



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

**CAUSE NO. 300 OF 2014**

**KUDHEIHA WORKERS.....CLAIMANT**

v

**CHEPTUECH SECONDARY SCHOOL .....RESPONDENT**

**RULING**

1. KUDHEIHA (Union) is a registered trade union. On 10 July 2014, it commenced legal proceedings against Cheptuech Secondary School (Respondent) and the issue in dispute was stated as unlawful/wrongful termination of Mr. Solomon Cheriro (Grievant).
2. Together with the Memorandum of Claim, the Union filed a motion application seeking certain interlocutory reliefs including an order restraining the Respondent from recruiting a replacement for the Grievant.
3. On 10 July 2014 Ongaya J granted *ex parte*, an interlocutory prohibitive order restraining the Respondent from recruiting or filing the Grievant's position.
4. The Respondent was served and on 22 August 2014, it filed a Replying Affidavit through its Principal Ezekiel K. Ngeno. On 18 September 2014, it filed a Memorandum of Response.
5. The motion seeking injunctive relief is the subject of this ruling. The Court will also consider a preliminary objection taken by the Respondent.
6. The Union's case on behalf of the Grievant is that the termination of the Grievant was premature and sudden and that the Respondent did not comply with the provisions of a Collective Bargaining Agreement between the Union and the Respondent and section 41 of the Employment Act, 2007. It was further urged that the Grievant was not heard before termination and was terminated because of his union membership and activities. It was further contended that the Respondent did not pay the Grievant half salary as provided for under clause 8(b) of the Collective Bargaining Agreement.
7. In a brief response, the Respondent submitted on the basis of a preliminary objection it had raised in the Replying Affidavit of Ezekiel Ngeno. This was to the effect that the Respondent had no legal capacity to be sued and that it could only be sued through its Board of Governors.
8. The Respondent further contended that the recognition agreement which had been annexed to the motion was not signed either by the Ministry of Education or the Respondent.
9. In a reply to the Respondent's submissions, the Union countered that the Respondent is a legal entity which can be sued and that Article 22 of the Constitution permitted it to commence legal proceedings on behalf of its members and that this was a matter of fair labour practices.
10. In essence, there are two issues raised, which the Court is called upon to determine.
11. The Court will start with the legal capacity issue. It is true as submitted by the Respondent that the proper party to be sued is the Board of Governors of the Respondent. Instead, the Union sued the School. However, in the view of the Court this is a mere irregularity and technicality which can be cured through appropriate amendments.
12. As to the point taken about the Recognition Agreement and Collective Bargaining Agreement not

being signed, these are issues of evidence to be taken at the hearing of the main Cause on the merits. The Court cannot determine the issue on the basis of affidavit evidence which has not been tested on cross examination.

13. On the main motion, the Union is seeking temporary prohibitive orders. It is not disputed that the Grievant was terminated. The Union is challenging the termination on the basis of the process followed, which it asserts was not in conformity with section 41 of the Employment Act, 2007 and the Collective Bargaining Agreement between the parties. The Union also contests the reasons for the termination.
14. Now, the principles upon which interlocutory injunctions are granted were set out in the case of *Giella v Cassman Brown & Co. Ltd. (1973) EA 338*. It is worth repeating what the Court stated in that case

*the conditions for the grant of an interlocutory injunction are now, I think, well settled in E.A. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be granted unless the applicant might otherwise suffer irreparable injury, which would not be compensated by an award of damages Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.*

15. It is worth setting out the interlocutory orders sought by the Union to put it in perspective

*2. THAT pending the hearing of this application inter-parties (sic), the Respondent be restrained by itself, agents or servants from undertaking the recruitment and appointment of any person to hold the office held by Mr S. Cheriro.*

*3. THAT the grievant be paid half salary for the time he was on suspension from 20<sup>th</sup> January to 4<sup>th</sup> April, 2014.*

16. The Grievant stood terminated on 7 April 2014 or thereabouts. Any actionable legal wrong or injury was suffered on that day. The Grievant is not at work. The Union now wants the Respondent restrained from recruiting a replacement. The duties he was performing must continue being performed.
17. Reinstatement is not ordinarily a remedy to be granted at an interlocutory stage. The Grievant has not sought reinstatement in the interim. He has not demonstrated how recruitment of a replacement would legally harm him.
18. Further, the Court is empowered to order reinstatement where it is merited or make an award of damages. In the instant case, there is no suggestion that the Grievant would suffer irreparable harm which could not be adequately compensated with an award of damages.
19. The Union has failed to satisfy the test for the grant of temporary injunctive relief or that the balance of convenience would tilt in favour of the Grievant.

## **Conclusion and Orders**

20. For the above reasons, the Court declines to grant the orders sought and orders that

- i. The motion dated 10 July 2014 be and is hereby dismissed.
- ii. The Union to file and serve an Amended Memorandum of Claim on or before 14 November 2014.
- iii. The Respondent to file and serve an Amended Response, if necessary on or before 21 November 2014.
- iv. Each party to bear its own costs.

21. The Cause to be mentioned on 21 November 2014 for purposes of confirming compliance and fixing of a hearing date.

**Delivered, dated and signed in open Court in Nakuru on this 7<sup>th</sup> day of November 2014.**

**Radido Stephen**

**Judge**

For Union Mr. Onwong'a, Industrial Relations Officer, KUDHEIHA

For Respondent Mr. Mburu instructed by Rodi, Orege & Co. Advocates