dated 15th December 2014, the end result which would be a reinstatement. Currently the Claimant is facing criminal charges before Court, the time of determination not known. To hold the Respondent at ransom not to recruit its Finance Manager would be counterproductive to the Respondent's operations as a government corporation given its mandate.

55. It is my finding that this is a suitable case where damages will be able to compensate the Applicant adequately if it is the finding of this Court that he has been treated unfairly.

56. I therefore find that the prayers sought at this stage are not tenable and the balance of convenience tilts in favour of not granting them. The orders given in the interim are therefore vacated and I direct the parties to take a hearing date to determine this claim in its entirety.

57. Costs in the cause.

Read in open Court this **31st day of July, 2017.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mugambi holding brief for Muriuki for the Respondent

Kamunya for the Claimant