



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NAIROBI**

**SUIT NO. 1978 OF 2017**

**STEPHEN MURUA.....CLAIMANT**

**VERSUS**

**ORACLE TECHNOLOGY**

**SYSTEMS (KENYA) LIMITED.....RESPONDENT**

**RULING**

1. The Claimant seeks through the notice of motion application dated 10<sup>th</sup> October 2017 for an interim order of injunction to restrain the Respondent from appointing or recruiting any replacement for the Claimant's position within the Respondent in the title known as Hardware Sales Representative in the Cloud Infrastructure Team managing public sector and utilities in Kenya as well as restrain the Respondent from paying commissions to any employees in the Cloud Infrastructure Team of the Respondent in respect of Kenya Power, Super Cluster Purchase and the National Treasury (IFMIS Project) pending the hearing and determination of this cause. The application is supported by grounds on the face of it and the affidavit of Stephen Murua the Claimant. The grounds in essence are that the termination of the Claimant's employment was meant to deny the Claimant his rightful dues as commission payment by the Respondent and that there is a dispute between the parties as to whether the Respondent can deny and/or refuse to pay the Claimant commission on the sales based on the said compensation plan. The Respondent is opposed and filed a replying affidavit sworn by the affidavit of Mukunya Mugo the Human Resources Manager of the Respondent. The response is to the effect that the application by the Claimant is an afterthought and is intended to frustrate the Respondent's business and delay the expeditious fair hearing of the substantive matters in dispute between the parties. It was deposed that the position held by the Claimant is vital to the Respondent's business and that the said position was reassigned as the public sector line of business is one of the highest revenue earners. It was posited that the orders sought had been overtaken by events and that to deny commissions to other employees pending the outcome of the case would be unfair and unjustified in the circumstances and would negatively impact on the Respondent's operations and affect staff morale.

2. Oral arguments were made on 7<sup>th</sup> December 2017 and it was submitted by Miss Macharia for the Claimant/Applicant that the termination of the Claimant was unlawful, unprocedural and illegal. The Claimant was entitled to commissions on sales and the dismissal had the effect of denying him the commissions earned. The Claimant sought that pending the hearing and determination of the matter the Respondent should be restrained from appointing or recruiting any person to take the Claimant's position. He also sought to restrain the Respondent from paying any other employee commissions in the project. The Claimant urged the court to take judicial notice of the Kenya Airways decision by Wasilwa J. and argued that he continues to suffer prejudice till these orders are granted.

3. In response, Mrs. Wetende for the Respondent submitted that the basis of the dispute is on issues disputed by the Respondent and that these should await the hearing. She submitted that granting the orders would be premature as the claim is unsupported. No special circumstances have been set out for grant of the motion or prayers sought. It was stated that the Claimant's service was terminated on 20<sup>th</sup> September 2017 and the claim was filed on 4<sup>th</sup> October 2017 while the motion was filed on 24<sup>th</sup> October 2017. Reliance was placed on the case of **Esther Mbinya Musau v National Bank of Kenya Limited**

[2015] eKLR and **Alfred Nyungu Kimungui v Bomas of Kenya** [2013] eKLR for the proposition that there exists no special circumstance to warrant the grant of orders sought. It was submitted that the threshold of grant of injunction had not been met and that the Kenya Airways case mentioned may have been reported in the press and the veracity of the news reports is known to be unreliable. The Respondent sought the motion to be dismissed with costs.

4. The application seeks injunctive orders. There are principles that guide the grant of injunctive relief. The grant of injunctive relief is based on the ratio in the case of **Giella v Cassman Brown & Co. Ltd. (1973) EA 358**. The test in **Giella v Cassman Brown** is threefold and this celebrated case was restating the principles that had been laid out in the case of **E.A. Industries v Trufoods (1972) EA 420**, where the learned judge Spry V-P stated as follows:-

*There is, I think, no real difference of opinion as to the law regarding interlocutory injunctions, although it may be expressed in different ways. A plaintiff has to show a prima facie case with a probability of success, and if the court is in doubt it will decide the application on the balance of convenience. An interlocutory injunction will not normally be granted unless the applicant for it might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages.*

The test set out in these leading cases on injunction is on three limbs - the first is whether there is a *prima facie* case with a probability of success, secondly, unless the injunction is granted there would be irreparable loss which would not be adequately compensated by an award of damages and thirdly if the court is in doubt it would decide the application on a balance of convenience. Before me is the Claimant who seeks injunctive relief as set out above. Does the Claimant have a *prima facie* case? The answer to this is that the Claimant has from the pleadings before me, a *prima facie* case the success of which will depend on the evidence that will be tendered in the suit by either side. The second test is whether if the injunction is not granted, would there be irreparable loss to the Claimant that cannot be compensated by an award of damages? It is apparent from the pleadings of the parties that the Respondent has the means to make good an award of damages if there is one made. It does not appear at all the loss to the Claimant is irreparable. Indeed the court on hearing the suit can order his reinstatement to his position without loss of benefits in terms of Section 12(3)(vii) of the Employment and Labour Relations Act 2011. In the case before me, the Claimant would wish that the bonuses or commissions due to other employees be withheld pending the determination of the claim. These are draconian orders and in the case of **Esther Musau v National Bank** (*supra*) the learned judge held that the *issue in dispute cannot be addressed within the current application as the same requires the call of evidence with regard to the claim of unfair termination and the grounds upon which the Claimant wishes to rely on*. It would be difficult to ascertain the commissions payable to the Claimant and whether he is entitled to any without calling evidence. The illegality or otherwise of the termination is also not easily discernible thus rendering the application one upon which the principles of the balance of convenience come into play. In my view, the Claimant's application fails to meet the threshold for grant of injunctive relief. I dismiss the motion but make no order as to costs. Suit should be heard on merits.

It is so ordered.

**Dated and delivered at Nairobi this 13<sup>th</sup> day of December 2017**

**Nzioki wa Makau**

**JUDGE**