



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**  
**CAUSE NO. 2067 OF 2013**

**DOROTHY NDAVI.....CLAIMANT/APPLICANT**

versus

**BOARD OF MANAGEMENT OF KENYA HIGH  
SCHOOL..... 1<sup>ST</sup> RESPONDENT**

**ROSEMARY C. SAINA..... 2<sup>ND</sup> RESPONDENT**

**LUCY MUGENDI..... 3<sup>RD</sup> RESPONDENT**

**SARA NYORO..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. What is up for determination is the Claimant/Applicant's Notice of Motion Application dated 31<sup>st</sup> December 2013. In it the Claimant mainly seeks the following:-
  - i. Pending the hearing and determination of this application the Honourable Court be pleased to grant interim order to stay the summary dismissal of the Claimant/Applicant.
  - ii. Pending the hearing and determination of this application the Honourable Court be pleased to grant an order to compel the Respondent to unconditionally reinstate the Claimant/Applicant to her office with full powers, salary, benefits and rights thereof.
  - iii. Pending the hearing and determination of this application the Honourable Court be pleased to grant an interim preservation order of injunction to prevent the Respondents from evicting the Claimant/Applicant from her residential house within the 1<sup>st</sup> Respondent's premises or denying her access to her residential house or the 1<sup>st</sup> Respondent's compound and to maintain the terms and *status quo* before dismissal.
  - iv. Pending the hearing and determination of this application or until further orders of the court, the Honourable Court be pleased to grant an interim prohibitory order to prohibit the 1<sup>st</sup> Respondent from processing, short-listing the applications received or interviewing or recruiting or employing any person to replace the Claimant/Applicant whether permanently or in acting capacity.
  - v. Pending the hearing and determination of this Claim the Honourable Court be pleased to grant interim order to stay the summary dismissal of the Claimant/Applicant
  - vi. Pending the hearing and determination of this Claim the Honourable Court be pleased to grant an order to compel the Respondent to unconditionally reinstate the Claimant/Applicant to her office

with full powers, salary, benefits and rights thereof

- vii. Pending the hearing and determination of this Claim the Honourable Court be pleased to grant an interim preservation order of injunction to prevent the Respondents from evicting the Claimant/Applicant from her residential house within the 1<sup>st</sup> Respondent's premises or denying her access to her residential house or the 1<sup>st</sup> Respondent's compound and to maintain the terms and *status quo* before dismissal.
  - viii. Pending the hearing and determination of this Claim or until further orders of the court, the Honourable Court be pleased to grant an interim prohibitory order to prohibit the 1<sup>st</sup> Respondent from processing, short-listing the applications received or interviewing or recruiting or employing any person to replace the Claimant/Applicant whether permanently or in acting capacity.
2. The Claimant/Applicant deposed that at all material times she was the 1<sup>st</sup> Respondent's Stores Keeper/Procurement Assistant and Head of the Procurement Unit and carried out the duties and functions of the procurement unit strictly in accordance with the Public Procurement and Disposal Act, 2005 and Regulations made thereunder. She swore that the termination of her services had everything to do with the personal interests of the 3<sup>rd</sup> and 4<sup>th</sup> Respondent's. She averred that she was not given a fair opportunity to be heard before her summary dismissal and that the purported dismissal was unconstitutional, unlawful and administratively and procedurally unfair as it was not sanctioned by the 1<sup>st</sup> Respondent as by law required. To the affidavit the Claimant/Applicant attached her letter of employment only.
  3. The Respondent's filed a Replying Affidavit sworn by the 2<sup>nd</sup> Respondent and in it the deponent Rosemary C. Saina deposed that the Claimant/Applicant was a storekeeper pursuant to a contract of employment dated 5<sup>th</sup> April 2011 as well as the secretary of the School Tender Committee. She denied that the Claimant/Applicant had carried out her duties in accordance with the Public Procurement and Disposal Act without necessarily disclosing that the Claimant/Applicant has been the center of great discontentment based on performance as a storekeeper and as secretary to the Tender Committee. She deposed that the Claimant was utterly unable to conduct rudimentary activities such as minute taking and minute keeping, inability to maintain up to par the store records, misplacing of invoices from suppliers and receiving goods not requisitioned for. The deponent stated that the Claimant/Applicant was given a show cause notice which clearly set out the grounds for inquiry into the Claimant's suitability and competence. It was deposed that the Claimant was not dismissed but that the Claimant willfully expressed her intention to resign from employment at a meeting held with the deponent in the Principal's office. The allegations of personal interest made were unsubstantiated and thus misleading and misplaced. The deponent attached the copies of incomplete minutes, the resubmitted copies of invoices, the minutes of the meeting held on 3<sup>rd</sup> December 2013 where the Claimant/Applicant willingly gave her intention to resign, the show cause notice and the Claimant/Applicant's response or defence.
  4. The parties also filed Written Submissions with authorities to buttress their positions. In the submission filed by the Claimant/Applicant on 25<sup>th</sup> February 2014, the Claimant submitted that the issues that lend themselves for determination are
    - i. Whether the Applicant has established a *prima facie* case with a probability of success at the hearing
    - ii. Whether the Applicant will suffer irreparable injury which cannot be compensated by an award of damages
    - iii. Whether the balance of convenience favours the Applicant
  5. The Claimant submitted the cases of **Giella v Cassman Brown & Co. Ltd [1973] EA 358**, **Mrao Ltd v. First American Bank of Kenya Ltd & 2 others [2003] KLR 125**, **Timothy John Bukibinga Igaga v DT Dobie & Co. (K) Ltd Cause 1417 of 2012**, **Engineer Stephen Gichuki v The Kenya Airports Authority Cause 1464 of 2012**, **Dinah Musindarwezo v African**

**Women's Development and Communication Network (FEMNET) Cause 1390 of 2012.**

6. The Respondent filed submission and in which the issues for determination were collapsed into two:-
  - i. Whether the stay and/or injunctive orders sought herein by the Claimant can issue
  - ii. Whether the orders for reinstatement can issue
7. The Respondent submits that the Claimant was a tardy and less than effective and competent employee. It was submitted that the Claimant was unable to discharge her duties efficiently and effectively thus eliciting disquiet from various quarters within the School. The Respondent relied on the cases of **Giella v. Cassman Brown** (supra), **Mrao v. First American** (supra), **Alfred Nyungu Kimungui v Bomas of Kenya Cause No. 620 of 2013**, **Professor Gitile J. Naituli v Multi Media University College & Another [2013] eKLR**, **Tailors & Textiles Workers Union v Summit Fibres Ltd [2013] eKLR**.
8. The issues for determination revolve around the injunction and reinstatement and I can comfortably deal with them under two heads.
  - a. Is the Claimant/Applicant entitled to the injunctive orders sought in relation to her employment and housing?
  - b. Is the Claimant/Applicant entitled to reinstatement to her position as store keeper?
9. The case of **Giella v Cassman Brown** (supra) is instructive in determination of the issue of injunctions. The locus classicus on injunctions provides a three tier test.

First, the applicant must show a *prima facie* case with a probability of success, secondly, it must be demonstrated that the applicant might suffer irreparable injury if the injunction is not issued and thirdly, should the court be in doubt, it will decide the application on a balance of convenience.

10. The principles to be considered include the probability of success, irreparable damage and where the Court is in doubt it will decide the case on a balance of convenience. In ascertaining whether the threshold for grant of the grant of injunction has been met, a Court must consider each case on its facts and the circumstances obtaining. At the *ex parte* stage of the present Application, the Court did not have the benefit of the facts and position articulated by the Respondent. In the Replying Affidavit, the Respondent sets out the steps taken during the process leading to the acceptance of the Claimant's resignation in December 2013. The Claimant has come to Court and the remedies she seeks are remedies for which damages would be an adequate compensation should I fail to order a reinstatement upon hearing the parties. Reinstatement ought not to be granted at interlocutory stage but after the hearing in terms of Section 12(3)(vii) of the Industrial Court Act and Section 50 as read with Section 49 of the Employment Act 2007. In the premises, the injunction sought is not fit for grant I dismiss it with costs to the Respondent.

Orders accordingly.

Dated and delivered at Nairobi this 9<sup>th</sup> day of June 2014

**Nzioki wa Makau**

**JUDGE**