



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 230/2013

(Before Hon. Justice Hellen Wasilwa on 3rd December, 2013)

JOHN OJWANG ATIENO & 13 OTHERS CLAIMANTS

-VERSUS-

1. THE MIGORI COUNTY GOVERNMENT
2. THE MIGORI COUNTY PUBLIC SERVICE BOARD... RESPONDENTS

RULING

The application before court is the one dated 12.8.2013. The application was filed by the claimants herein under a certificate of urgency through the firm of Otieno, Yogo, Ojuro & Company Advocates. The application was filed through a Notice of Motion dated the same day brought under Order 42 rule 6 of the Civil Procedure Rules and S. 3A of the Civil Procedure Act Cap 21 Laws of Kenya. The applicants sought orders that:-

1. **This Honourable court be pleased to hear this application *ex - parte* in the first instance.**
2. **Pending the hearing and determination of this matter *inter – partes*, there be a temporary injunction against the respondents, their employees, agents, representatives assigns or any other person acting through their direction from withholding the claimants' salaries in contravention of the law and terms and conditions of their employment or in any other way interfering with the plaintiff's employment and means of livelihood.**
3. **Pending the hearing and determination of this matter, there be a mandatory injunction against the respondents, their employees, agents, representatives assigns or any other person acting through their direction compelling them to effect payment of the claimants' salaries since July, 2013.**
4. **Pending the hearing and determination of this matter, there be a temporary injunction against the respondents, their employees, agents, representatives, assigns or any other person acting through their direction against termination and/or dismissal of the claimants from their employment without following the law and terms and conditions of their employment.**
5. **The costs of this application be provided for.**

The application was supported by the annexed affidavit of John Ojwang Otieno sworn the same day and further grounded on facts that:-

- a) **The claimants were deemed transferred to the 1st respondent by virtue of being employees of the County Council of Migori by virtue of the County Governments Act after the general elections held on 4.3.2013.**

- b) The claimants worked diligently for the months of March, April, May and June and were duly paid their wages.**
- c) The claimants reported to work on the 24.7.2013 and were issued with letters to the effect that their salaries were to be withheld pending further investigation by the Public Service Board.**
- d) The 1st and 2nd respondents have since removed the claimants' names from the staff payroll purporting to stop payments of salaries to the claimants without regard to their rights and/or their employment contracts and now threaten to terminate their employment due process.**
- e) The 1st and 2nd respondents' action has violated the Constitution of Kenya, Sections 59, 72 and 76 of the County Governments Act and Sections 17 and 18 of the Employment Act.**
- f) The claimants states that the 1st and 2nd respondents lacks the legal and statutory authority or basis to act as they purport to do and ought to be prevented from such acts.**
- g) The claimants are facing extreme hardship and injustice by the actions of the respondents and unless the respondents are restrained, the claimants' legal and Constitutional rights shall continue to be infringed.**
- h) The application is made in the interest of justice.**

The applicants appeared before this court *ex - parte* on 14.8.2013 and this court ordered them to serve the respondents before any order could be issued. The respondents were served to appear on 19.9.2013 but they failed to appear. The court then granted the applicants order in terms of prayers 2 and 4 which were to the effect that the respondents, their employees, their agents, representatives assign, or any other person acting through their direction be enjoined against withholding the claimants' salaries in contravention of the law and terms and conditions of their employment or in any other way interfering with the plaintiffs' employment and means of livelihood. The respondents and their agents were also enjoined against terminating or dismissing the claimants from their employment without following the law and terms and conditions of their employment.

The respondents were aggrieved by this orders given in their absence and they sought orders to review the same. The court allowed their application and ordered them to file their suit papers and reply to the claimants application.

This application was then set down for hearing *inter partes* on 5.11.2013. Basically the claimants' application is that the 1st respondent is an employer of the claimants. However, the claimants have not been paid their salaries since July 2013. It is the claimants' contention that the respondents have not justified their action. The applicants submitted that under the County Government Act, upon the announcement of the 1st general election results, former local governments ceased to exist and were taken over by the county government. The claimants argue that they were former employees of the defunct local government – county council of Migori and upon the county government coming into office the law creates an obligation on county government as successor of local government to take over the claimants.

The claimants further argue that the respondents are not in any way justified in withholding their salaries as provided for under Section 17 and 18 of the Employment Act 2007. The claimants have also submitted that Section 60 and Section 61 of the County Government Act vests in the County Government Service Board, the right to hire, create position and also abolish them but after following the due process. They argue that the exercise done by the County Government as submitted by the respondents herein was therefore an exercise in futility as the County Government usurped the powers of the County Government Service Board. In any case the applicants argue that no decision was ever made that the claimants be sacked nor their salaries be stopped. The claimants argue that of the 17 people interviewed, 4 were retained in pay roll and 13 were removed which the claimants say was discriminatory.

The claimants have cited various case among them; **Captain J. N. Wafubwa VS The Hon. A. G – HCC Nrb No. 674/1993** where the court found that termination without due process was not permissible. They argue that they have established a *prima facie* case and urges the court to grant their application.

The respondents on the other hand filed their memo of reply and affidavit of reply on 7.10.2013 through the firm of Mwamu and Co. Advocates. They submitted that the claimant/applicants have not established that they have a *prima facie* case. They argue that what claimants are seeking are finality orders which should be left to the court to determine at the end of the hearing of the entire suit. The respondent responded cited the celebrated case of **Giella VS Cassman Brown & Co. Ltd [1973] E.A 358** to show that a *prima facie* case has not been established against the respondents.

On a balance of probabilities, they submitted that the respondents have a genuine concern on establishing how the claimants were employed. They submitted that after an audit the claimants were found not to have personal files and are not part of the budget and are therefore illegal staff. It was then resolved that they be suspended pending investigations.

They argue that due process has been followed and therefore the application should not be allowed.

After hearing submissions of the parties, the issues for determination are as follows:-

1. **Whether there is a *prima facie* case established by the applicants to warrant the granting of an injunction.**
2. **Whether due process was followed before the respondents arrived at a decision to withhold claimants' salaries.**
3. **Whether respondents are justified in withholding claimants' salaries.**
4. **Whether the claimants are entitled to the orders sought.**

On the issue of a *prima facie* case, the rules are well established in the celebrated case of **Giella VS Cassman Brown & Co. Ltd [1973] E.A 358** where Spry V.P stated that:-

“First an applicant must show a *prima facie* case with a probability of success. Secondly, an *inter-locutory* injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt it will decide an application on the balance of expediency”.

This principle has been applied over and over again in other cases in Kenya amongst them the Court of Appeal in **Mrao Ltd VS First American Bank of Kenya Ltd and 2 Others [2003] KLR 125.**

In our instant case, the claimants have submitted that their salaries were stopped without any letters showing either they are suspended, interdicted or sacked. They were just removed from the pay roll with the result being that they are hanging in limbo. This actually points to the fact that on the face of it something is a miss which respondents must explain. The claimants still have a right to know what is happening to their job and keeping them in darkness is unacceptable. Indeed the claimants have suffered and continue to suffer non payment of salary for unknown reasons because this has not been brought to their notice. I do find that claimants have established a *prima facie* case and therefore the need for an injunction is established.

On the second issue, the withholding of claimants salaries offends Section 17(1) of Employment Act 2007 which states that:-

“Subject to this Act, an employer shall pay the entire amount of the wages earned by or payable to an employee in respect of work done by the employee in pursuance of a contract of service directly in the country of Kenya.

(a) in cash

(b) into an account at a bank or building society designated by the employee

(c) by cheque, postal order or money order in favour of the employee

(d) -----”

The claimants have exhibited appointment letters before court showing they are still employee of the respondents by virtue of the County Government Act. Failing to pay them is therefore an illegality which should not be condoned.

There is the issue of due process in terminating/dismissing or otherwise dealing with the claimants which has not been done to-date. The process is explained under S. 41 of the Employment Act and it has not been shown that the respondents have adhered to this process before taking action against the claimants.

I therefore make a finding that the claimants have established their case to warrant orders sought which I award in terms of prayers 3 and 4 as follows:-

1. Pending the hearing and determination of this matter, there be a mandatory injunction against the respondents, their employees, agents, representatives assigns or any other person acting through their direction compelling them to effect payment of the claimants' salaries since July, 2013.

2. Pending the hearing and determination of this matter, there be a temporary injunction against the respondents, their employees, agents, representatives, assigns or any other person acting through their direction against termination and/or dismissal of the claimants from their employment without following the law and terms and conditions of their employment.

3. Respondents will pay costs of this application.

HELLEN WASILWA

JUDGE

3/12/2013

Appearances:-

Claimants present

N/A for respondents

CC. Doreen