



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

ELRC CAUSE NO. 399 OF 2015

(Consolidated with ELRC. No. 400 of 2015)

(1) ALFONSO KATHEKA MUNYALI

(2) JEREMIAH NYAMBERI

ICHWARA.....CLAIMANTS

=VERSUS=

**(1) THE COUNCIL OF THE KENYA SCHOOL OF
GOVERNMENT**

**(2) THE DIRECTOR GENERAL OF THE KENYA SCHOOL
OFGOVERNMENT....RESPONDENTS**

RULING

INTRODUCTION

1. The Government of Kenya passed the Kenya School of Government Act (KSGA) in 2012 to establish Kenya School of Government (KSG) as the successor of Kenya Institute of Administration and the Kenya Development Learning Centre. The KSGA provided for the powers, functions and administration of the KSG. Under Section 4(2) of KSGA, Mombasa and Matuga Government Training Institutes (GTI) were converted into campuses of the KSG and by dint of **Section 21(3)** all the members of staff of GTI became employees of the KSG subject to the terms and conditions set by the KSG. **Section 21(4)** however provided that upon commencement of the KSGA, the employees of GTI, were to be given an option to chose to continue working for KSG or to be redeployed in the Public Service Commission (PSC).
2. The Claimants herein were the Director for the defunct Mombasa GTI and Matuga GTI (Job Group S and R) since 2009 and 2010 respectively. After the commencement of the KSGA on 1.7.2012, they continued serving in the same capacity until when were formally given the option, *vide* letter dated 28.2.2014 to chose between continuing to serve the KSG under the then “*current Terms and Conditions of Employment*,” or be deployed in the PSC. The Claimants accepted the offer to continue serving KSG under their “*current Terms and Conditions of Employment*”. However by letter dated 11.6.2015, the Director General (DG) notified the Claimants that they had been deployed in the academic functions of the KSG and advised them to report to the Director

Academic Affairs for determination of appropriate academic designation and assignment of duties and responsibilities in accordance with KSG terms and conditions of service.

3. The Claimants were offended by the decision communicated by the DG's letter dated 11.6.2015 and brought the suit plus the motion presently before the court. The court gave interim conservatory injunctions which is still in force. The main issue for determination is whether the Respondents should be restrained from installing new Campus Directors to replace the Claimants as Directors of Mombasa and Matuga Campuses respectively. The motion was heard on 23.7.2015 after consolidation this file and ELRCC No. 400 of 2015. After considering the material placed before it, this court is of the view that *interlocutory* injunction should issue for the reason stated herein after.

CLAIMANT'S SUBMISSIONS

4. Mrs. Kipsang, learned counsel for the Claimants relied on the supporting affidavits sworn by the Claimants on 16.6.2015 and 21.7.2015 to urge the court to allow the motion. She also relied on **Section 3** of the Employment Act (E.A) and rules 16 and 21 of the Industrial Court Procedure Rules (ICPRs) as the source of this courts jurisdiction to grant injunction against public entities. She submitted that the order being sought is for restraining the Respondents from removing the Claimants from office and from installing new Campus Directors.
5. The counsel further submitted that the Claimants have a *prima facie* case because, they are lawfully in office and they have been performing their duties well. That no performance appraisal was done on them to prove that they were not qualified for the appointment. Consequently the counsel contended that there was never any vacancies for Campus Director in the KSG Mombasa and Matuga to warrant any appointment of new Directors. She further contended that the action and decisions by the Respondent amounted to breach of contract of services entered *vide* the DG's letter dated 28.2.2014. According to the counsel, the said letter made an offer to the Claimants as provided under **Section 21 (3)** of KSGA to chose between continuing to serve the KSG under their current terms and conditions then or be redeployed in the PSC and they chose the former option.
6. Consequently the counsel submitted that letter for deployment dated 11.6.2015 was malicious and in bad taste and the whole exercise was done abruptly, without reasonable prior notice in writing to the Claimant and hence against the Law. The counsel further contended that all the other staff of GTI were given same option and those who chose to continue under the KSG, their jobs were never advertised or given new terms and conditions and as such, the Claimant's are being discriminated against. She cited **Giella Vs Cassman Brown & Co. Ltd. [1973] EA 358, Civil Appeal No. 1 of 2015, Governor of Nyeri County Vs Benson Kinyua Mwangi and Civil Appl. No. 39 of 2002, Mrao Ltd vs The First American Bank of Kenya [2003]KLR 125** to support her contention that the Claimants have shown that they have a *prima facie* case with probability of success.
7. The learned counsel further submitted that unless the conservatory order is granted, the Claimants will suffer irreparable injury because once the new Directors are installed the substratum of the suit will be destroyed and render the case nugatory in the event the Claimants succeed after trial. That the D.G's letter dated 11.6.2015 did not specify any job title or terms and conditions for the Claimants' in their intended new office. The letter only stated that they had been deployed in the academic function and advised them to report to the Director Academic Affairs by 18.6.2015 for determination of appropriate academic designation and assignment of duties and responsibilities according to KSG'S regulations. According to the counsel, that letter had the effect of demoting the Claimants because under the KSG's Organogram published *vide* the Strategic Plan and the Delinking Report there was no horizontal office equal to that of Campus Director. Consequently the counsel submitted that the Claimants will not be posted anywhere else if they are removed from office and new ones installed because all the KSG's campuses will have substantive Directors.

8. Lastly the learned counsel submitted that the balance of convenience favours the Claimants because they are lawfully in office and the Respondent are only acting in breach of the contract and the law. That the Claimants are only victims of discrimination because the KSGA does not provide for any minimum qualifications for the holder of the office of Campus Director. That the deployment letter has not stated the Claimants' new job titles and description and it has not guaranteed that they will continue enjoying all their benefits as before.

RESPONDENTS SUBMISSIONS

9. Miss Lutta learned state counsel opposed the Motion on behalf of the Respondents. She relied on the replying affidavit sworn on 30.6.2015 by Ludeki Chweya, the D.G. for the KSG to urge the court to dismiss the motion. The counsel submitted that the employment of the Claimants is governed by the KSGA of 2012. That the actions complained of on the part of the Respondents were proper and mandated under the KSGA. That when the KSG was established by Section 3 of the KSGA, all the pre-existing GTIs ceased to exist. That Section 4 of KSGA provided for the hierarchy of officers starting with the D.G. on top, followed by the Directors in charge of Finance and Academic Affairs then Campus Directors.
10. The counsel further submitted that **Section 21(4)** of KSGA provides for the transition from the defunct GTI to the KSG. That the said provision outlines the terms and conditions of employment of the Claimants in relation to the transition period. That by letter dated 28.2.2014, the Claimants accepted to become employees of the KSG but refused to apply for appointment in the new office of Campus Director when the vacancies were advertised. According to the defence counsel, the Claimants were not appointed because of lack of academic or professional experience but because they did not even apply for the vacancies.
11. As regards the deployment of the Claimants, Miss Lutta submitted that although no appointment letters were given to the Claimants their Job Group and benefits were not been affected at all. She admitted that the Claimants were to get their appointment letters only after reporting to the Director Academic Affairs for new assignment. She further maintained that deployment was a normal occurrence in Government Institutions. Consequently the counsel submitted that the Claimants have not proved a *prima facie* case because they never applied for the vacancies. That they had also accepted to be deployed *vide* letter dated 28.2.2014.
12. The counsel further submitted that the Claimants will not suffer irreparable harm if injunction is denied because the Claimant's Job Groups and Salary were not affected by the deployment. That even if the Claimants will suffer any injury, the same will be adequately compensated by damages.
13. Lastly Miss Lutta submitted that the balance of convenience favours the Respondents because any order will destabilise the operation of the KSG. In addition, the court is barred by the provisions of Government Proceedings Act from injunctioning the government.

ANALYSIS AND DETERMINATION

14. There is no dispute that the Claimants are qualified to serve in the office of Campus Directors for KSG. There is also no dispute that the Claimants have been serving in the office of Campus Director since the commencement of the KSGA on 1.7.2012. There is also no dispute that the Respondent by letter dated 28.2.2014, the Respondents gave the Claimants the option to choose between serving the KSG under the same terms and conditions of service they were enjoying as at 28.2.2014 or being deployed in the PSC. There is further no dispute that thereafter the Respondents advertised for vacancy in the office of Campus Director and the Claimants did not apply for the same. Finally there is no dispute that by letter dated 11.6.2015, the Respondent deployed the Claimants in the Academic function without any appointment to specific job title and job description. The issue for determination is whether the Claimants motion meets the conditions required for the grant of interlocutory injunction.

CONDITIONS FOR GRANTING INTERLOCUTORY INJUNCTION

15. The Court of Appeal pronounced the three conditions precedent to granting *interlocutory* injunctions in the celebrated ***Giella vs Cassman Brown & Co. Ltd, supra***. First, the applicant must show a *prima facie* case with probability of success. Second, the applicant must show that if the order is denied, he stands to suffer injury that cannot adequately be compensated by damages in the event the suit succeeds after trial. Lastly, If the court is in doubt, the application should be decided on a balance of convenience.

Prima Facie Case

16. The Claimants have contended they have a *prima facie* case with probability of success because the Respondents are acting in breach of the law and contract of employment by purporting to deploy them from their lawfully held office into unspecified destination. That the Respondents have by their alleged deployment discriminated the Claimants and demoted them unfairly and for no justifiable cause. On the other hand the Respondents have denied that the Claimants have any *prima facie* case and maintained that there is no wrong doing in deploying the Claimants since they never applied for the new positions of the Campus Directors when they were advertised. In addition, the Respondents have contended that they have lawfully acted within their mandate as donated by the KSGA which governs the Claimants employment contracts.

17. A *prima facie* case is one which involves breach of a legal right owed to the applicant by the Respondent in an application like the one before the court now. This court is satisfied by the material before it that the Claimants have proved that they have an arguable case being breach of contract and breach of KSGA by the Respondents. They have shown an offer letter dated 28.2.2014 which they accepted within the time given which is now being violated by the Respondent. The Respondents have admitted that the Claimants are qualified to serve in the office of Campus Director and they are upto now in office. The foregoing constitutes a genuine and arguable case both in law and facts which requires a rebuttal from the Respondents during trial. That is the standard that was set by the court in ***Mrao Limited Vs. First American Bank of Kenya [2003] KLR 125*** where the court held that:

“...a prima facie case in a Civil Application includes but is not confined to a “genuine and arguable case:” It is a case 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...”

Irreparable Harm

18. Irreparable harm, in the opinion of this court is one which cannot be quantified with reasonable accuracy or measured for purposes of compensation or where the defender is proved to be incapable of making prompt payment of any damages to the applicant if the suit succeed after trial. The Claimants have contended, and the Respondent have admitted, that the letter of deployment dated 11.6.2015 did not specify the new job title and job description for the Claimants. The letter also did not guarantee that the Claimants were to retain their Job Groups and benefits after deployment. The Claimants have also registered their concern that they may be headed to a demotion because there are no other vacancies either horizontally or vertically within the KSG's hierarchy as per the KSGA and the KSG Strategic Plan. The Replying Affidavit by the D.G. has not resonated with the assurances made by his counsel that the Claimants are qualified for the job and that they will not lose their job group and benefits.

19. After considering the arguments by both sides of the case, the court finds on a balance of probability that unless injunction is granted, the Claimants will suffer irreparable injury because there will be no horizontal or vertical office above their current office into which they can be deployed. The reason for the foregoing being that all the offices of Campus Director for KSG and above will be filled with substantive office holders. The Claimants services will therefore become

superfluous as Campus Directors and be condemned into some indefinite pagatory of some sort. That state of injury is not measurable or quantifiable in monetary terms and should be stopped before it happens..

Balance of Convenience.

20.The Claimants have argued that they are in the office to date and are qualified for the job. That if they are removed from the office it will be impractical to regain the same if they succeed after trial. The reasons for the foregoing being that all the KSG Campuses will have substantive Directors and no other horizontal or Senior Positions are available for the Claimants' deployment. The Respondents on the other hand contends that they are acting within the law in deploying the Claimants. In addition they are contending that the court has no jurisdiction to injunct the KSG because **Section 16** of the Government proceedings Act bars the court from injuncting Government and its Departments.

21.The view taken by the Court on this matter is that the balance of convenience is titled in favour of the Claimants. The reasons being that if injunction is denied and the deployment of the Claimants is completed, there will be nothing left to try here because the substratum of the suit will have been destroyed. That the inevitable result will be that the suit will be rendered nugatory if the suit finally succeed after trial because it will be impossible to reinstate the Claimants to their former office. The court does act in vain and the only way to avoid that is by granting the injunction order sought pending the hearing and determination of the suit. The submissions by the Respondent that they are insulated from injunction is neither here nor there because the dispute herein is founded on the **Employment Act (EA)**. **Section 3** of the EA binds the Government and KSG and this court has unfettered jurisdiction under **Section 12(3)** of the Industrial Court Act to make any orders that it deems fit so as to meet the end of justice. Injunction order is one of such orders. In any event employment relations are *prima facie* private law agreements whether the employer in government or not.

DISPOSITION

22.Consequently, the Claimants notice of motion is allowed in the following terms:

(a) That injunction is hereby issued restraining the Respondent, their agents, servants or assigns from terminating, removing, replacing, dismissing and or deploying the Claimants herein, Alfonso Katheka Munyali and Jeremiah Nyaberi Ichwara from their current position as the Director of Kenya School of Government Mombasa Campus and Matuga Campus respectively, and from installing any other person appointed to the position of Campus Director of Kenya School of Government Mombasa Campus and Matuga Campus and/or committing any breach of the contract of employment against the Claimants herein pending the hearing and determination of the suit herein.

(b) For avoidance of doubt, the Claimants herein Mr. Alfonso Katheka Munyali and Jeremiah Nyaberi Ichwara shall continue to discharge the duties of the Director of Kenya School of Government Mombasa Campus and Matuga Campus respectively with full benefits pending the hearing and determination of this suit.

(c) Costs to the claimants.

Dated, signed and delivered at Mombasa this 31st day of July 2015.

O. N. Makau

JUDGE