



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. E6501 OF 2020

MICHAEL MUNGA MAHIA.....CLAIMANT

VERSUS

KENYA UNIVERSITIES & COLLEGES

CENTRAL PLACEMENT SERVICE.....RESPONDENT

RULING

1. The Notice of Motion application before me is the one seeking conservatory orders, to wit:-

- a. This application be certified urgent and service be dispensed with in the first instance.
- b. Pending *inter partes* hearing and determination of this application a preservatory/conservatory order be issued in the first instance, restraining the Respondents by themselves, or by their servants, agents or otherwise howsoever from implementing or enforcing the purported decision made on the 11th of November 2020, purporting to summarily dismiss the Claimant.
- c. Pending the hearing and determination of this application a preservatory/conservatory order be issued in the first instance, restraining the Respondents by themselves, or by their servants, agents or otherwise howsoever from interfering with, stopping, blocking the Claimant/Applicant from resuming his employment forthwith and from hindering him from carrying out his functions as an employee of the Respondent.
- d. Directions be given as to an early *inter partes* date of prayers E to J herein below.
- e. Pending hearing and determination of this claim, preservatory/conservatory order be issued in the first instance, restraining the Respondents by themselves, or by their servants, agents or otherwise howsoever from implementing or enforcing the purported decision made on 11th of November 2020, purporting to summarily dismiss the Claimant/Applicant.
- f. Pending hearing and determination of the Claim herein a preservatory/conservatory order be issued in the first instance, restraining the Respondents by themselves, or by their servants, agents or otherwise howsoever from interfering with, stopping, blocking the Claimant/Applicant from resuming his employment forthwith and from hindering him from carrying out his functions as an employee of the Respondent.
- g. Reinstatement of the Claimant in the service of the Respondent with effect from 11.11.2020 in the position held before the termination without a break in his service with full prevailing benefits and to continue in that service until the due date of retirement or lawful separation.
- h. An order from this Court barring the Respondents by themselves, servants or agents whatsoever from victimizing and subjecting the Claimant to vendetta, witch hunt, terror, psychological torture, intimidation, impunity, indignity, torment, ridicule, professional dishonour, stereotyping, profiling, vilifying the Claimant in the devious scheme to hound him out of employment.
- i. Any such further or other Order as this Court may deem fit and just to grant to safeguard the Claimant's constitutional fundamental right to fair labour practices.
- j. Costs of this application be borne by the Respondent.

2. The application was premised on grounds on the face of the motion as well as the affidavit of Michael Mungai Mahia the applicant herein. In brief, the grounds and affidavit assert that through a letter dated 11th November 2020, the Claimant was summarily dismissed on account of the alleged breach of the Public Finance Management Act and the Public Procurement and Disposal Act. It was asserted the dismissal was based on the procurement of two servers, which procurement the Board of the Respondent queried two years after delivery. He asserts the dismissal was unprocedural as the Board of the Respondent acted in excess of its authority by holding disciplinary hearings which are a preserve of the Human Resource Advisory Committee. The Claimant asserted that the dismissal letter indicated that in its meeting of 30th September 2020 determined that the Claimant was guilty of the disciplinary offences complained of yet the Claimant was heard on the 11th November 2020 which shows that the disciplinary hearing was only a farce meant to sanitize an already predetermined outcome. He asserted that the Board gave him 30 days to appeal its decision as opposed to the 90 days prescribed in the Respondent's HR manual, which in addition to the matters aforesaid violated his rights to a fair hearing and fair administrative action.

3. The Respondent is opposed to the motion. In submissions filed, the Respondent asserts that the Claimant received vide letter dated 20th July 2020 of charges in accordance with Clause 11.3.2 of the Respondent's Human Resources Policies and Procedures Manual calling upon him to give an explanation as a member of the Tender Evaluation Committee and the Inspection and Acceptance Committee why the law was breached with regard to the procurement of servers. He was required to answer to the charges within 21 days and in response to the charges the Claimant drew letters in response. Subsequently the Claimant was invited on 2nd September 2020 to a Board Disciplinary Meeting hearing on 14th September 2020 which was later postponed to 11th November 2020. The Respondent submitted that the issues for determination were whether the Claimant had established a *prima facie* case with a probability of success, whether the Claimant will suffer irreparable damage not compensable by an award of damages (for reinstatement) herein sought are not granted; whether the Claimant is deserving of the orders sought on a balance of probabilities; whether the granting of the injunctive reliefs herein sought would be lowest risk of injustice. The Respondent cited the case of **Giella v Cassman Brown & Co. [1973] EA 358** as well as the case of **Suleiman v Amboseli Resort Ltd [2004] KLR 589** where Ojwang J. (as he then was) held:-

4. The Respondent submitted that the pleadings demonstrate the issue in contention is as to whether the Respondent's Human Resource Policies and Procedures Manual was followed in the disciplinary proceedings against the Claimant. The Respondent submitted that it would seem from the proceedings that the Claimant's only contention is that the disciplinary proceedings against him ought to have been conducted by the Human Resource Advisory Committee and not the Board as was the case herein while the Respondent contends that the Board had the prerogative to conduct the proceedings on account of the circumstances of this case and the cadre of staff issued with the letters of charge by the Board. The Respondent cited the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] eKLR** where the Court held:-

A prima facie case is more than an arguable case. 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.

The Respondent submitted that the Court should be persuaded to dismiss the motion as the remedies sought in the suit can be awarded after the hearing of the case on the merits.

5. The main thrust of the motion by the Claimant is injunctive relief. The *locus classicus* in this regard is the oft cited case of **Giella v Cassman Brown (supra)**. The Claimant was dismissed for alleged breaches of procurement laws and procedures. He takes umbrage that his termination was after a hearing by the Board as opposed to the Human Resources Advisory Committee (HRAC) of the Respondent which he asserts ought to have heard him with a recourse to an appeal to the Board. He asserts, *inter alia*, instead the Board heard his case thus eliminating the possibility of a review of the decision. In the case of **Giella v Cassman Brown (supra)** the Court held:-

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 an application on the balance of convenience.

6. The Court warns itself that at an interlocutory stage it cannot determine the matter on the merits without hearing the parties on the merits. Indeed, the Respondent has not been able to rebut the factual assertions of the Claimant due to a mix up on representation. The Claimant in my view has not demonstrated a *prima facie* case with a probability of success. Sure, he has the right to challenge the hearing conducted by the Board as opposed to the HRAC but would his success leave him bereft of remedy? I think not. As the case will be determined within 3 years he can be reinstated and where reinstatement will not be a fit remedy he can be compensated in damages per the law. In my considered view the motion has no merit and is accordingly only fit for dismissal. Each party to bear their own costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JANUARY 2021.

Nzioki wa Makau

JUDGE