



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**CAUSE NO. 2046 OF 2013**

*(Before D.K.N. Marete)*

**BENJAMIN LANGWEN.....CLAIMANT**

Versus

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....  
....RESPONDENT**

**RULING**

This is an application dated the 8th January, 2014 and filed on the following day. It seeks the following orders of court;

1. *THAT this application be certified urgent and service therefore be dispensed with in the first instance.*
2. *THAT pending the inter-parties hearing hereof this honourable court be pleased to restrain the respondent from commencing the recruitment and/or continuing with the process of filling the position of Director, Compliance and Enforcement, which was until 16<sup>th</sup> December 2013 held by the Claimant/applicant.*
3. *THAT pending the hearing and determination of this complaint, the respondent be and is hereby restrained from commencing the recruitment and/or continuing with the process of filling the position of Director, Compliance and Enforcement which was until 16<sup>th</sup> December 2013 held by the claimant.*
4. *THAT the costs of this application be provided for.*

and is based on grounds that;

1. *The claimant's dismissal was malicious and total violation of the respondent's previous express and unequivocal admission in NEMA Tribunal Cause No. 100 of 2012 that the process leading to the issuance of licence No. 0011390 that was the subject of disciplinary proceedings was lawful and procedurally beyond reproach.*
2. *The claimant was allegedly found guilty of a charge of "withholding crucial information" without that charge having been put to him in the show cause letter contrary to the rules of natural justice.*
3. *The claimant's constitutional right to fair administrative process as provided for in article 47 of*

*the constitution and Sections 41, 44 & 45 of the Employment Act have been violated.*

4. *The respondent's decision to dismiss the claimant from service was demonstrably unreasonable, grossly irrational, and totally against the weight of evidence placed before the respondent and cannot stand to reason.*
5. *The respondent's entire disciplinary process was a sham and a smokescreen to hoodwink the gullible that due process was followed while in real sense it was a choreographed charade to dismiss the claimant from public service on extraneous grounds.*
6. *It is demonstrably in the interest of justice that this honourable court be pleased to strike a blow for the rule of law and orderly management of public institutions and grant the prayers sought herein.*

The application is supported on the affidavit of Benjamin Langwen sworn on the same date.

The matter came for hearing on the 9th January, 2014 when it was certified urgent and *inter alia* leave was awarded to proceed with the matter during the court vacation.

On 6th February, 2014 counsel for the respondent offered to concede on the issue of a prima facie case with a possibility of success and thereby limit his submissions on the issues of irreparable loss and also balance of convenience. This was opposed by the claimant/applicant who posited that the respondent should concede *in toto* on grounds that the application is not opposed and that he should be allowed to pursue his client's case his own style.

The claimant/applicant's case is supported by his supporting affidavit sworn on 8th January, 2014. Here, the applicant avers that at all material times to this matter, he was an employee of the respondent as Director in charge of Compliance and Enforcement. On 16th December, 2013, he was summarily dismissed from service – Annexure BL1 is a letter of appointment. He also adduces and annexes an interdiction letter dated 19th November, 2013 and a show cause letter dated 24th November, 2013 (all copies not completed in full) and submits that this was anomalous in that interdiction should not have preceded show cause in accordance with the terms and conditions of employment. In a letter dated 30th November, 2013, the applicant comprehensively responds to the show cause letter whereby he denies all liability for his action in the issuance of the license known as EIA License No. 0011390 to Coconut Cave Limited for the construction of Carnival Village apartments as follows;

- a. *I DID NOT willfully neglect to supervise; neither did I carelessly or improperly supervise the process that led to the issuance of the EIA Licence No. 0011390 to Coconut Cave Limited with full knowledge that this was a second licence which was being issued to the said Proponent.*
- b. *I DID NOT willfully neglect to supervise, neither did I carelessly or improperly issue a conditional approval to Coconut Cave Limited without having satisfied myself that the Proponent had addressed all the issues that would inform the decision of Authority in EIA Licence No. 0011390.*
- c. *I DID NOT deliberately mislead your office into signing the EIA Licence No. 0011390.*
- d. *I DID NOT fail to undertake due diligence before advising your office to issue Licence No. 0011390. All the comments made by lead agencies such as Kenya Forest Service and National Museums of Kenya among many others were received during the public hearing and were reflected in the licence conditions.*

Annexure BL6 of the supporting affidavit of the Notice of Motion issues a detailed and itemized process that was pursued in the issue of the licence aforesaid.

The respondent opposes the application and raises various Grounds of Opposition as follows;

1. ***THAT*** the Claimant's application is wholly misconceived in substance and digressive as it does not address the material issues in an application for temporary injunction to wit; prima facie case, irreparable loss and a balance of convenience but rather argues the merits of the main cause in its grounds.
2. ***THAT*** as further evidence of the ground 1 above, Claimant's supporting affidavit is word for word to the statement of claim in the main cause and does not in any way depone to the factual circumstances that merit the grant of an application for temporary injunction.
3. ***THAT*** the application as a whole is therefore an attempt to argue the main cause at an interlocutory stage.
4. ***THAT*** as a consequence of the application and affidavit being misconceived in substance and digressive for failing to address the considerations of a grant of temporary injunction, the claimant has not spelled out how he has a prima facie case with a high probability of success.
5. ***THAT*** further to that, a prima facie case with a high probability of success for the reinstatement of the claimant is not made out since as a rule of law reinstatement will not avail in cases where confidence and trust is substantially eroded in the employer-employee relationship as in this case where the claimant alleges malice, prejudice, 'witch hunting' and spite.
6. ***THAT*** as a consequence of the application and affidavit being misconceived in substance and failing to address the considerations of a grant of temporary injunction, the claimant has not evidenced any irreparable injury that cannot be compensated with damages that he would suffer if the injunction is not granted.
7. ***THAT*** the claimant in the main suit has admittedly requested in paragraph 13(c) of his statement of claim for an award of damages and thereby is estopped from claiming in the same breath that damages would be inadequate.
8. ***THAT*** almost invariably, an award for damages for termination of employment is generally an adequate compensation for termination and this case should be no different just because of the high station in life of the claimant.
9. ***THAT*** further to ground 7, as a general rule of law, breaches of personal service contracts are compensated by damages unless the services are unique and therefore unavailable from another source, or when the amount of monetary damages is difficult to prove. The claimant in his application has stated no ground (or proof) claiming this unique service to the Respondent.
10. ***THAT*** the balance of convenience would lie in the denial of the injunction and allow for an expeditious recruitment of a new Director of Compliance and Enforcement which is a crucial office in the running of the Respondent's authority and should not be left vacant as the case whiles away in a protracted legal process.
11. ***THAT*** further, it would offend public policy to have such a crucial public office left in abeyance for an indeterminate time just so that an individual's interest is protected while the public interest languishes. A nation's environmental compliance and enforcement needs are greater than any individual therefore the balance of convenience lies with the public interest not the individual.
12. ***THAT*** in the whole the application is digressive, lacks merit and unsubstantiated and should be struck out/disallowed with costs.

The issue for determination is whether the applicant merits a case for issue of orders sought or otherwise. In his chamber summons application dated 8th January, 2014, the applicant avers that the respondent in the National Environment Management Tribunal Cause No. 100 of 2012 had admitted that the procedure leading to the issuance of Licence no. 0011390 was lawful and procedural and therefore his dismissal is

an afterthought and unprocedural;

*(5) The respondent's entire disciplinary process was a sham and a smokescreen to hoodwink the gullible that due process was followed while in real sense it was a choreographed charade to dismiss the claimant from public service on extraneous grounds.*

By a letter of interdiction referenced NEMA/0168/2004 and dated 19th November, 2013 the claimant/applicant was interdicted from employment on grounds of alleged anomalies in the issue of various EIA Licences and particularly Licence No. EIA/815, Registration No. 0011390 for the construction of a five (5) storey residential block for Carnival Village apartments in Mombasa County. The following is the averment by the respondent in the supplementary affidavit;

4. *“Following preliminary investigations on issuance of various EIA licenses, it has been noted that there has been a number of anomalies in the process. A case in point is the issuance of license number EIA/815, Registration No. 0011390 for construction of five (5) storeyed residential block for carnival Village Apartments, in Mombasa County. Consequently, it has been decided that you be and are hereby interdicted with immediate effect in accordance with the HR manual Section 13.10 to allow for further investigations.*

On 24th November, 2013, the applicant was issued with a show cause letter of the same date asking that he shows cause as to why disciplinary action should not be taken against him on the following grounds;

- a. *You willfully neglected to supervise and or carelessly or improperly supervised the process that led to the issuance of the EIA Licence No. 0011390 to Coconut Cave Limited for the construction and operations of Carneval Village Apartments with the full knowledge that this was a second licence which was being issued to the said Proponent. This is contrary to clause 13.8 (c) of the human Resources and Procedures Manual.*
- b. *You willfully neglect and or carelessly and or improperly issued a conditional approval to Coconut Cave Limited without having satisfied yourself that the Proponent had addressed all the issues that would inform the decision of Authority in the issuance of EIA Licence No. 0011390. In particular, the requirement to undertake an Archaeological Impaci Assessment since construction along the shores and creeks was likely to impact on archeological or historical or cultural sites. In addition, the requirement by the Proponent to remove any construction that had already taken place within the riparian reserve and rehabilitate the area to the satisfaction of the Authority. This is contrary to clause 13.8 (c) of the Human Resources and Procedures Manual.*

He does not however, annex the letter of interdiction.

Again, the applicant wrote to claimant on 25th November, 2013 protesting the unprocedural nature of the show cause letter and requested for various materials to enable him answer to the issues raised. He indeed made a reply vide a letter dated 30th November, 2013 in which he demonstrated full compliance with the requirements of issue of the licence allegedly issued on a wrongful premise and grounding. He also produced the following accompanying documents in his reply;

- a. *Letter from EACC dated 29<sup>th</sup> December, 2011*
- b. *Caution dated 10<sup>th</sup> August 2012*
- c. *EIA License signing schedule*
- d. *EIA standard approval process that was strictly followed with respect to the subject license*
- e. *Project approval by the Municipal Council of Mombasa*

In further support of his reply and response, the claimant annexes a set of documents under annexure BL6A-L as follows;

- a. *Letter from the Ethics & Anti-Corruption Commission*

- b. *Caution letter dated 10th August, 2013 advising the claimant on caution in future operation and citing anomalies in 3 earlier ones*
- c. *Annexure 3 – EIA process that was followed for EIA 815 – Proposed Carnival Village Apartments*
- d. *Annexure 4 – Municipal Council of Mombasa – Notification of Approval of the Application for development permission dated 29th October, 2009*
- e. *Letter of approval of Change of User by the Commissioner of Lands dated 5th December, 1994*
- f. *Conditional approval headed EIA Project Report for proposed construction and operations of Carnival Village Apartments along Tudor Creek –Coconut Cave*
- g. *Approval for change of use by District Lands Officer dated 23rd August, 1994 in consultation with the Commissioner of Lands and Provincial Surveyor – Mombasa*
- h. *Annexures – Minutes of Public Hearing where various issues for and against the proposed project were raised dated 9th July, 2012*
- i. *Letter of stoppage of construction and restoration of excavated area from NEMA dated 19th May, 2010*
- j. *Letter of protest against (1) above by Alando & Co. Advocates for the Licensee.*
- k. *Court order in HC Civil Appeal No. 199 of 2010 staying the ruling of the Tribunal in WET/55/2010 pending hearing also stopping the 1st respondent from lifting the stop order against development of PLOT LR No. MN/1/764, Tudor Creek, Mombasa pending hearing and determination of this matter, inter alia.*
- l. *Ruling on preliminary objection in Tribunal Cause No. WET/55/2010 which was sparingly upheld.*
- m. *Letter of Appeal against development section by residents of Mwembeni Road*
- n. *Letter confirming issue of licence to develop on 5th October, 2009 by Alando & Co. Advocates*
- o. *Letter dated 10th June, 2010 from Head of Legal Services, NEMA urging developer to adhere to the terms of conditional licence.*
- p. *Letter of objection to construction dated 23rd April, 2010*
- q. *Response to appeal WET/100/212 – by NEMA reluctantly/unconvincingly supporting the licence.*

At the hearing of this matter on 6th February, 2014, Mr. Mungla submitted that he prayed for order No. 3 - a restraint of the respondent from commencing recruitment and continuing with the process of filling the position of Director, Compliance & Enforcement held by the claimant/applicant as at 10th December, 2013 when he was unlawfully dismissed. He further submitted that in the main suit, the applicant seeks ultimate orders for reinstatement. He in his submissions walks us through the entire process of dismissal and deems the same unlawful and therefore justifies his prayers in the application.

The respondent at the hearing opposed the application and submitted that the application is one of a temporary injustice and therefore the principles in *Giella Vs Cassman Brown* are all applicable. These are as follows;

(i)...

(ii)...

(iii)...

(iv) *an applicant must show a prima facie case with a probability of success;*

(v) *an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury;*

(vi) *when the court is in doubt, it will decide the application on the balance of convenience;*

That the basis of the grounds were not pleaded or proven except the first one of prima facie case and therefore the application must fail. He further submitted that a plea for reinstatement is not supported by the authority of Shollei Vs Judicial Service Commission, Industrial Court Cause No. 30 of 2013 and an award of damages would always be an adequate remedy in case of success. A prima facie case is therefore not proven. The other two ingredients of the Giella principle are not met, or at all.

This application revolves around termination of employment on grounds of misconduct of the applicant. It is mainly a convoluted case of issue of license No. 011390 to Coconut Cave Limited, a client of the respondent. The respondent in her pleadings and submissions faults the process and blames the applicant for neglect of process and misconduct in the performance of his office. The claimant/applicant denies this and pleads malice and bad faith in his dismissal.

I am inclined to agree with the respondent in the circumstances. Firstly, a prima face case is not explicit on the face of the application. Two, on a preponderance of evidence, this matter tilts in favour of the respondent. I therefore dismiss the application with costs to the respondent.

Dated, delivered and signed this 17th day of March, 2014.

**D.K. Njagi Marete**

**JUDGE**

Appearances:

1. Mr. Mungla instructed by Paul Mungla & Company Advocates for the Claimant.
2. Mr. Kalii instructed by Ms Nyaberi & Company Advocates for the Respondent.