



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, J.J.A)**

**CIVIL APPEAL NO. 284 OF 2016**

**BETWEEN**

**KENYA ELECTRICITY TRANSMISSION**

**COMPANY LIMITED.....APPELLANT**

**AND**

**AGNES ONGADI.....RESPONDENT**

*(Being an appeal from the decision of the Employment and Labour Relations Court of Kenya at*

*Nairobi (M. Mbaru, J.) made on 13<sup>th</sup> October, 2016*

**in**

**E.L.R.C. No. 1406 of 2016)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

[1] This is an appeal from the Ruling of Employment and Labour Relations Court (ELC) allowing the respondent's interlocutory application in the following terms:

**“(a) the respondent is hereby restrained from recruiting other persons for the positions held by the claimant as Chief Manager Human Capital and Administration or as Chief Manager Human Resource and Administration;**

**(b) The disciplinary process against the claimant commenced vide show cause dated 5<sup>th</sup> April 2016 is unlawful and a nullity;**

**(c) The suspension against the claimant commencing 28<sup>th</sup> April, 2016 is hereby lifted;**

**(d) the claimant shall resume her duties as allocated and assigned by her supervisor with the respondent on 17<sup>th</sup> October, 2016 at 8.30 a.m.;**

**(e) The claimant shall be paid all salaries and benefits due to her office as held 1<sup>st</sup> July, 2016.”**

[2] The respondent is employed by the appellant (a Government owned company) as Chief Manager, Human Capital and Administration on permanent and pensionable terms.

On 25<sup>th</sup> April, 2016, the Ag. Managing Director of the appellant issued a “**show cause letter**” to the respondent to show cause why disciplinary action should not be taken against her for insubordination and the violating Board’s authority. The letter alleged that the respondent had unilaterally varied the decision of the Board in connection with the employment of four employees and selectively approved the payment of arrears to one employee. The letter further alleged that the action of the respondent constituted gross misconduct. The respondent responded to the allegations through a letter dated 6<sup>th</sup> April, 2016. By a letter dated 28<sup>th</sup> April, 2016 the Managing Director communicated to the respondent the decision of the Board that her response had been found unsatisfactory and that the Board of Directors had approved her suspension with immediate effect.

[3] By a letter dated 10<sup>th</sup> June, 2016, the respondent was informed by the Managing Director that the Board had sanctioned a special audit on Human Resource Policies, Procedures and Controls of Human Capital & Administration Division which revealed a number of weaknesses and non compliance with HR policies which were highlighted in the letter including irregular recruitment of five employees. The respondent was required to respond, which she did by a letter dated 13<sup>th</sup> June, 2016.

[4] By a letter dated 5<sup>th</sup> July, 2016 the Managing Director requested the appellant to appear before the Staff and Remuneration Committee of the Board for disciplinary hearing. The respondent prepared a comprehensive written response to the allegation which she submitted to the committee and by her own admission, made oral representations. A full Board meeting was scheduled for 21<sup>st</sup> July, 2016 for purpose of deliberating on the report by the Staff and Remuneration Committee.

[5] By a letter dated 14<sup>th</sup> July, 2016, the Managing Director communicated to staff in part as follows:

**“RE: RESTRUCTURING**

***Following Board approval to implement the new organizational structure as per our new strategic plan, the following senior officers have been appointed on acting capacity effective 1<sup>st</sup> July 2016 in the following Divisions until positions are filled competitively.”***

The letter named the six offices and officers appointed in acting capacity and said:

***“This follows the declaration of their former positions redundant.”***

The appellant proceeded to publicize the vacancies and sought applications. The office of the respondent was one of the six offices affected and she was informed by a letter dated 14<sup>th</sup> July, 2016 as follows:

***“Following Board Approval to implement the new company structure, the office of the Chief Manager, Human Capital & Administration has become redundant as the role has been taken over by the Senior Manager Human Resource & Administration. You have therefore been appointed Ag. Senior Manager, Human Resources & Administration effective 1<sup>st</sup> July 2016 as the company embarks on a competitive recruitment process.”***

[6] The disciplinary process was not completed as the respondent filed a statement of claim in the ELC on 18<sup>th</sup> July 2016 and an accompanying notice of motion and obtained *ex-parte* orders on the same day restraining the appellant from recruiting any person to fill her position and staying the disciplinary process until the notice of motion was heard *inter-partes*. By the statement of claim, the respondent alleged, amongst other things, that the disciplinary proceedings contravened the provisions of the appellant’s Human Resources Policies and Procedures Manual, (HR Manual) and Article 47 of the

Constitution on fair administrative action. The respondent also alleged that the abolition of the office of the Chief Manager was in violation of the law and her rights as an employee. The main reliefs sought in the claim were a permanent injunction to restrain the appellant from recruiting a person for position of Chief Manager, a declaration that the disciplinary process is irregular, unlawful and a nullity; and order lifting her suspension and a mandatory injunction to reinstate the respondent. The appellant filed a comprehensive response to the claim. By the notice of motion, the respondent sought an order staying the suspension letter dated 28<sup>th</sup> April 2016 and reinstatement pending the determination of the application.

[7] The notice of motion was supported by the respondent's affidavit and various documents in which the respondent contended that the disciplinary process was flawed and that declaring her office redundant, is a confirmation that the disciplinary process is a sham to get rid of her.

Mr. Barasa, the Managing Director and Chief Executive Officer of the appellant swore a lengthy affidavit demonstrating that the disciplinary process was justified and regularly conducted. In response, the respondent filed a lengthy affidavit annexing more documents, and this elicited a further replying affidavit from Mr. Barasa.

[8] Upon hearing the notice of motion, the learned Judge crafted a long ruling and stated in paragraph 54 thereof:

***“On that basis that there is challenge to the manner and procedures applied against the Claimant during the disciplinary meeting held on 13<sup>th</sup> July 2016, upon failure by the respondent to demonstrate that indeed the due process of the law was followed, I find good reason to find that the process lacked fairness and the resulting decision, whether made or pending was clothed with an illegality. Such a process cannot be allowed to proceed as its foundation is lost”.***

In paragraph 59 of the Ruling, the learned Judge said in part:

***“...I find no good faith in the processes and procedures adopted by the respondent from the time of suspension, 28<sup>th</sup> April 2016 to the disciplinary meeting called for 13<sup>th</sup> July 2016, and subsequent events leading to the notices and memo on a restructuring that lack basis. To proceed on such flaws would negate the principles of fair labour relations and allow an employer geared to remove an employee from her employment for no good cause.”***

Lastly, in paragraph 62 of the Ruling, the learned Judge stated that the orders sought in the memorandum of claim and in the application are similar, save for the alternative claim for compensation and damages for unfair termination; that the court had lifted the respondent's suspension, stopped the disciplinary process and the recruitment of a replacement and reinstated the respondent to her position and remarked;

***“The main claim thus is academic. It is hereby dealt with.”***

The court proceeded to make the orders quoted in paragraph 1 of this judgment.

Before dealing with the disciplinary process, the court had earlier comprehensively considered the issue of redundancy and the applicable law and made a finding that it contravened the provisions of section 40 of the Employment Act.

[9] The appellant is aggrieved by the Ruling and orders of the Court on grounds that the trial Judge erred in issuing final orders at an interlocutory stage; in acting in excess of jurisdiction by granting orders that were not prayed for; in determining the application on a single issue of redundancy; in prematurely arriving at conclusions relating to disciplinary proceedings without any basis or justification; in exhibiting open bias and in failing to consider any other remedies available to address the respondent's complaint.

**Ms. Jan Mohammed** for the appellant and **Eric Mutua** counsel for the respondent relied on the respective written submissions already filed which each highlighted.

[10] The appellant submits that the learned judge made final orders based on contested affidavits filed in an interlocutory application without having the advantage of hearing evidence from witnesses thereby violating the appellant's constitutional right to fair hearing. The appellant further submitted that parties are bound by their pleadings and that the learned Judge acted in excess of jurisdiction by granting orders which were not prayed for in the application. The appellant relied on **Vivo Energy Kenya Limited v. Maloba Petrol Station & 3 Others [2015] eKLR** where this

Court said in respect to an interlocutory application:

***"...We are satisfied that the learned Judge erred by making several definitive conclusions without the advantage of hearing and seeing witnesses who have been subjected to cross-examination the time tested device of testing the truth or falsity of evidence."***

The appellant further relied on **Galaxy Paints Company Limited v Falcon Guards Limited [2000] eKLR** for the proposition that issues for determination flow from the pleadings and that unless the pleadings are amended, the trial court may only pronounce judgment on the issues arising from the pleadings.

On the other hand, the respondent's counsel submitted that a court has jurisdiction to issue final orders in form of a mandatory injunction at an interlocutory stage where the claimant's case is very clear and where the effect of the order is to dispose of the entire suit. He referred to the facts of the case in attempt to demonstrate that the respondent's case was very clear. Learned counsel cited **Olive Mwihaki Muganda & Another v. Okiya Omtata Okoiti & 4 Others [2016] eKLR** for the proposition that if there is a very strong prima facie case, the court may grant an interim relief though it amounts to granting the final relief itself. The appellant also relied on **Kenya breweries Limited & 2 Others v Washington Okeyo 2002 eKLR** for the proposition that an interlocutory injunction can be granted both at the interlocutory stage and at the hearing.

On the issue of granting orders that were not prayed for, the appellant's counsel submitted that the court had inherent jurisdiction to make orders for the ends of justice and that the effect of granting the orders was to restore the status quo.

[11] The grounds against the granting final orders and granting orders not prayed for will be considered together. The court was seized of the notice of motion which sought stay of the suspension letter dated 28<sup>th</sup> April 2016 and reinstatement pending the determination of the suit on the grounds stated in the application. That is the application which was heard and on which the respective counsel made extensive submissions. After the hearing of the application, the respective counsel expected the court to pronounce its decision on the application. The court had jurisdiction to either allow or dismiss the application or to partly allow the application or in its inherent jurisdiction, to grant any other appropriate relief in the circumstances. The duty of the court at the interlocutory stage was to assess the strength of each party's case without determination of the dispute on the merits, and render its decision, of course, judicially. This was a seriously contested dispute both on the facts and on the law particularly on the construction and application of the relevant provisions of the HR Manual and the provisions of law relating to redundancy and reinstatement. The detailed affidavits, documents and the lengthy ruling of the court attest to this.

[12] As the ruling of the learned Judge show, the court unmistakably departed from its duty to determine the application and embarked on an exhaustive analysis of the dispute and decided the entire dispute on the merits at an interlocutory stage. That deliberate course, as the learned Judge appreciated and remarked, rendered the suit academic and finalized. This was without hearing evidence and testing the evidence by cross-examination and without the valuable contribution of the respective counsel for the parties.

Furthermore, the court overlooked the reliefs sought in the application and instead granted remedies sought in the memorandum of the claim and even reliefs which had not been sought. It is not surprising that the appellant's counsel now contends, quite correctly so, that the nature of the orders granted handed the respondent a permanent employment, thereby depriving the appellant its legal rights as an employer.

This is not a case where an interim relief incidentally amounts to granting a final relief. Rather, it is a case where the court consciously determined the main suit through an interlocutory application and granted the reliefs in the suit instead of the relief sought in the interlocutory application without affording the appellant a fair opportunity to be heard

In doing so, the court acted in excess of jurisdiction. In the circumstances of this case, the dispute could not be fairly determined without the formal hearing of the suit.

[13] That finding is sufficient to dispose of the appeal save to say that the court did not investigate whether or not the reasons given in the suspension letter justified the suspension of the respondent from the standpoint of the appellant seeing that as section 43(2) of the Employment Act provides that it is the reason or reasons that the employer genuinely believed to exist at the time that counts and not what the court considers to be reasonable.

[14] The appellant's counsel asks that the appeal be allowed. The respondent suggests that in the event that the court finds that the court erred in determining the matter at an interlocutory stage, it should allow the application as prayed and then remit the suit to the ELC for hearing. The appellant opposes that course saying that there is no cross-appeal. As our decision is dependent on the error of jurisdiction, the just course is to allow the respondent to prosecute the suit so that the issues raised can be determined on merits. That is why we have refrained from delving into the merits of the dispute. From the nature of the dispute, it is our view that the orders sought in the application cannot be properly granted at an interlocutory stage.

The just order would be to protect the respondent's office pending the resolution of the dispute. The appeal is allowed because of the error committed by the court. Thus, it is just that the costs of the appeal should abide the determination of the dispute.

[15] For the above reasons;

- (i) The appeal is allowed.**
- (ii) The ruling and orders of the court appealed from are set aside in their entirety**
- (iii) The memorandum of claim and the response to the claim (the main suit) shall be heard by a judge other than M. Mbaru, J.**
- (iv) The appellant is restrained from recruiting another person to the position of Senior Manager, Human Resource & Administration or Chief Manager pending either the determination of the suit or completion of the disciplinary process, whichever comes first.**
- (v) The costs of the appeal shall be costs in the main suit.**

Orders accordingly.

*Dated and delivered at Nairobi this 9<sup>th</sup> day of February, 2018.*

***E. M. GITHINJI***

.....

***JUDGE OF APPEAL***

***H. M. OKWENGU***

.....

**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

**DEPUTY REGISTRAR**