



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATION COURT**  
**AT MOMBASA**  
**CAUSE 760 OF 2015**  
**ABDI MOHAMMED DAIB.....CLAIMANT**  
**VS**  
**KENYA PORTS AUTHORITY.....RESPONDENT**  
**RULING**

**Introduction**

1. The claimant was dismissed from employment by the respondent for gross misconduct. The reason for the dismissal cited in the letter dated 29.9.2015 is that the claimant presented to the respondent forged academic and professional certificates for purposes of securing employment and career progression. The dismissal letter also gave the claimant a notice of 48 hours to vacate the staff house in which he was living. The claimant was aggrieved and brought this suit seeking:
  - a. declaration that the dismissal was unfair and unlawful
  - b. Reinstatement to his employment with full benefits
  - c. Compensation for unlawful termination
- a. General damages
2. Contemporaneously with the suit, the claimant also filed Notice of Motion dated 7.10.2015 seeking injunction to restrain the respondent and her agents from evicting and/or interfering with the claimants peaceful and quiet occupation of the house known as **House No. KZG-BLK-28/1-D2** in Kizingo (staff quarter) pending the hearing and determination of the main suit. The Motion was brought under Certificate of Urgency on 7.10.2015 and on 8.10.2015 the court granted temporary injunction pending the hearing of the Motion. The motion is supported by the affidavits sworn by the claimant on 7.10.2015, 3.11.2015 and 16.11.2015 by which he denies the misconduct cited in the dismissal letter dated 29.9.2015. He however admits that he was accorded disciplinary hearing by the respondent before the dismissal.
3. The respondent has opposed the motion through the affidavits sworn by Mr. Amani Yuda Komora, the respondent's Head of Human Resource, sworn on 19.10.2015 and 9.11.2015 which he deposes that the dismissal by the claimant was fair and justified. That the academic and professional certificates that the claimant had presented to the respondent for employment and career progression had been investigated and found to be forged documents. That the claimant was

given a chance to defend himself before a Disciplinary committee after which he was dismissed. That he must therefore vacate the staff quarters as directed because he is no longer in the respondent's employment.

4. The motion was disposed of by written submissions by counsel for both parties and highlighted orally on 18.11.2015.

### **Analysis and Determination**

5. After careful consideration of the pleadings, Motion, Affidavits and the submissions made by the two parties, there is no dispute that the employment contract between the parties herein ended on 29.9.2015 when the claimant was dismissed for misconduct. There is also no dispute that the claimant was ordered to vacate the staff quarters within 48 hours after the dismissal. There is also no dispute that the claimant has brought this suit to challenge the said dismissal and to seek reinstatement to his employment. The issue for determination in the present motion is whether interlocutory injunction should be ordered to protect the claimant's occupation and peaceful enjoyment of the staff quarters pending the determination of the suit herein.

### **Interlocutory injunction**

6. For this court to grant interlocutory injunction, the applicant must meet the threshold established by the ***Giella vs Caseman Brown & Co.Ltd (1973) EA 359*** and rule 16 (3) of the Industrial Court Procedure Rules (ICPRs). Basically it was held in the ***Giella case*** that, the applicant must establish a *prima facie* case with a probability of success, show that if the order is withheld, he stands to suffer irreparable loss that cannot be adequately compensated by damages of the case succeeds, and if the court is in doubt, it will decide the application on a balance of convenience test. On the other hand, rule 16 (3) of the ICPRs provides that this court will only grant interlocutory injunction if the applicant has prayed for injunction in the main suit.
7. In this case, the applicant has not made any prayer for injunction in the main suit. It means therefore that under rule 16 (3) of the ICPRs, the court is barred from granting interlocutory injunction as prayed in the present motion. Injunction being an equitable remedy can only be granted within the purview of the law because equity follows the law. It is trite that before a party moves a court or a tribunal, he must appreciate and acquaint himself with the rules of procedure of that court or tribunal. In this case the claimant is presumed to have read rule 16 of the ICPRs under which the motion was brought. Although the court appreciates the provisions and the importance of Article 159 of the Constitution, the court also takes Judicial notice that rules of procedure are as important as the substantive law. That it is because of the value of procedural for determining the misconduct of the claimant that this suit is brought. That Article 159 never abolished rules of procedure, but only freed the courts from the ghosts of legal technicalities.
8. In this case, rule 16 (3) of ICPR does not only prescribe the procedure for seeking interlocutory injunction but is also a substantive legal provision going to the jurisdiction of the court to grant the order. That the provision limits the jurisdiction of the court to grant injunction only to suits where the applicant has sought injunction as a relief in the main suit. The corollary to the foregoing is that the court has no jurisdiction to order interlocutory injunction in a suit where the applicant has not prayed for injunction in the main suit. For the foregoing reason, the court finds that the notice of motion dated 7.10.2015 is incompetent and must fail.

### **Merits**

9. Notwithstanding the finding above that the motion is incompetent, the court never the less will consider whether motion has merits. The first issue to consider is whether the applicant has established a *prima facie* case with probability of success. The claimant through Mr. Gikandi learned counsel, submits that he has proved that he has a *prima facie* case with probability of success because he was not found guilty of forgery and fraud by competent court. That he was dismissed before the outcome of investigations by the Ethics and Anti-corruption Commission (EACC) who had been requested by the respondent to investigate the claimant's academic certificates. That the respondent is responsible for the alleged forgery of his certificates because

- she is the one who had the custody of the claimant's personal file.
10. In response the Mr. Munyao, learned counsel for the respondent Submitted that the claimant presented a curriculum vitae and academic certificates for employment and promotions, which were investigated after a directive from the public service commission (PSC) dated 27.6.2012 and found to be forged. That the claimant was accorded a hearing before dismissal by a Disciplinary committee on 10.8.2015 after which he was dismissed. That the dismissal was fair and as such the claimant's suit has no probability of success. In that regard the counsel submitted that the right to housing for the claimant under section 31 of the Employment Act was extinguished after the termination of the employment contract.
  11. He relied on ***Mrao Ltd vs First American Bank of Kenya Ltd & Others (2003) eKLR***, where the court of Appeal defined a *prima facie* case to mean genuine and arguable case, which involves infringement of a legal right by the opposing party. The counsel maintained that the right to housing of an employee under section 31 of the EA does not survive termination of employment whether or not the termination is unfair or wrongful. That the employer's obligation to provide housing or House Allowance ceases immediately after the termination of the employment contract.
  12. After considering the submissions made, the court is not satisfied that the applicant has a *prima facie* case with probability of success. The case before the court concerns a right to housing founded under employment contract between the parties herein. The right is guaranteed under section 31 of the EA and it ends immediately the employment ends whether or not the termination is unfair or wrongful. That if the right was in form of a physical shelter, the right to occupy and use the same likewise ceases immediately after the termination of the employment unless the employer grants the former employee a licence or a lease. Without such licence and lease, the former employee is rendered a trespasser.
  13. As already stated above, equity follows the law and as such the court will not grant equitable remedy to the claimant because he has already lost his right to housing as an employee under section 31 of the EA. This court has made similar decision in ***Fadhil Juma Kisua vs Kenya Ports Authority [2015] eKLR*** while following the binding decision of the Court of Appeal in ***Eric V.J. Makhokha & 4 Oyhers vs Lawrence Sagini & 2 others [1994] e KLR*** where it was held that:

***“The contract of employment having gone, the fringe benefits of subsidized housing goes with it.”***

14. In view of the findings above that the motion is incompetent and that the applicant has not established a prima face case with probability of success, the court sees no need of considering whether or not the applicant has proved that she will suffer irreparable loss if injunction is denied or whether to decide the motion on a balance of probability.

### **Disposition**

15. The Notice of motion dated 7.10.2015 is dismissed. Costs in the cause. The claimant is however given a grace period of upto 31.12.2015 to vacate the staff quarters.

**Signed, Dated and Delivered this 4<sup>th</sup> day of December 2015**

**ONESMUS MAKAU**

**JUDGE**