



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 266 OF 2016

RAYMOND ROBERT NGETICH.....CLAIMANT/APPLICANT

VERSUS

KENYA UTALII COLLEGE.....RESPONDENT

RULING

1. The application before the Court is the Claimant/Applicant's notice of motion application dated 22nd February 2016 seeking various orders the main of which is injunctive relief. The Claimant/Applicant sought in the motion expressed to be brought under Sections 1A, 1B, 3 & 3A of the Civil Procedure Act 2010 and Order 40 Rule (1), (2) and Order 50 Rule 1 of the Civil Procedure Rules 2010 for orders as follows:-

- a. This application be certified urgent and service thereof be dispensed with in the 1st instance
- b. This honourable court be pleased to issue temporary injunction restraining the Respondent from evicting the Claimant from house number DQ 49 pending hearing of this application *inter partes*.
- c. This honourable court be pleased to issue a temporary injunction restraining the Respondent from evicting the Claimant from house number DQ 49 pending hearing and determination of this application.
- d. This honourable court be pleased to issue a permanent injunction restraining the Respondent from evicting the Claimant from house number DQ 49 pending hearing and determination of this cause.
- e. Costs of this application be provided for.

The application was based on the grounds on the face of the motion as well as supported by the Claimant's affidavit sworn in support.

2. The Respondent was opposed and filed a replying affidavit sworn by the Respondent's acting human resource manager Mr. Abdallah Randani who deposed that the Respondent derives rental income from the premises that the Claimant resides in and that the income is used to maintain the college and run its programmes. He deposed that the continued stay in the premises without payment of rent is detrimental to the Respondent and that the Claimant was trying to use the Court to evade payment of rent which is an independent obligation separate from his employment.

3. The Claimant filed a further affidavit on 11th July 2016 in which he deposed that as of the time of making the affidavit, the Respondent had not commenced the appeal against the summary dismissal and that the request that he vacates the house is detrimental to him and is against his legitimate expectation for a hearing. He deposed that the house DQ 49 is a house provided by the Respondent in the course of his employment.

4. The application was urged by Miss Kosgei on 13th July 2016. She submitted that the application was for an injunction to prevent the Respondent from evicting the Claimant from the house DQ 49 and that the Respondent was the Claimant's employer from October 2006 to 11th February 2016 when his services were summarily terminated. She submitted that the Claimant has already challenged the dismissal and had filed an appeal against the dismissal. She submitted that upon filing the appeal on 17th February 2016 the Respondent immediately served upon the Claimant an eviction notice. She stated that the Respondent had sought time to finalise the appeal process and had failed to do so in spite of time being given. She submitted that the Respondent had shown a lack of interest to hear the Claimant contrary to his rights to a fair trial as protected under the Constitution. She submitted that the Claimant will be evicted any time his appeal notwithstanding. She submitted that the Claimant is no longer salaried and has a family to fend for and that the Respondent continues to delay in determining the appeal and shows a willingness to evict him even before the appeal is determined. She submitted that the Claimant had shown a *prima facie* case that is likely to succeed and he would suffer irreparable loss if the application is not granted.

5. Miss Wanjiku replied for the Respondent and submitted that she would rely on the replying affidavit sworn in response to the Claimant's motion. She submitted that the appeal process is ongoing and that the council could not agree as the issue is very grave. She submitted that the property the Claimant is occupying is a rental premises and the position taken by the Claimant that he will not pay rent until the appeal is determined is untenable. She asked what would happen if the appeal was unsuccessful. She urged the Court to dismiss the motion with costs.

6. Miss Kosgei replied and submitted that it was more than 3 months since the appeal was lodged and the Respondent gives the same answer and in spite of having been given time by the Court to resolve the appeal this had not happened. She submitted that on the replying affidavit it was conceded that the houses were given at subsidised rates and therefore not a profit making venture. She submitted that in any event if the appeal fails the Respondent has recourse which can be taken at that point. She submitted that the party that is greatly prejudiced is the Claimant and that the delay in concluding the appeal violates the established principle of legitimate expectation. In closing she submitted that the Claimant had fulfilled the conditions for the grant of the prayers sought and the principles of grant of injunction.

7. The application is one for an injunction. Grant of injunctive relief follows 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 the 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.

8. The test set out in the leading cases on injunction is that there are 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. To my mind the test for these three principles are to be applied sequentially. Once one part is satisfied there is no need to consider the other limbs. Before me is the Claimant who seeks injunctive relief. He asserts that he was summarily dismissed without cause and the Respondent has dithered in determining the appeal due to his innocence of the charges leveled against him. He asserts that he is abiding the outcome of the appeal he preferred

against his dismissal with the Respondent and until the same is determined the balance tilts in his favour to occupy the premises until the issue is determined at which time the Respondent has recourse it can take. The Respondent on its part asserts that the Claimant is occupying a rental premises and is not paying rent to the detriment of the Respondent and that the Claimant should vacate the premises.

9. The test to be applied is

- i. whether there is a *prima facie* case with a probability of success
- ii. unless the injunction is granted there would be irreparable loss which would not be adequately compensated by an award of damages
- iii. if the court is in doubt it would decide the application on a balance of convenience.

The Court has not been able to ascertain if there is a *prima facie* case with a probability of success. This is because the parties have not set out in full the facts surrounding the dismissal. There is talk of invoices and goods delivered, or not delivered, an internal audit and so on that are not before the Court. I would therefore not apply the first limb. In regard to the second limb, the Claimant's appeal against dismissal is pending before the Respondent. The Respondent has sought time to resolve the appeal and its counsel concedes that there is a disagreement in the Council considering the appeal. The appeal remains undetermined. In my view, the Claimant may be evicted, forced to look for alternative accommodation, resettle his family elsewhere and make adjustments that could in all probability not be adequately compensated by an award of damages. In my view, the balance of convenience tilts in favour of granting the injunction. However, the grant must be on terms. There is no way the Claimant can assert that he has no means of livelihood and therefore create a scenario where he would occupy a house rent free. If he had no employment or nexus with the Respondent he would have adjusted his life to ensure that he is able to meet his obligations. In the premises I will grant the prayer for injunction provided the Claimant pays rent for the house and clears any arrears that may be pending. The arrears be paid within 15 days of the grant of the order and in default the Respondent be at liberty to evict the Claimant.

10. The costs of the application will be costs in the cause.

Orders accordingly.

Dated and delivered at Nairobi this 22nd day of July 2016

Nzioki wa Makau

JUDGE