

REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 429 OF 2014

DR.PRIMUS APAMO OCHIENG.....CLAIMANT

VERSUS

THE PRINCIPAL SECRETARY, MINISTRY OF HEALTH.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. The Claimant/Applicant seeks to be granted a slew of reliefs set out in his Notice of Motion application dated 19th March 2014. Chief amongst them is the prayer relating to the proposed study at Groote Schuur Hospital in South Africa. He has submitted through his counsel Mr. Ochich that the studies are a unique opportunity which will arm him with relevant knowledge, training and skills in the field of oncology. It is urged that the training so acquired is for public good.
2. The Claimant it's argued should be released and facilitated to attend the studies as he will suffer loss should the orders not be granted. He submits through counsel that he was assured by the 1st Respondent that his studies would be facilitated. The Claimant thus incurred expenditure to that end and obtained an air ticket, visa *inter alia*. He has also raised issues regarding his salaries and allowance, his confirmation of employment and the administrative action. He claims that he has been subjected to unfair working conditions contrary to Article 41(2) of the Constitution. It is urged that the argument by the Respondent on public interest actually supports the Claimant/Applicant as the grant of the injunction sought is for a special situation and circumstance.
3. The Respondent is opposed and to that end Mr. Ngumi filed Grounds in Opposition as well as skeletal submissions today. Briefly, the submissions capture what Mr. Ngumi succinctly submitted on. He submitted that the Claimant seeks final orders at an interlocutory stage and secondly that public interest overrides a private individual's interest. He submitted that the traditional approach on interlocutory injunctions is to preserve the *status quo* or *status ante*. He stated that the issues raised by the Claimant require an inquiry of facts and the Court cannot make such a determination at this stage. He submitted that on the strength of the 3 tiers in **Giella v. Cassman Brown**, the Claimant was not entitled to the orders sought. He submitted that the orders sought by the Claimant in his Notice of Motion application are the very same ones in his claim and a grant of these orders would be tantamount to grant of final orders at interlocutory stage. He submitted that this Court should find that the order sought are mandatory in nature and ought not be granted at this stage. He submitted that the Claimant's education will entail expenses of 3,813,600/= a year which would total roughly 16 million shillings over the 4 year duration of the course. This money is from tax payers hence the public interest aspect. He submitted that if the interdiction proceeds then the public would have no recourse to recovery as the Claimant has not disclosed his means or the wherewithal to pay. He relied on the case of **Shepherd Homes v. Shabahu, Kenya Breweries & 2 Others v. Washington Okeyo, Locabil International v. Agroexport & Others** in support of the submissions on the mandatory injunction.
4. He cited the case of **Kenya Hotels Properties Ltd. v. Willisden Investment** where the Court of

Appeal held that if the Court allowed the application before it, it would harm the greatest number of people. He added the cases of **KNEC v. Republic ex parte Kemunto and ABN Amro v. Le Monde Foods.**

In conclusion he cited Article 23 of the Constitution which grants right to the Court to give any appropriate reliefs. He submitted that this is probably not the last course on offer in oncology. He urged the Court to decline the grant of orders sought as the Court could, if it later found in favour of the Claimant, order the 1st Respondent to obtain a suitable course for the Claimant and pay for it. He submitted the Claimant will not suffer any injury that will not be compensated by way of damages.

5. The case that has played out is unique. The Claimant seeks various reliefs which all cannot be granted at interlocutory state. I agree with Mr. Ngumi that a number of these fall under the category of mandatory injunctions. The principle to guide the Court before grant of any injunctive relief is the celebrated case of **Giella v. Cassman Brown**. I have keenly read the application, the Grounds in Opposition and the skeletal arguments. I've also heard both counsel and am persuaded that placing all the material through the 3 tiers of the injunction test in **Giella v. Cassman Brown** there is ground to find there is a *prima facie* case. At this stage I am not required to make any final determination except for exceptional cause. The study the Claimant seeks to go for is in a subject that is of great public concern. Oncology is an area of study of medicine that has become an area of focus in this country. It is a unique opportunity and the credentials of Groote Shuur are not in doubt. In the case before me, the Claimant/Applicant has secured admission and his course is to commence in a few weeks' time. If he loses the opportunity and ultimately a Court finds in his favour will the Respondents obtain a similar admission? It is probable given the might of the State but does the present opportunity present the unique circumstances referred to in **Halisbury's laws of England para 948?** I think so. If the Claimant misses out, this might be the only opportunity he could have to study oncology in Groote Shuur. The sands of time shift oh so often that it might be a once in a lifetime chance.
6. I hold that it is in the public interest for the Claimant/Applicant to proceed to Groote Shuur for further studies. As to the expenses, as pointed out by Mr. Ngumi it is a considerable sum but given the benefits to the Nation it will be worth it. The only caveat I will place on the same is that the Claimant/Applicant must sign a bond to secure his service to the people of Kenya for a minimum of 4 years upon the successful completion of his studies. He must return immediately upon the completion of his course. The 1st Respondent has an opportunity to greater service from a man they have had in their service for a decade and one who shows promise.

As regards the suspension, the same will be subject to the inquiry that is envisaged in the Claim and the administrative action as well as the emoluments he is entitled to will be dealt with upon hearing which I direct to be undertaken by way of affidavit evidence. Application partly successful. Costs in the Cause.

Orders accordingly.

Dated and Delivered at Nairobi this 26th day of March 2014

NZIOKI WA MAKAU

JUDGE