



**Mudasia v Kansai Plascon Kenya Limited (Cause E159 of 2022)
[2022] KEELRC 4069 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 4069 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E159 OF 2022
M MBARÚ, J
JUNE 30, 2022**

BETWEEN

NICHOLAS ABWUNZA MUDASIA CLAIMANT

AND

KANSAI PLASCON KENYA LIMITED RESPONDENT

RULING

1. The claimant filed application dated March 15, 2022 seeking for orders that pending determination of this application the court be pleased to grant a conservatory order prohibiting and restraining the respondent from advertising or recruiting in any manner to replace the claimant in his position as the group human resource and administration manager of the respondent.
2. The application is supported by the affidavit of the claimant and on the grounds that he was employed by the respondent on October 19, 2020 and confirmed on July 21, 2021 as the group human resource and administration manager. It was a term of the contract that salary would be reviewed annually but the claimant was ignored in this regard while other employees received a 6% salary review.
3. In his supporting affidavit and further affidavit, the claimant avers that on February 1, 2022 the claimant wrote to the respondent's chief executive officer raising issues in relation to possible human resource related malpractices within the business and seeking for a meeting to discuss the same and which related to recruitment of expatriates which had raised concerns with Kenyans who feared they would be replaced by the expatriates, summons to the respondent from Immigration and clarifications on specific internal email discussions relating to single payment of up to \$20,000 to facilitate a work permit for the CEO after application was rejected. There was need for clarification from the CEO to the claimant that he had not terminated some senior employees including the Managing Director – Kansai Plascon Uganda among other senior employees. The claimant was required to obtain a residence pass in Kenya despite not meeting the criteria set by *Immigration Act* and the regulations set therein. There was discrimination against the claimant who was the most senior local employee of the respondent.



4. The claimant also avers that instead of the CEO calling for a meeting to address the noted concerns on February 3, 2022 he was issued with a notice to show cause in allegations of misuse of fuel, continuous disregard of the local organisation structure and creating discord among senior management. No warning had issued and the respondent was simply fishing for information and the notice issued after the claimant had requested for a meeting with the CEO.
5. It is a requirement under section 12 of the Employment Act, 2007 (the Act) that an employer with over 50 employees should have internal disciplinary procedures and in this case none exists.
6. On February 5, 2022 the claimant responded to the show cause notice and denied the allegations and on the same date he was suspended until February 15, 2022 but on February 9, 2022 he was invited to a disciplinary meeting and at the hearing were two employees, John Kabiru the human resource manager and Duncan Njaramba the chief accountant who were biased since the claimant had issued them with warnings with regard to work performance.
7. On February 11, 2022 the claimant was issued with a letter termination his employment despite the matters addressed in the show cause notice not being proved. There were no policy guidelines on disciplinary matters to justify the procedures undertaken nor was an appeal allowed leading to an unfair termination of employment contrary to the Constitution and the law.
8. The respondent is in flagrant violation of constitutional and legal rights and unless the orders sought in the interim are granted the claimant shall suffer irreparable loss and damage since the position he held with the respondent shall be replaced and his orders seeking reinstatement shall be spent before the hearing of his suit.
9. In reply, the respondent filed the replying affidavit of Bernard Ogango the HR and Admin officer and an employee of the respondent who avers that the claimant was employed as the group human resource and administration manager on July 21, 2021 and worked until February 11, 2022 when his employment was terminated by the respondent for gross misconduct in accordance with section 44(4) (g) of the Act.
10. Before termination of employment, the claimant was issued with warnings and suspended over his conduct for misuse of company fuel allowances where the claimant had questionable consumption of fuel using the fuel card while on a foreign official trip, defrauding the company by presenting fake and falsified copies of fuel receipts for reimbursement, breaching the organisation's local structure by imposing and forcefully involving himself in local daily company operations, creating discord among senior managers and interfering with responsibilities of the company maintenance team in the construction of new fabricated offices with the intention of manipulating the awarding of tenders to his preferred vendors contrary to laid down procedures.
11. The claimant replied to the show cause notice but he failed to give satisfactory responses. He was invited to a hearing and allowed to have an employee of his choice and the disciplinary committee made a recommendation to terminate employment which was effected on February 11, 2022 for gross misconduct.
12. The respondent has a policy to review salaries annually. Such are dependent on the company's performance and individual employee appraisal rating above 70%.
13. The alleged corruption activities are denied and are without proof and there is no law forbidding junior employees from attending a disciplinary committee on behalf of the employer. The claimant failed to safeguard the company property and leading to gross misconduct which justified termination of employment and the orders sought should not issue.



Both parties addressed the application by way of written submissions.

Determination

14. The claimant is seeking to stop the respondent from advertising or recruiting in the position of Group Human Resource and administration manager a position he held until February 11, 2022 when his employment was terminated for reasons he asserts were unfair and without justification. That such sanction issued when he raised various concerns with the respondent particular the employment of expatriates to replace local employees, immigration matters for the expatriates and concerns relating to management of the business.
15. Whereas the employer has the prerogative to manage the business and should be allowed to re-organise the human capital to suit the business and the court should not interfere with such management prerogatives as held in *Alfred Kinyungu v Bomas of Kenya* [2013] eKLR, the Act under section 5 specifically prohibits discriminatory practices at the workplace in any manner and the court should stop all else and interrogate once such matter is raised and require the employer to address.
16. The rationale is that In employment and labour relations, the employer has the prerogative to deal with discipline of its employee(s) by application of the internal mechanisms, disciplinary measures or human resource management policies. Such prerogative can only be interfered with by the court where there is apparent illegality or apparent violation of the *Constitution* or the law as held in the case of *Mulwa Msanifu Kombo v Kenya Airways Ltd* and in *Prof Francis M Njeru v Jomo Kenyatta University of Agriculture & Technology* [2013] eKLR.
section 5(4) of the Act directs that;
 - (4) It is not discrimination to—
 - (a) take affirmative action measures consistent with the promotion of equality or the elimination of discrimination in the workplace;
 - (b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job;
 - (c) employ a citizen in accordance with the national employment policy; or
 - (d) restrict access to limited categories of employment where it is necessary in the interest of state security.
17. the claimant has based his claim with regard to alleged discriminatory practices of the respondent in employing expatriates as against local employees which on the face of it go contrary to the mandatory provisions of section 5 of the Act which forbids discriminatory practices whether directly or indirectly and if applicable such is contrary to article 27 and 41 of the *Constitution*, 2010 with regard to prohibition of discrimination and unfair labour practices.
18. Pursuant to sections 5(6) and (7) of the Act, an employer who is alleged to commit such discriminatory practices at the workplace commits an offence and has the burden of proving that the discrimination is not taking place as alleged or that the same is justified and based on the law or state policy.
 - (6) An employer who contravenes the provision of the section commits an offence.
 - (7) In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section.



19. This inquiry must be undertaken first before the court can issue any further directions and to secure the subject of the suit, the employment of the claimant, it will serve justice to issue orders sought in the interim;
20. In the interim, a conservatory order is hereby issued prohibiting the respondent or its agents from advertising or replacing the claimant in the position held as the group human resource and administration manager until the suit herein is heard and determined.

Orders accordingly.

DELIVERED IN COURT AT NAIROBI THIS 30TH DAY OF JUNE, 2022.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant:

..... and

