



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 128 OF 2015

(BEFORE HON. JUSTICE HELLEN S. WASILWA ON 17TH DECEMBER, 2015)

JUMA KIPRONO KANDIE 1ST CLAIMANT

CHRISTOPHER KEMEI 2ND CLAIMANT

MATANO NDARO 3RD CLAIMANT

VERSUS

COMMUNICATIONS AUTHORITY OF KENYA.....RESPONDENT

RULING

1. The Application before Court is one dated 3rd February, 2015, in which the Applicants basically seek the following Orders:
 - i. **THAT** this application be certified urgent and be heard ex-parte at the first instance for the purpose of granting this prayer and prayer ii) iii) iv) v) & vii) herein;
 - ii. **THAT** pending the inter parties hearing and determination of this Application, the Respondent be restrained either by itself, assign, agent, organ or any person claiming through it from advertising, renaming or taking any steps or further steps to recruit any person to the positions of:
 - a. Chief Manager, Human Capital and Administration;
 - b. Chief Manager Licensing and Standards
 - c. Compliance and Enforcement
 - iii. **THAT** pending the inter parties hearing and determination of this Application, the Respondent be ordered either by itself, assign agent or any person claiming through it, to forthwith publish an advertisement carried in at least one newspaper the Daily Nation Newspaper dated Friday, the 19th day of December 2014, Daily Nation Newspaper of Monday 26th day of January 2015, and the Standard Newspaper of 28th day January 2015 or any other publication announcing vacancies in the following listed position, is suspended to wit:

- a. Chief Manager, Human Capital and Administration;
- b. Chief Manager, Licensing and Standards
- c. Chief Manager, Compliance and Enforcement.

iv. **THAT** pending the inter alia hearing and determination of this Application, the Respondent be ordered, whether by itself, assign, agent, organ or any person claiming through it, to forthwith publish an advertisement carried in at least one newspaper of National Circulation, notifying the public that the Respondent's newspapers carried in the Daily Nation newspaper dated Friday, the 19th day of December 2014, Daily Nation Newspaper of Monday 26th day of January 2015, and the standard newspaper of 28th day January 2015 or any other publication announcing vacancies in the following listed position, is suspended, to wit:

- a. General Manager, Technical Services
- b. General Manager, Corporate Affairs
- c. General Manager, Support Services
- d. Chief Manager, Licensing and Standards;
- e. Chief Manager, Compliance and Enforcement;
- f. Chief Manager, IT Industry Policy and IS;
- g. Chief Manager, Frequency Spectrum Management;
- h. Chief Manager, Broadcast and Multimedia Services;
- i. Chief Manager, Consumer and Public Affairs
- j. Chief Manager, Market Research and Development;
- k. Chief Manger, Human Capital and Administration;
- l. Chief Manager, Finance;

- m) Chief Manager Legal Service;

- n) Chief Manager Risk and Internal Audit; and

- o) Chief Manager, Universal Service Fund

v. **THAT** pending the inter parties hearing and determination of this Application, the Respondent be restrained whether by itself assign agent organ or any person claiming though it, from taking any further steps rename, modify, restructure or scrap the positions of:

- a. Director / Human Resource & Administration; and
- b. Director / Licensing Compliance & Standard;

vi. **THAT** pending the inter parties hearing and determination of this application, the Respondent either by itself, assign, agent, organ or any person claiming through it from taking further steps to restructure, modify or scrap the positions of:

- a. Director / Legal Services & Commission Secretary;
- b. Director Finance & Accounts;
- c. Directory/ Competition, Tariffs & Market Analysis;
- d. General Manager Human Resource & Administration;
- e. Directory/ Information Technology;
- f. Director/ Licensing Compliance & Standards; and
- g. Directory Multimedia.

vii. **THAT** pending the inter alia hearing and determination of this application, the Respondent be restrained whether by itself, assign, agent, organ or any person claiming through it, from taking any steps to terminate employment of declare redundant, interfere with the positions and or rank of, or in any manner whatsoever interfere or further interfere with the

employment of the following employees of the Respondent:

- a. **Mr. Juma Kiprono Kandie – Director / Human Resource & Administration; and**
- b. **Mr. Christopher Kemei – Director / Licensing, Compliance & Standards.**

viii. **THAT pending the hearing and determination of the claim herein the Respondent be restrained, whether by itself, assign agent, organ or any person claiming through it, from advertising or further advertising, renaming or taking any steps or further steps to recruit or retain any third party or parties to the position of:**

- a. **Chief Manager, Human Capital and Administration; and**
- b. **Chief Manager Licensing and Standards;**
- c. **Chief Manager, Compliance and Enforcement.**

ix. **THAT pending the hearing and determination of the claim herein, the Respondent be restrained, whether by itself assign, agent organ or any person claiming through it from taking any steps to rename, modify, restructure or scarp the position of:**

- a. **Director Human Resources & Administration, and**
- b. **Director / Licensing, Compliance & Standards.**

x. **THAT pending the hearing and determination of the claim, the Respondent be restrained, whether by itself, assign, agent, organ or person claiming through it, from taking any further steps to restructure, modify or scarp the position of:**

- a. **Director / Legal Services & Commission Secretary;**
- b. **Director Finance & Accounts;**
- c. **Directory/ Competition, Tariffs & Market Analysis;**
- d. **General Manager Human Resource & Administration;**
- e. **Directory/ Information Technology;**
- f. **Director/ Licensing Compliance & Standards; and**
- g. **Directory Multimedia.**

xi. **THAT pending the hearing and determination of the claim herein, the Respondent be restrained, whether by itself, assign, agent organ or any person claiming through it from taking any steps or further steps to terminate employment of declare redundant, interfere with the position and or rank of, or in any manner whatsoever interfere or further interfere with the employment of the following employees of the Respondent.**

- a. **Mr. Juma Kiprono Kandie – Director / Human Resource & Administration; and**
- b. **Mr. Christopher Kemei – Director / Licensing, Compliance & Standards.**

xii. **That pending the hearing and determination of the Claim herein, the Respondent be ordered, whether by itself, assign agent, organ or any person claiming through it, to forthwith publish an advertisement carried in at least one newspaper of National Circulation, notifying the public that the Respondent' newspaper advertisement carried in the Daily Nation newspaper of Monday 26th day of January 2015 and the Standard Newspaper of the 28th of January 2015 or any other publication announcing vacancies in the following listed positions, is suspended to wit:**

- a. **Chief Manager, Human Capital and Administration; and**
- b. **Chief Manager Licensing and Standards;**
- c. **Chief Manager, Compliance and Enforcement.**

xiii. **That pending the hearing and determination of the claim herein, the respondent be ordered, whether by itself assign, agent organ or any person claiming through it, forth worth publish**

an advertisement carried in at least one newspaper of national circulation, notifying the public that the Respondent newspapers advertisement carried in the Daily Nation Newspaper dated Friday, the 19th day of December 2014, Daily Nation Newspaper of Monday 26th day January 2015 and the Standard Newspaper of 28th day January 2015 or any other publication announcing vacancies in the following listed position, is suspended to wit:

- a. **General Manager, Technical Services**
- b. **General Manager, Corporate Affairs**
- c. **General Manager, Support Services**
- d. **Chief Manager, Licensing and Standards;**
- e. **Chief Manager, Compliance and Enforcement;**
- f. **Chief Manager, IT Industry Policy and IS;**
- g. **Chief Manager, Frequency Spectrum Management;**
- h. **Chief Manager, Broadcast and Multimedia Services;**
- i. **Chief Manager, Consumer and Public Affairs**
- j. **Chief Manager, Market Research and Development;**
- k. **Chief Manger, Human Capital and Administration;**
- l. **Chief Manager, Finance;**

m) Chief Manager Legal Service;

n) Chief Manager Risk and Internal Audit; and Chief Manager, Universal Service Fund.

2. The Application is supported by the grounds on the face of the Application which are further restated in their submissions and on an Affidavit and supplementary Affidavit both sworn by **Juma Kiprono Kandie**.
3. According to the Applicants, the gist of their case is that the Respondent's Board Resolution of 3.12.2014 and 16.12.2014 declared redundant all employees that served in the positions of Directors or Assistant Directors. This was communicated to the employees *vide* a memo dated 11.12.2014. The memo was to the effect that all employees serving in the position of Directors will be changed to Chief Managers and General Managers and the Positon of Assistant Directors to Senior Managers. The Respondent allegedly brought this resolution to the Minister of Labour after the event in a letter dated 19.12.204. In the said letter, it explained the events as change of position from Director to Chief Manager and that the process was not a restructuring but a change of names and titles as the job descriptions remain the same. According to the Claimant, the Respondent in its letter to the Minister for Labour purported to change names and in the same breath declared the affected employees redundant. The Respondent then proceeded to suspend provisions of its Human Resource Manual that was in conflict with the "renaming process".
4. In a newspaper advertisements carried on the Daily Nation dated Friday 19th December, 2014, 26th January, 2015, Standard Newspaper dated 28th January, 2015 and the Star Newspaper dated 30th January, 2015, the Respondent proceeded to advertise the renamed positions of the Applicants and other Directors, terming them "vacant" and invited suitable members of the entire public to apply to the Respondent by the 9th, February, 2015, in order to be considered to fill the purported vacant positions in the Respondent. The Respondent later on by a letter dated 6.05.2015, wrote to the Minister of labour revoking its earlier decision declaring the Applicants redundant.
5. The Application came up for *interpartes* hearing on 26.05.2015 and it is the Applicants' submission that the injunctive Orders sought against them are to stop the Respondent from restructuring or in other way rendering redundant employees serving as Director and Assistant Director. According to the Applicants the Application is required to demonstrate a prima facie case with a likelihood of success, irreparable loss and where the Court is in doubt, the balance of

convenience must be in favour of the Applicant as was set out in the case of **Match Masters Limited Vs Rhino Matched Limited (2006) eKLR.**

6. The Applicants submit that redundancy should invoke a detailed summary of the roles and it should reflect in its entire organizational structure. The Predecessor of the Respondent was called the Communications Commission of Kenya which was renamed Communications Authority of Kenya.
7. The Applicants submit that the Section 41(2) of the Kenya Information and Communications (Amendment) Act No. 41A of 2013 which provided for the renaming also preserved the terms of service, position and rank of employees of the Communications Commission of Kenya that transited to the Communications Authority of Kenya.
8. The Applicants also state that it was the Respondent's practice that whenever the nomenclature of positions change, the staff holding the former position is automatically re-designated to the renamed position and that they legitimately expected the said practice to apply to them. To buttress the doctrine of legitimate expectation the Applicants rely on the case of **Keroche Industries Limited Vs Kenya Revenue Authority & 5 Others (2007) KLR 240,** where the Court stated that for an employer not to follow a practice that it is legitimately expected to follow amounts to an abuse of power.
9. Further to the Respondent's gross violation of the Applicants' rights, the Applicants state that at no point did the Respondent duly notify them and other employees serving in the rank of Directors and Assistant Directors and the Labour office of its decision to render them redundant. The Applicants rely on the case of **Kenya Union of Domestic, Hotels, Educational Institutions & Hospitals Workers Vs Mombasa Sports Club (2014) eKLR;** which laid out the procedure to be followed in redundancy as:

“the employer must notify the union in writing at least one month in advance of the reasons and extent of redundancy, compliance with the principle of last in , first out having regard to skill, merit, ability and reliability; the requirement to pay severance pay and the requirement to give notice to the affected employees in accordance with the termination of employment provision.”

10. They further rely on the case of **Joseph Koech & Another Vs County Government of Baringo & Another (2014) eKLR;** in which the Court was of the opinion that once an employee is appointed on permanent and pensionable basis as a substantive holder of an office, the employer cannot purport to reappoint a party to the position substantively held by an employee.
11. The Applicants further aver that they were not given a hearing as set out in Section 41(2) of the Employment Act No. 11 of 2007 and Article 47(1), 236(b) of the Constitution.
12. The Applicant in conclusion states that if the Orders sought are not granted the Applicants will suffer irreparable loss as the Applicants' employment stand to be terminated.

The Respondent's Case

13. The Respondent in opposition to the Application filed a Replying Affidavit deponed by one, Francis Wangusi, the Respondent's Director General. He avers that the Respondent is constitutionally required to restructure in order to improve on good governance and it is also empowered to appoint such officers as are necessary for the proper discharge of the functions of the Commission upon such terms and conditions of service as the Board may determine.
14. That consequently the Board of the Respondent held a meeting on 3.12.2014, to deliberate on restructuring in conformity with the repealed Information and Communication Act and the Constitution of Kenya. The process, according to the Respondent was informed by a report of *Deloitte and Touche* 2011 commissioned by a previous board and now implemented by the current board. As a result of the said meeting it was resolved to adopt the new organizational structure

- which introduced new positions. These new positions were to be advertised both internally and externally. The Claimants consequently filed the instant suit claiming inter-alia that the advertisements were tantamount to constructive dismissal and/or a declaration of redundancy and that the entire recruitment process should be halted.
15. It is the Respondent's position that the Claimants/Applicants have not disclosed the substantive law that clothes this Court with jurisdiction to grant the wide Orders sought and this therefore renders the Application null and void. Further the Respondent states that granting the said Orders would lead to paralysis of the Respondent organization.
16. The Respondent's position is that the Claimants were not constructively dismissed because they remain in the employ of the Respondent and continue to earn salaries to date. They rely on the case of **Maria Kagai Ligaga Vs Coca Cola East and Central Africa Limited**, quoted in the case of **Kenneth Kimani Mburu & Another Vs Kibe Muigai Holdings Limited (2014)eKLR**; where the Court defined Constructive dismissal and set the ingredients of constructive dismissal as:
- a. ***The employer must be in breach of the contract of employment***
 - b. ***The breach must be fundamental as to be considered as a repudiatory breach;***
 - c. ***The employee must resign in response to that breach; and***
 - d. ***The employee must not delay in resigning after the breach has taken place, otherwise the Court may find such breach waived.***
17. It is the Respondent's position that none of the conduct complained of falls within the criteria set out in the aforementioned case and the Claimants cannot therefore say that they were constructively dismissed.
18. On the allegation of restructuring and reorganization of the Respondent, the Respondent submits that neither restructuring nor reorganization amounts to redundancy unless employees affected were served with notice of termination of employment. The Claimant's job description are still the same and they have not been served with any termination notice and as such they have in no way whatsoever been declared redundant.
19. The Respondent has cited the case of **Bridgehouse Limited Vs Bilderbeck (1994) 2 ERNZ 243** quoted in the case of **Aviation and Allied Workers Union Vs Kenya Airways Limited & 3 Others (2012) eKLR** where Rika J defined redundancy as a situation where the affected employees have done no wrong; neither their conduct, nor their capacity is in issue, it is only that in the circumstances, the employer feels the employees are considered to be surplus to the needs of the business.
20. In the instant case the Respondent is still in the process of restructuring and the Claimant's positions are still intact and for this reason the Respondent is of the view that the Claimants have come to Court prematurely. The Respondent cites the case of **Kenya Plantation & Agricultural Workers Union Vs Bamburi Cement (2015) eKLR**, where Rika J held that parties should wait until redundancy occurs before instituting a suit. The Respondent therefore submits that the Claimants have not made a case for redundancy.
21. In addition to the above submissions by the Respondent, the Respondent has submitted on restructuring as a prerogative of the employer and has cited the case of **Kenya Game Hunting and Safari Workers Union Vs Lewa Wildlife Conservancy Limited, Industrial Cause No. 1567 of 2011** where Rika J Held *inter alia* that ***"The managerial prerogative is a fundamental principle in capitalist production. It must be protected and not consumed in the liberal slide into egalitarian anarchy."***
22. The Respondent is also of the view that the Claimants have not satisfied the requirements set out in the case of **Giella vs Casman Brown** for the granting of interim injunctions. They have cited the following reasons:

1. ***The Claimants have only demonstrated that there is ongoing restructuring at the Respondent's organization which prerogative cannot be interfered with unless it is exercised unreasonably;***
2. ***The Claimants are welcome to reapply for the same positions;***
3. ***The Claimants have not been served with any termination notice;***
4. ***The Claimants are still in the employ of the Respondent and continue to receive salaries;***
5. ***The Claimants will not suffer irreparable loss in the event the Orders sought are not granted;***
6. ***That the Respondent is already formulating exit packages for those who will not be interested in reapplying for the new positions or who will not be successful after the recruitment;***
7. ***The Respondent has considered its employees (including the Claimants) in the restructuring process by putting up internal advertisements for senior positions to ensure that its employees get first priority;***
8. ***That the balance of convenience tilts in favour of the Respondent.***

23. The Respondent also filed an Application dated 20.04.2015 seeking to set aside Orders of the Honourable Court halting the ongoing recruitment at the Respondent which benefited parties not privy to the instant suit. The Respondent submits that the Orders issued by the Court are highly prejudicial to the Respondent and are highly irregular and should be set aside *in limine*.

24. Upon considering the submissions of both parties above, the only issue this Court has to consider at this stage is whether a prima facie case has been established by the Applicant to warrant issuance of orders sought.

25. The guiding principle in granting of Interim Injunction is to assess whether the Applicant has established a prima facie case with a likelihood of success. The Applicant must further demonstrate that unless the conservatory orders are granted, the Applicant will suffer irreparable loss or harm. Where the court is in doubt, the balance of convenience must fall in favour of the Applicant. This principle was 1st established in the celebrated case of **Giella vs Cassman Brown**.

26. The principle in **Giella vs Cassman Brown** is not case in stone though and in the case of **Olympic Sports House Limited HCCC No. 190 of 2012 (2012) eKLR**, the case of **Suleiman vs Amboseli Limited (2004) 2 KLR 589** Ojwang Ag. J. (as he then was) rendered himself as follows:

“Counsel for the Defendant urged that the shape of the law governing the grant of injunction relief was laid long ago in Giella vs Cassman Brown in 1973 cast in stone and no new element may be added to that position. I am not with respect in agreement with Counsel in that point for the law has always kept growing to greater levels of refinement as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover International made this point regarding the grant of Injunctive relief (1986) 3 ALL ER 772 at page 780 – 781”.

“A fundamental principle of ----- that the Court should take whichever course appear to carry the lower risk of injustice if it should turn out to have been wrong-----”

Traditionally, on the basis of the well accepted principles set out by the Court of Appeal in Giella vs Cassman Brown the Court has to consider the following questions before granting Injunctive relief ----- even as these must remain the basis tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court is responding to prayers for Interlocutory Injunctive relief. Should always opt for the lower rather than the higher risk of injustice -----“.

27. In considering whether the Applicants herein have established a prima facie case, I do refer to the chronology of events that have led to the present application. These events are well captured above in the affidavits filed by the Applicants which show the movement of the Respondent from the Communications Commission of Kenya to the Communications Commission of which was later renamed the Communications Authority of Kenya the Respondent herein.
28. The positions of the Applicants have in all the previous engagements been preserved in terms of service, position and rank. Whereas it is not the position of this Court that this must always be the case, the question this Court needs to ask is whether the process underway in restructuring the Respondents' organization is above board and in determining to what extent the Applicants would be affected. It is not possible to determine that case without having to hear this case fully.
29. On a balance of probabilities and in considering what the lower rather than higher risk of injustice will be, if I granted or not granted the orders sought, I find that it would be less risky to grant the orders sought than not. This is because the Respondents still have an opportunity to do what they set to do in restructuring the company if the Court finds that they ought to proceed with the process.
30. The Applicants stand to suffer irreparable loss if this Court denies them the orders sought and later the Court finds that it would have been prudent to confirm what they now seek.
31. Having found as above, I find that the application has merit and I allow it accordingly.
32. On the application filed by the Respondent to set aside Interim orders granted, I find that the same has no merit and I decline to set aside the ex parte orders in force.
33. I therefore make orders in term of prayers **(vii), (ix), (x), (xi) and xii)**. Costs of this application will be in the course.

Read in open Court this 17th day of December, 2015

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Tebino holding brief Ahmed Nassir for the Respondents – Present

Ojienda & Company Advocates for Applicants – Absent