



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 620 of 2004

SAMMY MUHIA & 2 OTHERS PLAINTIFF

VERSUS

KENYA POWER & LIGHTING COMPANY LIMITED..... DEFENDANT

ORDER

The plaintiffs application dated 9th June, 2004 was filed under certificate of urgency on 11th June, 2004. The said application is based on the plaint dated 9th June, 2004 in which the plaintiffs as casual employees of the defendant The Kenya Power and Lighting Company Limited, seek judgment for:-

- a) A declaration that the practice of giving short term contracts renewable indefinitely is wrongful and contrary to law
- b) A declaration that the plaintiff's are entitled to long term contracts of employment similar to those enjoyed by other employees of the defendant on permanent and pensionable terms with effect from their original letters of appointment.
- c) An order restraining the defendant company by itself, its directors, officers, servants or any of them or otherwise howsoever be restrained from terminating or otherwise interfering with the plaintiff's employment contracts save on terms similar to those under permanent and pensionable terms.
- d) Damages
- e) Costs
- f) Interest on © and (d) above
- g) Any such orders, writs and/or directions considered appropriate for the purpose of enforcing or securing the enforcement of the fundamental rights breached in relation to the plaintiffs.

The plaint was filed on 11th June, 2004 and on the same day the chamber summons dated 9th June 2004.

In the plaint, the 3 plaintiffs contended that they have instituted the proceedings on their own behalf and in addition seek leave of the Honourable court to represent all other casual employees, who have been employed by the defendant on diverse dates beginning in 1996 to date. In the said application the plaintiffs claim that this suit will affect at least 1000 employees of the Kenya Power and Lighting Company Limited who have been serving on temporary employment contracts for periods ranging from 12 years to 1 month.

The said application sought the following prayers:-

1. The plaintiffs be granted leave to sue on behalf of all other casual employees of the defendant
2. Notice of the institution of the suit be advertised in at least one of the daily newspapers with a national circulation.
3. The defendant, Kenya Power & Lighting Company Limited by itself directors, officers, servant or agents or any of them or otherwise howsoever BE RESTRAINED FROM terminating otherwise interfering with the plaintiff employment contracts, pending the determination of this suit or further orders.
4. Costs of this application be provided for.

The court subsequently granted the first 2 prayers and left the prayer for injunction to be heard inter partes. Before the injunction application was heard on its merits, the plaintiffs filed a Notice of Motion on 7th July, 2004 under, Inter alia, the provisions of section 84 of the Constitution of Kenya and Rules 10(a) and (b) of the Constitution of Kenya (Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules, 2001. The suit motion seeks inter alia, an order that the said motion and the Chamber summons referred to earlier be heard together numerous declaratory orders, damages etc under the provisions of the Constitution. In other words the Notice of Motion is a Constitutional application alleging the infringement of the plaintiff's Fundamental Rights under the Constitution by the defendant. The declarations sought include the following:-

****A declaration that the plaintiff's entitlement to contractual terms on permanent and pensionable terms in the Employment. Act and other laws relating to employment has been violated and accordingly the plaintiff's fundamental rights to the due protection of the Law guaranteed by section 70(a) of the Constitution – has been breached in relation to the plaintiffs.***

****A declaration that the keeping of the plaintiffs on short term contracts without attendant benefits available to other employees of the defendant has resulted in the breach of the plaintiffs fundamental rights guaranteed under section 73 of the Constitution not to be held in servitude.***

The said 2 applications was placed before me on 14th July, 2004, 2 days ago for hearing. Counsel for the parties had agreed that the question of the court's jurisdiction be dealt with at the commencement. The matter was placed before me and was to be heard on priority basis because the last temporary contracts of employment of the 3 plaintiffs are scheduled to expire on 16th July, 2004 or upon one day's notice being given before the said date. I have perused the 3 letters pertaining to the plaintiffs and I am satisfied that indeed their employments if not terminated earlier will expire on 16th July, 2004.

Before commencement of the hearing before me, upon consideration of the matter before me I made the following orders.

1. An order of stay of proceedings in the suit to investigate and determine the questions raised by the application and which are of a Constitutional Nature.
2. An order of Consolidation of the Notice of motion under s 84 of the Constitution and the chamber summons for the injunction herein.
3. An order permitting the immediate hearing of the aforesaid chamber summons due to the urgency thereof albeit the stay proceedings.

I heard counsel between 11 a.m and 2 30 p.m on 14th July 2004. I reserved my Ruling and ordered that I

would deliver it today, 16th July, 2004 at 2.30 pm. I would like to state that given the very short time that I had from Wednesday afternoon - until today, my busy schedule as I continued to hear other matters and the complexity of the issues raised and the importance of this application and possible implication either way, I found that I am unable to do justice to the parties and the issues by giving a considered and reasoned decision within the given time.

I toyed with the idea of thoroughly studying the facts and the law presented to me and to give my decision but reserve the delivery of the reasons for it. However, I have not been able to reach a final and conclusive decision in my mind on the issues and questions for determination and therefore have neither a decision or reasons for it to be reserved. Even if I had a conclusive decision today, I would not have been inclined to deliver it and reserve the reasons considering the nature of this case and circumstances thereof. This is a Constitutional reference or application and raises very important and significant questions and relates to the 3 plaintiffs but with hundreds waiting on the side-lines to be formally enjoined. It is a public interest case or I am aware that there are other similar cases pending in our courts. Whatever decision I reach is appealable but it would still have longtime implications in the long run whether in the decision itself as any preferred appeal. It is my desire that I take the challenge that any decision I make stands the test of time.

As a result, I do hereby defer my Ruling to a date to be given on Notice in the new term which commences on or about 15th September, 2004 and after I return from leave on 20th September, 2004.

So, what should happen in the meantime, considering that the plaintiff's employment contracts expire today, at 5 pm. This has been a most difficult decision to make. On one hand, if I grant an Interim Injunction pending the delivery of ruling, I would be granting orders which the respondent would mightily be aggrieved with and there is a possibility that if I find in favour of the respondent ultimately, that I have no legal basis to have granted the said orders or worse that I have no jurisdiction to do so. On the other hand, if I do not grant an interim order, whether the injunction or other order, the contracts of employment will end today at 5 pm, and as the plaintiffs apprehend, their cause of action under the provision of the Constitution would disappear and the motion rendered nugatory. The plaintiffs claim that their suit goes beyond a claim for damages. Their's is a Constitutional claim – enforcement of their fundamental rights.

It is in the light of the foregoing that one way or the other I have to make a decision. I have considered that the effect of any order in favour of the applicants would be of a mandatory nature and compulsive, that at this stage there is the question of mutuality of remedies, that the relief of injunction is an equitable one. I have also considered the lengths of period that the applicants have been employed by the defendant from time to time, the importance of this Constitutional reference to the jurisprudence of our country and development of our law. Finally I have considered with some little comfort, I hope not misplaced, that the Kenya Power & Lighting Company Limited is still a company wholly owned by the Government of the Republic of Kenya and the applicants are Kenyans and tax-payers one way or the other, even if they have been casuals.

With more confidence, I take comfort and rely on the Court of Appeal decision in Civil Appeal No 110 of 2001 – RASHID ODHIAMBO ALOGGOH & 2 OTHERS V HACO INDUSTRIES LIMITED a very similar case as this one filed by casual employees, where the court said:-

“... But if the court were to find that the period or admitted facts amount to a constitute a contravention of any of the Constitutional provisions relied on by the appellants, then in that event the court would move to the last stage, namely, the remedy or remedies to which the appellants would be entitled to and the best guide on the types of remedies available to be found in section 84(2) of the Constitution where the High Court is authorized to:-

“... make such orders issue, such writs and give such directions as it may consider appropriate for the purposes of enforcing or securing the enforcement of any of the provisions of section 70 or to 83 inclusive.”

As the Chamber Summons for Injunction has been consolidated with the motion or is at the very least to be considered in the light of the context and existence of the Constitutional application, and also because I have not made any decision my mind must be open as I do not know which side I will go.

In the light of the foregoing, invoking the court's inherent jurisdiction and exercising the court's discretion and to ensure that the subtratum of the application does not disappear thereby rendering the Constitutional reference or application nugatory, I do hereby grant prayer 4 of the Chamber Summons for a limited period until 30th October, 2004 or the date the court will deliver its ruling whichever is the earlier.

It is common ground that to date this application is in respect of the 3 plaintiffs and so shall the Order be confined to their employment contracts respectively.

Orders accordingly.

Dated and delivered at Nairobi this 16th day of July 2004.

MOHAMMED IBRAHIM

JUDGE

Coram: Ibrahim Judge

Court clerk Chacha

Mr Gitobu Imanyara for applicant

Mr Mwangi for respondent

Ruling delivered in their presence.