

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

PETITION NO. E169 OF 2022

(Before Hon. Justice Dr. Jacob Gakeri)

BOAZ OWINO OIYOPETITIONER/APPLICANT

VERSUS

TEACHERS SERVICE COMMISSIONRESPONDENT

RULING

1. Before the court for determination is a Notice of Motion dated 23rd September, 2022 by the Applicant filed under Certificate of Urgency seeking **ORDERS THAT:**
 1. *Spent.*
 2. *Spent.*
 3. *This Honourable Court be pleased to order a temporary stay of the Respondent's Notice of Retirement issued on 18th February, 2021 pending the hearing and determination of this Petition.*
 4. *Upon the issuance of orders in terms of prayers 2 and 3, this Honourable Court be pleased to issue an interim order directing the Respondent to resume payment of the Petitioner/Applicant's salary and*

emoluments due to him from August 2022 pending the hearing and determination of this Petition.

5. The costs of this Application be in the cause.

2. The Notice of Motion is based on the grounds set out on its face and supported by the Affidavit sworn by the Petitioner/Applicant on 23rd September, 2022.
3. The affiant depones that he has been an employee of the Respondent, TSC No. 251607 and by a letter dated 18th February, 2021, the Respondent informed him that he was due for retirement effective 1st July, 2022 having attained the mandatory retirement age of 60 years and the last working day would be 30th June, 2022.
4. The letter required the affiant to make arrangements to hasten processing of pension.
5. That the affiant informed the Respondent that he was a person living with a disability and requested for extension of service to 65 years pursuant to Circular No. 13 of 2017 which raised the mandatory retirement of public servants with disabilities from 60 years to 65 years effective 1st July, 2022.

6. The affiant further depones that he provided the Respondent with all the necessary documents including the National Council for Persons Living with Disability and Medical Assessment letter and has since received a Tax Exemption Certificate from the Kenya Revenue Authority on account of the disability.
7. That despite availing the documents, the Respondent declined to extend service to the age of 65.
8. That the Petitioner be paid Kshs.10,673,460/= tabulated at Kshs.177,891/= per month being the amount the Petitioner would have earned but for the violations of his rights to serve until attaining the age of 65.
9. The Petitioner/Applicant filed an unsworn Further Affidavit and attached a letter purportedly dispatched to the Respondent at Nyamira on 30th February, 2021.

Response

10. In its Replying Affidavit sworn by Dr. Julius Olayo, the Director Human Resource Management and Development on 19th October, 2022, the Respondent states that it has a constitutional mandate to register trained teachers, recruit

and employ, promote, transfer, exercise disciplinary, control and terminate their employment.

11. The affiant deposes that the Petitioner/Applicant was its employee at Kisii County as the Principal of Nyambaria High School.
12. That a retirement Notice was issued on 18th February, 2021 informing the applicant that his retirement was effective 1st July, 2022 and the Claimant acknowledged receipt and forwarded to the Commission all the documents required to facilitate the processing of pension.
13. That 3 months later on 28th May, 2021, the Petitioner not keen to retire wrote to the Commission seeking an extension of service for 2 years ostensibly to complete projects he had initiated at the school, a request the Respondent declined upon careful consideration vide letter dated 18th January, 2022.
14. That on attainment of retirement age on 30th June, 2022, the Respondent's payroll IPPD automatically deleted the Petitioner/Applicant from the system deeming him retired.

15. That on 20th July, 2022, the Petitioner's counsel wrote to the Commission demanding immediate reinstatement of the Petitioner enclosing a letter purportedly dated 14th July, 2022 addressed to the Respondent seeking extension of service on the basis of disability. Other enclosed documents included a medical report dated 28th June, 2022, NCPWD Card dated 1st July, 2022 and an introductory letter from the NCPWD dated 4th July, 2022.
16. The affiant depones that as at the date of retirement, the Petitioner was not duly registered as a person with a disability and thus not eligible for extension of service.
17. The affiant further deposes that the Petitioner did not comply with the Respondent's Circular No. 13/2017 on extension of service for teachers living with disabilities which requires the application to be made at least 6 months before attaining retirement age of 60.
18. That the Respondent cannot extend a non-existent contract of service as the employment ended on 30th June, 2022 and the Petitioner's remedy has been overtaken by events.

19. It is the Respondent's case that the Petitioner's conduct from receipt of the Notice of retirement reveal that he did not intend to retire but undermine the Respondent's rules and regulations and using the court to pursue his needs to the detriment of the Respondent.
20. The affiant urges the dismissal of the application with costs.

Petitioner/Applicant's submissions

21. Counsel rehashed the principles governing the grant of temporary injunctions as enunciated in **Giella V Cassman Brown Co. Ltd (1973) EA 358** and further relied on the decision in **Paul Gitonga Wanjau V Gathuthi Tea Factory Co. Ltd & 2 others (2016) eKLR** to formulate the issues for determination as;

- (i) Whether there is a serious issue to be tried,*
- (ii) Whether applicant will suffer irreparable loss if the injunction is not granted and*
- (iii) Which party will suffer greater harm from granting or refusing the remedy pending the decision on merits.*

22. As regards the issue to be tried, counsel submitted that although the applicant attained retirement age, he was a

person living with a disability and was by law entitled on application to be granted an extension of service and provided correspondence to that effect.

23. That the Petitioner had availed a document dated 17th June, 2022 showing that he had a visual impairment for which he had been on treatment as well as documents from the National Council for Persons Living with Disabilities (NCPWD).
24. That the Petitioner requested for extension by letter dated 30th February, 2021 and the Respondent declined to do so.
25. Reliance was made on the sentiments of the court in **Mrao Ltd V First American Bank of Kenya & 2 others (2003) KLR 125** on the meaning of *prima facie* case as well the provisions of Article 27(4) of the Constitution of Kenya, 2010 on discrimination.
26. Counsel submitted that the Petitioner had demonstrated that he had 30% loss of vision and was thus living with a disability which would impair his ability to source for livelihood and thus seeks injunctive relief.

27. That the 6 months requirement was untenable as a disability can occur at any time as held in **Margaret Martha Byama V Alice A. Otwala & 3 others (2016) eKLR**.
28. That Circular No. 13/2017 was unconstitutional as it took away a right guaranteed by the constitution.
29. Counsel urged that the Petitioner had established a *prima facie* case.
30. As regards irreparable loss, counsel submitted that the Petitioner had a legitimate expectation of an extension of service and would suffer as he had no other source of income and he will continue to suffer if the order was not given and damages would be inadequate.
31. On balance of convenience, counsel urged that the Petitioner stood to suffer more as he had no source of livelihood and the Respondent would benefit from his work.

Respondent's submissions

32. Counsel submitted that as at the date of retirement, the Petitioner had not been registered as a person living with a disability and there was no basis for the Respondent to extend service.

33. That the Petitioner's prayer lies after hearing and determining the petition as the facts alleged in the application are part of the petition as orders whose effect is the final relief should not be granted at the interlocutory stage as it denies parties the opportunity to present their case. Reliance was made on the Court of Appeal decision in **Olive Mwihaki Mugenda & another V Okiya Omtata Okoiti & 4 others (2016) eKLR**.
34. Counsel submitted that an order of reinstatement of salary was entwined with reinstatement of employment and the applicant was no longer an employee of the Respondent.
35. That if the court was to issue the order of reinstatement of salary, it must be satisfied that the principles enunciated in **Giella V Cassman Brown (Supra)** were satisfied and the Petitioner had not established a *prima facie* case with a probability of success as he retired on 1st July, 2022 on attaining the age of 60.
36. That the Petitioner's loss was quantifiable and compensatable by way of damages and had not demonstrated the loss he stood to suffer if the termination was unlawful and the court had discretion to award compensation or order re-engagement if the petition is successful.

37. Reliance was made on the sentiments of the court in **Dennis Nyagaka Ratemo V The Kenya Film Commission & another (2014) eKLR** to urge that the reliefs sought by the Petitioner at this stage are available after hearing of the petition.
38. That the orders sought have been overtaken by events as the Notice of retirement was effected on 1st July, 2022, when the Applicant attained retirement age.
39. Counsel urged the court to dismiss the Notice of Motion dated 23rd September, 2022.

Determination

40. The Applicant/Petitioner herein is seeking temporal stay of the Respondent's notice of retirement issued on 18th February, 2021 pending the hearing and determination of the petition as well as payment of salary from August 2022 pending the hearing and determination of the petition.
41. The issues for determination are;
- (i) *Whether the applicant has met the threshold for the grant of the orders sought.*
 - (ii) *Whether the order sought are final or interlocutory.*

42. As regards the threshold for the grant of temporal injunction and as counsel for the parties have correctly stated, the guiding principles were enunciated in **Aniello Giella V Cassman Brown & Co. Ltd (Supra)** as follows;

*First, an applicant 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, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience."*

43. As regards *prima facie* case, in the often cited decision in **Mrao Ltd V First American Bank of Kenya Ltd & 2 others**, the Court of Appeal stated as follows;

*"A **prima facie** case in a civil application includes but is not confirmed to a "genuine and arguable case." It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."*

44. The court further held that;

"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."

45. See also **Nguruman Ltd V Jan Bonde Nielsen & 2 others (2014) eKLR**.

46. In the instant case, the applicant's case is that he is a person living with a disability and forwarded the relevant documents to the Respondent on an unidentified date.

47. The documents are unidentified as well.

48. Without delving into the merits of the petition, it is not in dispute that the Respondent notified the Applicant of his impending retirement at least 12 months before the effective date and the applicant availed the documents identified by the Respondent's letter for purposes of processing of pension.

49. However, in May 2021, the applicant applied for an extension of service by two (2) years to complete projects he had initiated at the school but the request was declined in early 2022 and the date of retirement arrived and passed without

incident until July 20th 2022 when documentation to prove the Applicant's disability were forwarded to the Respondent.

50. On the face of it, the documents on record reveal that the applicant's rights may have been violated by the Respondent.

51. The court is persuaded that the applicant has demonstrated a *prima facie* case with probability of success as expounded in **Habib Bank AG Zurich V Eugene Marion Yakub CA No. 43 of 1982** that;

"Probability of success means the court is only to gauge the strength of the plaintiff's case and not to adjudge the main suit at the stage since proof is only required at the hearing stage."

52. As regards irreparable loss or injury, the court is guided by the following authorities.

53. According to the Halsbury's Laws of England, 3rd Edition Vol. 21 paragraph 739 of 352,

". . . By the term irreparable injury is meant injury which is substantial and could never adequately remedied or atoned by damages, not injury which cannot possibly be repaired . . .

In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured . . .”

54. The concept of irreparable injury was also explained in **Pius Kipchirchir Kogo V Frank Kimeli Tenai (2018) eKLR**.
55. It requires no gainsaying that the remedy of temporary injunction is an equitable remedy which is granted to obviate substantial and irreparable injury.
56. Other than alleging that the Applicant will have no source of livelihood, no irreparable loss or injury had been shown.
57. In fact, the applicant quantified the amount involved and prayed for compensation for violation of constitutional rights.
58. In the upshot, the requirement of irreparable loss has not been established.
59. On the balance of convenience, in **Bryan Chebii Kipkoech V Barnabas Tuitoek Bargoria & another (2019) eKLR**, the court held that;

"The meaning of balance of convenience in favour of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favour of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. . ."

60. As regards the temporal stay of the Notice of retirement issued on 18th February, 2021 pending the hearing and determination of the petition, it is unclear why the applicant waited for more than one (1) year to apply for the injunction, which is an equitable remedy and must be sought without undue delay. The notice lapsed on the date of retirement and there is no notice to stay.
61. In sum, the applicant has not demonstrated the balance of convenience is in his favour.
62. As to whether the reliefs sought are final or interlocutory, there is no gainsaying the order of injunction is typically granted in interlocutory applications and its objects is to maintain the *status quo*.

63. However, the order to direct the Respondent to resume payment of the Applicant's salary and emoluments from August 2022 is not interlocutory. Since the Claimant's salary was discontinued on his retirement on 1st July, 2022, an order directing to Respondent to pay the salary would be tantamount to a reinstatement of the applicant to his former position as the Chief Principal, Nyambaria High School, which is a final remedy and which ought not be granted at the interlocutory stage as held in **Vivo Energy Kenya Ltd V Maloba Petrol Station Ltd & 3 others** and **Kenya Breweries Ltd & another V Washington O. Okeyo (2002) eKLR** among others.
64. In the upshot, the Notice of Motion dated 23rd September, 2022 is unmerited and accordingly dismissed.
65. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI
ON THIS 25TH DAY OF APRIL 2023**

**DR. JACOB GAKERI
JUDGE**

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI
JUDGE