



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL CASE NO. 103 OF 2011

GEORGE OMWANZA
KINANGA.....APPLICANT/PLAINTIFF

VERSUS

**NAKURU WATER & SANITATION AND SEWAGE COMPANY
LIMITED....RESPONDENT/DEFENDANT**

RULING

The applicant brought the present action against the defendant simultaneously with the motion dated 6th May, 2011 for orders that the latter be restrained by an order of injunction from terminating the applicant's employment with itself or in any manner interfering with his employment pending the hearing and determination of the suit herein. He also seeks that the respondent be ordered to pay him half salary with full allowances in terms of **section 62(1) of the Anti-Corruption and Economic Crimes Act (No.3 of 2003)**.

The application is premised on the grounds that the applicant was employed by the respondent. On 13th January, 2011 he was charged with a criminal offence in Nakuru ACC. No.1 of 2011. Prior to this, the respondent had suspended the applicant by a letter dated 11th January, 2011. The applicant contends further that that suspension was in violation of **section 62(1) of the Anti-Corruption and Economic Crimes Act** (the Act) as the respondent failed and/or refused to pay the applicant half of his salary and all the allowances. This forced the applicant through his present counsel to write to the respondent demanding that he be paid his entitlement while on suspension. The applicant being apprehensive that the respondent would convene a meeting to dismiss him promptly brought this action and application as explained earlier.

The respondent in response has maintained that even as the applicant brought the action, his employment had been terminated with three (instead of one) month's salary in lieu of notice hence an injunctive relief is not available to stop action already taken; that the respondent having lost confidence in the applicant in his performance of duty had to take this course of action. That in brief is the dispute before the court.

I have considered the arguments in the written submission as well as authority cited by both sides. At this

stage, the court is only called upon to consider whether the applicant has demonstrated a *prima facie* case with a probability of success at the trial, whether he will suffer substantial loss, incapable of compensation by an award of damages if the orders sought are not granted. However, should the court be in doubt as to the above two parameters, it must decide the matter on a balance of convenience. See **Giella V. Cassman Brown & Co. Ltd.** (1973) EA 358.

In considering the first issue, i.e. *prima facie* case, the court is not expected to make any definite findings of either fact or law as doing so is to decide the dispute on merit at an interlocutory stage. What the court is concerned with at this stage is to see if from the material presented, the applicant's rights have been infringed to warrant calling upon the respondent to rebut the claim of infringement. See **Mrao Ltd V. First American Bank of Kenya Ltd & 2 others** (2003) KLR 125.

The applicant argues that having been suspended, he remained an employee of the respondent and is entitled to half salary and all the allowances; that the respondents were, at least when he brought the action, in the process of convening a meeting to dismiss him. It is common ground that on 10th January 2011, the Managing Director of the respondent addressed a letter to the applicant in which he noted that the applicant having been arrested by officers from the Kenya Anti-Corruption Commission on allegations of corruption, the respondent regarded that arrest to constitute act of gross misconduct. The applicant was directed to show cause why disciplinary action should not be taken against him. In the meantime, he was suspended from the functions of his office pending investigations.

Three days later on 13th January 2011, the applicant was arraigned in court charged with three counts of **corruptly soliciting for a benefit** contrary to **section 39(3) (a)** as read with **section 48 (1)** of the **Anti-Corruption & Economic Crimes Act, No 3 of 2003**.

It is also apparent that through a resolution at the defendant's meeting held on 6th May 2011, the applicant's services were terminated and the same communicated to the applicant through registered post. The applicant has denied having received any communication conveying that decision.

Be that as in may, the position at this time is that the respondent has terminated the services of the applicant with three months' salary in lieu of notice and other terms. Before the decision to terminate applicant's services was reached, he had been on suspension with effect from 10th January 2011. The letter communicating that decision did not say anything about the applicant's salary or allowances but intimated that he would be notified of the way forward upon conclusion of the investigations.

Section 62 (1) (2) (3) and (4) of the **Act** provides as follows:

“62(1) A public officer who is charged with corruption or economic crime shall be suspended at half pay, with effect from the date of the charge.

(2) A suspended public officer who is on half pay shall continue to receive the full amount of any allowances.

(3) The public officer ceases to be suspended if the proceedings against him are discontinued or if he is acquitted.

(4) This section does not derogate from any power or requirement under any law under which the public officer may be suspended without pay or dismissed.”

It can readily be seen from the foregoing that the right to half pay and full amount of allowances is subject to any other statute making provision for suspension without pay or for dismissal.

As premised, at this stage, I am not concerned with the merit of the applicant's case but with whether it

discloses a *prima facie* case with probability of success. If the respondent had not moved quickly to dismiss the applicant, then the question of his entitlement to half pay and payment of all allowances would have been relevant at this stage as there is no provision in the **Employment Act, 2007** on suspension. But there being no dispute that the respondent has terminated the services of the applicant, the question is whether an order of injunction as prayed is available to the applicant.

The letter of termination is dated 9th May, 2011. It is alleged to have been posted to the applicant on 11th May, 2011. This action was brought on 19th May, 2011. As it was being brought, the decision to terminate the applicant's services had been taken. The horse had bolted from the stable. See **David Mbugua t/a Flash Commercial Agencies V. Pinkam Holdings Limited and Another**, H.C. Civil Appeal No.12 of 2000. No orders can be issued to restrain an action already taken.

If issued, such an order would be tantamount to reversing the decision of the respondent and converting the relief sought to an order of mandatory injunction. That is unacceptable. In conclusion on this aspect, I need only to quote the Court of Appeal in **Rift Valley Textiles Limited V. Edward Onyango Ogada**, Nakuru Civil Appeal No.27 of 1992 where it was explained as follows:

“.....the rules of natural justice have no application to simple contract of employment, unless the parties themselves have specifically provided in their contract that such rules shall apply. Where a notice period is provided in the contract of employment, as was the case here..... an employer need not assign any reason for giving the notice to terminate the contract and if the employer is not obliged to give a reason, the question of offering to the employee a chance to be heard before giving the notice does not and cannot arise. Again, if the employee was to be minded to leave his employment, say for a better-paid job and he gives notice of his intention to leave, it would be ridiculous for the employer to insist that he be given a hearing before the employee leaves.”

It must be noted that **Section 43** of the **Employment Act, 2007** requires the employer to prove the reason or reasons for termination. Where the employer fails to do so, the termination of employment is deemed to be unfair. **Section 49** of that **Act** enumerates the remedies available to an employee whose termination is found to be unfair or who has been wrongfully dismissed.

Looking at those remedies and the totality of the pleadings, I am of the view that the applicant does not have a *prima facie* case with a probability of success at the hearing. Again, based on those remedies, the damage the applicant stands to suffer is capable of compensation. I need not consider the last ground of **Giella** case. See **Kenya Commercial Finance Company Limited V. Afraha Education Society**. (2001)1EA 86 at 89.

For the reasons stated, the application fails and is dismissed with costs.

Dated, Signed and Delivered at Nakuru this 27th day of January, 2012.

W. OUKO

JUDGE