**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1818 OF 2014**

**JULIANA MUTISYA.....1ST CLAIMANT**

**CATHERINE NJERU.....2ND CLAIMANT**

**EMILY ONGAGA.....3RD CLAIMANT**

**VERSUS**

**THE NATIONAL GENDER AND EQUALITY COMMISSION..RESPONDENT**

**RULING**

1. The Application before me is the Claimant/Applicants Notice of Motion Application dated 15th October 2014. Through the said application the Applicants sought the grant of various orders chief of which was an order restraining the Respondent, its servants or agents from interviewing or sourcing for replacements for the Applicants positions and a mandatory injunction directed at the Respondent to reinstate the Claimants to their positions. The Application was grounded on the reasons on the face of it and was supported by an Affidavit sworn by the 1st Claimant/Applicant. The 1st Claimant/Applicant deponed that the cause of the present application was the tendering process under NGEC/01/2013-14/INS and in particular the minutes which were amended after an error was noted. The Applicant deponed that the alteration of the minutes was subject of some inquiry by the Commissioners of the Respondent leading to letters of termination dated 6th October 2014 being issued to the 3 Applicants.

2. The Respondent was opposed to this Application and filed a Replying Affidavit on 4th November 2014. The Chairperson of the Respondent Winfred Osimbo Lichuma deponed that the Applicants were enjoined by the Constitution and the Public Officer Ethics Act to execute their duties in a way that maintains public confidence in the integrity of their office and that what led to the dismissal was engagement in corrupt practices in violation of the Constitution and the Public Officer Ethics Act. It was deponed that the Applicants had willfully altered minutes of the evaluation committee and the tender committee reports. She deponed that the Claimant/Applicants were all accorded an opportunity to show cause and subsequently were sent packing.

3. The Applicants sought and obtained leave on 10th November 2014 to file a Supplementary Affidavit. In the Supplementary affidavit the 1st Claimant/Applicant deposed that the deposition by the Chairperson of the Respondent was flip flopping as on one hand she accused them of corruption while on the other hand it was said that the dismissals were on account of involvement in the alteration of records and signing altered minutes without authority. She deponed that there was no conspiracy to award the tender and

denied any dishonesty, fraud or breach of trust. It was deponed that the dismissal flouted the disciplinary process of the Respondent.

4. Parties proposed to dispose the Application by way of written submissions and the Applicants filed submissions on 10th December 2014 while the Respondent filed submissions on 28th January 2015.

5. The Claimants/Applicants submissions were to the effect that the Respondent's reasons for termination as contained in the Replying Affidavit of Winfred Lichuma the Chairperson of the Respondent were at variance as the reasons communicated in the termination letters and show cause letters given to the Claimants. It was submitted that there was nothing to suggest corruption and that the tender process was actually cancelled as conceded by the Respondent but that the Respondent did not reveal the reasons for the cancellation. On the law, the Claimants/Applicants submitted that at this stage what the Court is asked to do is evaluate whether grounds exist for the grant of orders sought. The Applicants submitted that the law is well settled on the ingredients that an applicant needs to prove as held in the celebrated case of **Giella v Cassman Brown [1973] EA 358**. The Applicants asserted that they have satisfied the *prima facie* case with probability of success criteria. Relying on the case of **Mrao Limited v First American Bank of Kenya & 2 Others [2003] KLR 125** submitted that the Applicants had shown that they have an arguable case with high chances of success. They submitted that they should have been interdicted and suspended on half pay to pave way for investigations and consequently any disciplinary process and not the arbitrary dismissals handed out. The Applicants also submitted that they had met the second limb of the **Giella** case which was that they will suffer irreparable injury if injunction is not granted. They submitted that there is no guarantee that they will ever find alternative employment or positions commensurate with what they have held at the Respondent and that the loss would be incapable of compensation by way of damages. On the balance of convenience limb the Applicants submitted that the balance tilts in favour of the grant of the order to them.

6. The Respondents submissions were to the effect that the twin issues for consideration were whether the Applicants have satisfied the requirements for the grant of an injunction and whether the prayer for reinstatement could be granted at this stage. The Respondent submitted that the conditions for grant of injunctions are settled in the cases of **Giella v Cassman Brown** and **E.A Industries v Trufoods [1972] EA 420**, that is to say

a. An applicant has to show a *prima facie* case with probability of success;

b. An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages; and

c. If the court is in doubt, it will decide the application on a balance of convenience.

7. The Respondent submitted that the grant of the relief sought is a discretionary remedy which should be exercised to suffocate the management prerogative. The Respondent placed reliance for this proposition on the case of **Sergean v Paul (1949) EACA** a view held in the case of **Richard Muimo Parsitau v Kajiado County Government & 2 Others [2014] eKLR**. The Respondent submitted that the Claimants/Applicants had not satisfied they have a *prima facie* case and that secondly if they are successful there is a remedy under the Industrial Court Act and the Employment Act which both provide for fair compensation in the event the case is decided in the Applicants favour. On the balance of convenience, the Respondent submitted that the burden of vacant positions has to be shouldered by other employees of the Respondent and the Respondent being shorthanded with employees doubling up in roles previously undertaken by the Applicants and these employees are overworked. The Respondent relied on Petition 39 of 2013 **Gladys Boss Shollei v Judicial Service Commission** where the learned Judge held that it is in the public interest that the office which is critical to the functioning of the judicial arm of Government does not remain vacant. The Respondent submitted that the balance of convenience lies in favour of the Respondent as it is impossible for the Respondent to conduct its affairs without filing the vacant positions. In regard to reinstatement, the Respondent submitted that an order for reinstatement is difficult to enforce and it is plainly wrong to impose an employee on an employer. Reliance was placed on the cases of **Salmat B. Oguye v KNTC Civil Appeal No. 125 of 1995**, **Michimikumi Tea Factory v**

**Geoffrey Kithela Kanaa Civil Appeal 63 of 2007**, **Joab Mehta Oudia v Coffee Development Board of Trustees [2014] eKLR**, **Muslims for Human Rights (MUHURI) & 2 others v Attorney General & 2 others [2011] eKLR**, and finally **JR 2512/2012 National Union of Mine Workers & Another v Commission for Conciliation, Mediation and Arbitration & 2 Others** from the Labour Court of South Africa. In conclusion the Respondent submitted that the Applicants had not met the principles for grant of injunction and that the Respondent had established that the termination of the Claimants/Applicants services was fair and lawful and that the Respondent has shown commitment to pay them compensation by way of damages in the event that this Court determines in their favour at the end of the case.

8. The matter before me is quite rightly as identified by parties on injunctive relief. Grant of injunctive relief follows the pattern in the oft-cited case of **Giella v Cassman Brown & Co. Ltd. (1973) E.A. 358**. The test laid out in the **Giella v. Cassman Brown** case is threefold and this case was was restating the case of **E.A Industries v Trufoods (1972) E.A 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."

9. Quite evidently the issues for determination fall within the 2 walls the Respondent adverted to in its submissions. First I have to determine whether grounds do exist for the grant of the injunction sought and secondly whether an order for reinstatement would issue.

10. In the test set out in **Giella v Cassman Brown** and **EA Industries v Trufoods**, three limbs exist. 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.

11. The Applicants have submitted that they were dismissed capriciously and the Respondent asserts that the dismissals were on sound basis. It is evident from the evidence adduced in the Affidavits of parties that there was some reason for disciplinary processes being invoked by the Respondent. It would appear that the Respondent in contravention of its own Human Resource Manual did not accord the Claimants/Applicants the processes outlined in the Manual. In my view this failure fits perfectly in the *prima facie* stage of the **Giella** case. I appreciate that at this stage I do not have to consider the merits of the action taken but whether there is a *prima facie* case.

12. On reinstatement the Respondent asserts that on the strength of the decisions in **Oguye v KNTC**, **Michimikumi Tea Factory v Geoffrey Kanaa**, **Oudia v Coffee Development Board**, **MUHURI & 2 others v Attorney General & 2 others**, and **National Union of Mine Workers & Another v Commission for Conciliation, Mediation and Arbitration & 2 Others** the Court would be remiss to order reinstatement. The argument given by the Respondent is that reinstatement is an order that would be difficult to enforce. Industrial Court Act 2011 Section 12 and the Employment Act 2007 Section 49 all identify reinstatement as a remedy that can be given. The cases of **Oguye** and **Kanaa** were decided in the old days when there was no Industrial Court Act 2011 and the effects of the Employment Act 2007 largely unfelt. In the current dispensation reinstatement is a remedy that can be granted. In the case of **Muhuri v AG** above, the applicants fell short of the principles for grant of orders of prohibition or mandatory injunction. Ibrahim J. (as he then was) correctly held that the Petitioners had failed to satisfy the threshold for grant of the orders. That case is a clear indication that if the Petitioners therein had met the threshold the learned judge would have issued the mandatory injunction and prohibition sought. The South African case is out of context in this matter. It was determined after full hearing and was a review of the decision of the Arbitration proceedings. The case of **Michimikuru** was decided by a Court without jurisdiction in terms of Article 162 of the Constitution and is not binding or even persuasive.

13. In the case of **Shollei v JSC** Nduma J held that the office of the Chief Registrar of the Judiciary could not remain vacant as the Judiciary is a very vital arm of Government. I agree. The position of the CRJ is not the same as that the deputy commissioners and members of staff of the National Gender and Equality Commission hold. It is a commission whose chief role is to ensure parity in gender issues. It is not any where near as important as the third arm of Government.

14. Reinstatement refers to the restoration of a former employee to his or her previous position after unfair or unlawful dismissal, demotion, or transfer. Reinstatement involves no loss of earnings or entitlements accrued as a result of absence in service. This means the employee is deemed to have continued to perform work for the employer although was not at work at the material time and whereas reinstatement may seem like a final remedy it is not. The Respondent admits that it is suffering under the present circumstances where staff have had to take on additional roles in acting capacity due to the absence of the 3 applicants. It is an exceptional circumstance in my view as the Commission is seriously handicapped at present. In this case, the Claimants seek to have proper process followed before their termination. This, I think, they are owed. In the premises it is imperative, in my view, that they be reinstated to their positions effective immediately. If the Respondent so desires it can initiate processes under its Human Resource Manual to remedy any breaches it may have found to exist within its workforce. The process may absolve some or all of the Applicants and the remedy of damages may not be adequate recompense for the loss. The upshot of the foregoing is that the Application is allowed in terms of prayer 3 and 4 of the Notice of Motion Application dated 15th October 2014.

Orders accordingly.

**Dated and delivered at Nairobi this 4th day of February 2015**

**Nzioki wa Makau**

**JUDGE**