



**Nyongesa v Masinde Muliro University of Science and Technology
& another (Employment and Labour Relations Cause E023 of 2022)
[2022] KEELRC 13092 (KLR) (3 November 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13092 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS CAUSE E023 OF 2022
JW KELL, J
NOVEMBER 3, 2022

BETWEEN

FERDINARD CHIRURE NYONGESA CLAIMANT

AND

**MASINDE MULIRO UNIVERSITY OF SCIENCE AND
TECHNOLOGY 1ST RESPONDENT**

**MASINDE MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY
COUNCIL IENCE AND TECHNOLOGY COUNCIL 2ND RESPONDENT**

RULING

1. The claimant pending the hearing of his suit, by way of notice of motion application dated August 22, 2022 lodged in court on even date sought the following substantive orders:-
 - (a) That this honourable court do certify this application as urgent and place the same to be heard on priority basis and service of the same be dispensed with in the first instance.
 - (b) That an interim injunction do issue barring the respondents, their agents, servants from removing the claimant/applicant on the payroll pending the inter parties hearing and determination of the application.
 - (c) That an interim order do issue directing the respondents, their agents, servants to temporarily reinstate the claimant/applicant on the payroll pending the inter parties hearing and determination of the application.
 - (d) That a temporary injunction do issue barring the respondent, their agents, servants from removing the claimant/applicant on the payroll pending the hearing and determination of the main suit.



- (e) That a temporary order do issue directing the respondents, their agents, servants to reinstate the claimant/applicant to the payroll pending the hearing and determination of the main suit.
 - (f) Costs of the application be provided for.
2. The application is grounded on several grounds and on the affidavit of the applicant sworn on the August 22, 2022 and summarized to be, that the applicant was an employee of the respondent and had filed a petition against the employer in Bungoma E005 of 2021 after which he avers the employer had not been treating him well. That recently the employer removed him from the payroll without affording him opportunity to be heard (FCN-3), that he has been performing his duties as a lecturer diligently for the academic year 2021/2022, that under the 2nd semesters beginning August /September 2022 he was assigned work and was ready to teach. That in July 2022 he was removed from the payroll for his salary paid at Wevasity Sacco Society Ltd by the 1st respondent which act has subjected him to financial distress as he was serving a loan.
 3. The application is opposed by the respondents through the replying affidavit sworn by Benard Ooko sworn on the August 26, 2022. The employer employee relationship is not in dispute. The respondent avers that the applicant being a public servant offered himself as a candidate for Kanduyi Constituency, Bungoma County where he was gazetted vide Gazette Notice No 129 A and vied on Jubilee Political Party. That the act of vying was in direct breach of Government circular dated January 28, 2022 which required public servants vying for elective seats to resign by February 8, 2022. That in breach of the law the applicant continued to draw salaries and other emoluments which the respondent counterclaims in defence (BO3-a-e payslips).
 4. That the actions of the applicant were in violation of the CBA and the circular and it is on that basis they wrote letter dated August 18, 2022 to the applicant(B05).
 5. That the respondent investigated and confirmed that the applicant was an aspirant for Kanduyi Constituency. (BO6)
 6. The respondent submits that the applicant has not been dismissed and all what was done was stoppage of his salary being paid to the applicant and he is facing notice to show case pending the disciplinary measures as by law established.
 7. The court directed the application be canvassed by way of written submissions. Only the applicant complied and filed on the September 16, 2022.

Determination.

8. The applicant identified the following issues for determination:-
 - a. Whether the plaintiff has a *prima facie* case with probability of success
 - b. Whether the plaintiff will suffer irreparable injury/loss that cannot be compensated by award of damages if the application for temporally injunction is allowed.
 - c. In whose favour the balance of convenience tilts..

The court will proceed to consider the above issues identified by the applicant in its ruling.

9. The applicant submits that the law on granting of interlocutory injunction is set out under section 40(1) (a and b)of the [Civil Procedure Rules 2010](#) which provides as follows:- “Where in any suit it is proved by affidavit or otherwise— (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or(b) that



the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders”

10. The applicant rightly submits that granting of the interlocutory injunction is the discretion of the court which is exercised judiciously. That the conditions of granting interlocutory orders is as stated in *Giella v Cassman Brown & Co Ltd* [1973]EA 358 to wit:- first an application must show a prima facie case with a probability of success. Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury by an award of damages, thirdly if the court is in doubt it will decide the application on the balance of convenience . The applicant relies on definition of prima facie case in Court of Appeal decision in *Robert Mugo Wa Kaaranja v Ecobank* which cited decision on *Moses C Mubia Njoroge & 2 others v Jane lesaloi and 5 others* to wit: A prima facie case in a civil application included but not convided to a genuine and arguable case. It is a case in which on the material presented to the court , tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as it calls for an explanation or rebuttal from the later.
11. The applicant submits that relying on his affidavit he demonstrated a prima facie case of having missed salary for months of July to date and having executed his duties his salary was due.
12. The respondent in response has produced evidence through the affidavit of Bernard Ooko that the applicant’s salary was stopped on basis of having proceeded to vie for Kanduyi constituency as a Member of Parliament under Jubilee Political Party an act which violated the government circular on resignation of public servants wish to vie for elective seats (BO-2)and further the applicant had been issued with a notice to show cause explaining how the employer had stopped the salary and giving notice of intended disciplinary action.(BO-5)

Decision

13. The court while appreciating and upholding decision cited by the applicant in *Robert Mugo Wa Kaaranja v Ecobank* which cited decision on *Moses C Mubia Njoroge & 2 others v Jane Lesaloi and 5 others* further upholds the decision in *Mrao Limited v First American Bank of Kenya & 2 others* [2003]eKLR where it was held, “A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”
14. The court finds that the applicant concealed material fact from the court in his application being the show cause letter dated August 18, 2022 which stated the reasons for stopping the salary. The court having examined the content of the replying affidavit of Benard Ooko of the respondent and applying the authority in *Mrao Limited v First American Bank of Kenya & 2 others* [2003]eKLR where it was held, “A *prima facie* case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.” The court finds that the applicant case on *prima facie* basis does not meet the threshold considering there are valid reasons for the stoppage of the salary.

Whether the plaintiff will suffer irreparable injury/loss that cannot be compensated by award of damages if the application for temporally injunction is allowed. The applicant submits that he used



his salary to service a loan facility which he is still serving. That he is in financial distress for failing to meet his household bills. The court finds that the unpaid wages are not irreparable injury/loss as they can be compensated by award of damages.

In Whose Favour the Balance of Convenience Tilts

15. The applicant submits that the balance tilts in his favour in view of the subsisting employer employee relationship and him continuing to offer services to the employer and relies on the decision in *Paul Gitonga Wanjau v Gatbuthi Tea Factor Company Limited and 2 others* eKLR cited with approval in the said Robert Mugo Wa Karanja case (*supra*) where the court while dealing with balance of convenience stated: " .. thus the court makes a determination as to which party will suffer the greater harm with the outcome of the motion, if the applicant has a strong case on merits or there is significance the balance in favour of granting an injunction. The court will seek to maintain the *status quo* in determining whether the balance on convenience lies" (emphasis by applicant)
16. The applicant submits that the *status quo* to be maintained is that already in place. That they have demonstrated subsisting employer employee relationship, the respondent receiving the services of the applicant the respondent should be ordered to maintain salary payment .
17. In view of the concealed material evidence of having been issued with show cause letter and of having been an aspirant (BO-1 Gazette of applicant as candidate) without resigning contrary to the government circular (BO-2), the court finds that the balance would tilt in favour of the respondent being a public institution and the applicant having failed to resign to proceed to elections, it is in the interest of the public not to grant the orders sought.
18. Consequently, court finds and determines that the application dated August 22, 2022 was tainted by material non disclosure and further did not meet the conditions set out in *Giella v Cassman Brown Co Ltd & another* which has been upheld as law on interlocutory injunctions. The application is dismissed with costs to the respondent in cause.
19. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 3RD NOVEMBER 2022.

J. W. KELI,

JUDGE.

In the Presence of:

Court Assistant; Brenda Wesonga

Applicant: Shikhu holding brief for Khakula Advocate

Respondent : Tarus, Senior State Counsel

