



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**ELRC CAUSE NO. 88 OF 2015**

- (1) PAUL KAMAU MAINA  
(2) DOMINIC IRERI  
(3) ASMANI PETRONILLA  
(4) JUSTINA MUIDI  
(5) GEOFFREY KIVUVA  
(6) DAVID MONARI  
(7) THOMAS GAYA  
(8) PAUL MWONGELA  
(9) BONIFACE MUNGAI  
(10) EDWIN SIFUNA  
(11) ATHANASIUS NYANGANGA  
(12) CAROL MWITHIGA.....CLAIMANTS

**VERSUS**

**KENYA CIVIL AVIATION AUTHORITY.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Claimants are employees of the Respondent. The Respondents pays the Claimants house allowance in addition to monthly basic salary. The employer has however let his staff quarters to the Claimants at monthly rent which is deducted monthly from Claimant's salary. The rent for the respective Claimants has always been below what the Respondent pays the Claimants towards House allowance. In the year 2011 the Respondent renovated the staff quarters and unilaterally increased the rent by huge margin and started deducting the new rent rates without the Claimants' consent. The Claimants protested and the Respondent sought valuation report from the Government valuer who then advised on the proper

rent chargeable for the respective houses which was acceptable to the Claimants. The Respondent however ignored the valuation report and continued to deduct rent she had unilaterally fixed without the consent of the Claimants.

2. The Claimants have now sued the Respondent for the refund of the overcharged rent and for punitive damages. In the interim, the Claimants have filed the Notice of Motion dated 25.2.2015 seeking basically an injunction to restrain the Respondent, her agents or assigns from deducting or continuing to deduct overcharged rent from the payslips of the Claimants. The motion is supported by the affidavit sworn by **Paul Kamau Maina** on 25.2.2015 and further affidavit sworn on 12.5.2015. The gist of the application is that the Respondent has illegally been charging excess rent from the Claimants' salary despite the existence of a clear Valuation Report from Government valuer about the correct rent chargeable in respect of each house.

3. The Respondent has opposed the motion *vide* Replying Affidavits sworn on 17.4.2015 and 29.5.2015 by **Mr. Thomas K. Bett**, the Respondent's Human Resources and Administration Manager. The gist of the said affidavit is the Claimants are being paid adequate House Allowance and as such they are not entitled to staff housing in the Respondents premises. Consequently he deponed that the Claimants are greedy individuals out to seek unfair enrichment. On the other hand, it is the Respondents case that she is legally entitled to charge rent for her premises at the market value and disputed the valuer's report dated 21.7.2014 filed by the Claimants for being a piece shoddy and skewed work requisitioned by one of the claimants herein without authority. She therefore urged the court to rely on the Valuation Report done in 2011 by the same Ministry of Housing which recommended for charging of rent now being disputed by the Claimants. The court ordered temporary injunction pending the determination of this motion. The motion was disposed of by written submissions which were highlighted by counsel for the two sides on 3.6.2015.

#### **CLAIMANTS SUBMISSIONS**

4. **Mr. Mwaniki** learned counsel for the Claimants urged the court to confirm the interim order of injunction aforesaid, pending the hearing and determination of the suit. He submitted that the Respondent renovated the suit premises and hiked the rent unilaterally. She then effected the new rent by deducting the Claimant's salary without prior consent. When the Claimants protested, the Respondent asked a Government Valuer to do a valuation. The valuer confirmed that the new rent was *exorbitant* and advised on the correct rent but the Respondent never reduced the rent to the one recommended by the valuer. The counsel cited ELRC Petition No. 42 of 2011 **Kennedy Owende and 18 others versus KCCA** where Onyango J and Ndolo J ordered the Respondent to stop overcharging rent and refund the excess rent. He disputed the competence of a Valuation Report filed by the Respondent by submitting that the report was prepared by a quack who was not qualified under the ***Valuation Act Cap 532***. He denied that the photographs annexed to the quack's report were the ones occupied by the Claimant's herein. He maintained that the report prepared by **Victor Olonde** on 21/7/2014 was the correct report not withstanding the seniority of the Author. According to **Mr. Mwaniki** the Claimants have proved a *prima facie* case with probability of success and if injunction is denied, the Claimants will suffer irreparable harm.

#### **RESPONDENT'S SUBMISSIONS**

5. **Mr. Simiyu**, learned counsel for the Respondent opposed the motion. He submitted that the rent in issue was increased based on a Valuation Report done by the Ministry of Housing on 30.12.2011. The said valuation was done after the houses were renovated. He distinguished this case from ELRC Petition 42 of 2011 in that the rent in the latter case was increased before any renovation were done. The counsel dismissed the alleged valuation report by **Olonde** dated 21.7.2014 as a mere letter and not a Valuation report. He submitted that the said letter merely recommended the rent payable for the respective houses without any basis. According to the counsel the valuation standards were not followed in preparing the report. He further submitted that **Mr. Paul Mwangela**, one of the Claimant's who requested for the valuation had no authority to do so and was due for disciplinary action.

6. Mr. Simiyu submitted that no *prima facie* case had been made out to warrant the order of injunction. He further submitted that, the Claimants would not suffer irreparable harm if injunction be denied because damages would give adequate compensation if the suit succeeds. Lastly he submitted that the balance of convenience favours the Respondent because, she renders essential services which should not be interrupted. In conclusion it was submitted that the motion does not meet the threshold for grant of interlocutory injunction and it is an attempt by the Claimants to get unfair enrichment.

### **ANALYSIS AND DETERMINATION**

7. There is no dispute that the parties herein are related as employees and their employer. There is also no dispute that the employees are resident in the Respondent's staff quarters as tenants for rent. There is further no dispute that Claimants are paid House Allowance just like their colleagues who are not housed in the Respondent's staff quarters. Lastly its a common knowledge that there two valuation report prepared by the Ministry of Housing which are in conflict about the correct rent chargeable for the suit premises. The issue for determination is whether the motion herein meets the threshold for the grant of interlocutory injunction.

#### **Threshold for Order of interlocutory injunction.**

The criteria for the grant of interlocutory injunction was set up in *Giella versus Cassman Brown & Co. Ltd. [1973] EA 358* where it was held as follows:

***“...First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable harm, which would not be adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience...”***

A *prima facie* case in this court's view would only arise where a party's legal right has been breached or is likely to be breached. In the case of *Mrao Limited vs First American Bank of Kenya Ltd [2003] KLR 125*, 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***

***1. 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.....”***

8. The Respondent believes that the claimants have not proved any *prima facie* case as defined above because the houses in dispute belong to the Respondent who has paid them adequate House Allowance that can enable them to lease houses else where if they don't want to pay to her the required rent. On the other hand the Claimants maintains that the rent is exorbitant and was fixed by the Respondent unilaterally and proceeded to unlawfully deduct it from their salary. The above two positions held by the two sides are both legal. The Respondent as landlord has the legal right to levy rent for her premises as advised by experts. Likewise the Claimants as employees have a legal right to have their salary not deducted otherwise than as allowed by the Law and as otherwise authorised by them.

9. This being an Employment dispute, the court will not major on the Respondent's right to property or concern itself with the evaluation of the correct rent chargeable on the suit premises. In this courts view, there exists better fora where such disputes should be referred to. The mandate of this court is to majorly deal with the rights of parties to employment contracts as provided for mainly under the Employment Act and other sources of Labour Law. In this case the Claimants are not with pleased with their employers decision to deduct more money as rent for her premises than what is authorised by them. They have annexed as exhibits, copies of payslips which reflect deduction for rent which they say was fixed by the employers unilaterally. The Respondent has not adduced any evidence to show that the Claimants have authorised her to deduct rent from their salary using the new rates. **Section 17** of the Employment Act

protects the salary of an employee from being deducted. The only exemption to the foregoing right is in the few instances provided for under **Section 19** of the Act which are either automatic taxes to the government, levies to social security, or court awards or deductions consented to by the employee.

10. In this case the rent is not one of the automatic statutory levies or an award from a court of law. Consequently the Employer was bound by **Section 17** and **19** of the Act to secure a consent from the Claimants before effecting the new rent rates . If the Claimants refused to agree, the Respondent should have commenced the relevant proceedings as a landlord to seek authority to first hold the claimants liable to pay the new rent rates and if they fail, enforce her rights as a landlord as provided by the laws. The decision to use her power as employer to take a short cut in effecting the rent rates was not only mischievous but unlawful. It infringed on the Claimant's legal rights to protection from unlawful deduction of their salary. As stated above an apparent infringement or likelihood of such infringement of a legal right amounts to a *prima facie* case for purposes of ordering interlocutory injunction. The court is therefore satisfied that the Claimants have made out a *prima facie* case with probability of success.

11. As regards whether the Claimants will suffer irreparable harm, the court is alive to the fact that the Claimants have already quantified their claim if they succeed in their suit. The court therefore agrees with the defence that the Claimants have not proved that they will suffer irreparable harm if injunction is denied. In addition the court is not clear as to how the parties herein became landlord and tenants because no evidence of any contract was given. Consequently the court will proceed to consider the issue of the balance of convenience. Since it has not been denied that the Respondent will be able to refund the excess rent if the suit succeeds, injunction will not issue because as already found above by the court. The injury to the Claimants can be adequately compensated by damages.

13. As a parting short, the court has noted that the Claimant did not pray for permanent injunction in the main suit. That is contrary to the Industrial Court Procedure Rules which bar the court from ordering interlocutory injunction unless the main suit prays for permanent injunction. Although that issue was not raised by the defence, the court is empowered to consider that legal criterion as one of the reasons for denying the interlocutory injunction.

### **DISPOSITION**

14. For the reasons stated above the Notice of Motion dated 25.2.2015 is dismissed and the interim order of injunction ordered on 2.3.2015 set aside. The parties are however directed to fix the suit for hearing the soonest possible in order to bring the matter to rest.

**Dated, signed and delivered at Mombasa this 17<sup>th</sup> day of July 2015.**

**O. N. Makau**

**JUDGE**