



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. E503 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

JANE KAIMURI DAVID.....CLAIMANT

VERSUS

CO-OPERATIVE BANK SAVINGS AND

CREDIT SOCIETY LIMITED.....RESPONDENT

RULING

The application before me for determination is dated 7th September 2020 and seeks the following orders –

1. Spent.

2. That this Court be pleased to grant a temporary injunction restraining the Respondent by itself, its servants, agents or employees from initiating the process of recruiting and/ or recruiting any person to take up the position of general manager in replacement of the Claimant/ Applicant pending the hearing and determination of this application.

3. That the Court be pleased to grant a temporary injunction restraining the Respondent by itself its servants, agents or employees from unlawfully or unfairly terminating the employment services of the Applicant/ Claimant or in any other way interfering with her rights, benefits and privileges as an employee on grounds the letter dated 17th July 2020 or for any other reason without following due process pending the hearing and determination of this Application.

4. That this court do stay the implementation of the Respondents letter of termination dated 17th July 2020, pending the hearing and determination of this suit.

5. That this Court be pleased to grant a temporary injunction restraining the Respondent by itself, its servants, agents or employees from initiating the process of recruiting and/ or recruiting any person to take up the position of general manager in replacement of the Claimant/ Applicant pending the hearing and determination of this suit.

6. That this Court be pleased to grant a temporary injunction restraining the Respondent by itself, its servants, agents or employees from unlawfully or unfairly terminating the employment services of the Applicant/ Claimant or in any other way interfering with his rights, benefits and privileges as an employee on grounds of the letter dated 17th July 2020 or for any other reason without following due process pending

the hearing and determination of this suit.

7. That the Respondent be and is hereby ordered to remit the Claimants/Applicant's salary, together with her benefits and emoluments pending the hearing and determination of this suit.

8. That the costs of this application be met by the Respondent.

The application is made under Rule 17 of the Employment and Labour Relations Court (Procedure) Rules and all other enabling provisions of the law. The grounds upon which the application is made are as set out on the face of the application and in the supporting affidavit of JANE KAIMURI DAVID, the applicant sworn on 7th September 2020.

The Respondent opposes the application through the replying affidavit of AMOS CHACHA MWITA, the Respondent's Chairman sworn on

22nd September 2020. The application was disposed of by way of written submissions.

Facts

The applicant was employed by the Respondent on 20th March 2013 as General Manager and worked in the same capacity until 17th June 2020 when her employment was terminated. Prior to the termination the applicant was issued with a notice to show cause dated 4th June 2020 which she responded to by her letter dated 15th June 2020. She was subjected to a disciplinary hearing on 17th June 2020 and served with a letter of termination of employment on 17th June 2020. The grounds of termination as set out in both the show cause letter and the termination of employment letter are negligence in the performance of her duties and insubordination.

In her affidavit in support of the application, the claimant sets out in detail the facts leading to the termination of her employment. It is her position that the termination was unfair and violated the Respondent's Human Resources Manual, in particular clause 6.2 which provides for dismissal after warning. It is her position that she was never warned, that she had a stellar performance as a result of which she had earned salary increases and bonuses, the latest bonus of Kshs.733,852.22 having been awarded to her in March 2019. She contends that the show cause letter was vague and unparticularised, that she sought better particulars by her letter of 5th June 2020 but the same was only supplied to her on 11th June 2020 which required her to respond by close of day on 12th June 2020.

The applicant contends that her request to respond in 10 days was rejected and she was directed to respond by close of business on 15th June 2020.

She further contends that upon receiving her response the Respondent hurriedly convened a disciplinary hearing on 17th June 2020 at 7 am via Microsoft Teams Software application. That she was never informed and was not aware that the meeting was a disciplinary hearing, hence she did not have adequate opportunity to prepare for the hearing.

The applicant further contends that she had to attend the meeting from her office which is an open office where there was no privacy hence very embarrassing as her staff could hear all the conversation at the meeting.

The claimant further contends that the issue of being rude and unprofessional to board members, for which her employment was terminated, did not come up at the disciplinary hearing.

The Applicant contends that she appealed against the termination by letter dated 25th June 2020 but the appeal was not responded to within reasonable time prompting her to send a reminder on 27th July 2020. That on 23rd July 2020, one Mr. Eli Waweru, the Treasurer in the Respondent's Board reached out to her with a request to tender a resignation so that interest on her staff loan may not be converted to commercial rates and a deferment of payment. That it is only after she declined to resign that she was issued with a letter rejecting her appeal.

It is the Applicant's contention that the real reasons for termination of her employment was a disagreement between her and the Respondent's Group Managing Director – Dr. Gideon Muriuki over non-assignment of duty to a staff member by the name Jacqueline Lugusa Akwah upon declaration of COVID-10 pandemic. That the Group CEO is the one who had recommended the employment of the said Jacqueline Lugusa Akwah.

In the replying affidavit of Amos Chacha Mwitwa he deposes that the termination of the applicant's employment was lawful and fair. He denies that Eli Waweru was the Respondent's agent or that he was instructed by the Respondent to approach the applicant with an offer to resign.

Mr. Mwitwa deposes that under the Respondent's Human Resource Policy, an employee who leaves service before attaining 10 years' service is required to pay interest at commercial rates on any outstanding loans after one month of leaving service. That the applicant having served for only 7 years was liable to pay commercial interest on her loan facilities.

Determination

Having considered the pleadings and submissions of the parties, the issue for determination is whether the applicant has met the threshold for grant of the orders sought.

As submitted by the claimant, the principles for grant of interim injunctive orders were set out in the case of **Giella v Cassman Brown (1975) E.A 358** as follows: -

- *An applicant must show a prima facie case with a probability of success.*
- *An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury and*
- *When in doubt, the court will decide on the balance of convenience.*

The applicant has referred the Court to Articles 41, 47, 50 and 236 of the Constitution but these are not relevant for the determination of the application.

In the instant application, the Applicant's employment was terminated by letter dated 17th June 2020. She filed the instant application on 7th September 2020, just 10 days short of 3 months from the date of her termination. In essence therefore, she seeks orders for her reinstatement back to work and for restraining the Respondent from filling her position.

Reinstatement is provided for under Section 49(3) of the Employment Act as follows –

(3) Where in the opinion of a labour officer an employee's summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to—

(a) reinstate the employee and treat the employee in all respects as if the employee's employment had not been terminated; or

(b) re-engage the employee in work comparable to that in which the employee was employed prior to his dismissal, or other reasonably suitable work, at the same wage.

As provided under Section 49(3), reinstatement is only capable of being granted as a remedy after the court has established that a summary dismissal of an employee is unfair. This can only be done after hearing testimony from the parties.

For this reason, the prayer for reinstatement is not capable of being granted on an interim basis. This prayer by the applicant must therefore fail.

The other prayer by the Applicant is an injunction restraining the Respondent from recruiting any person to take up the position of general Manager. This relief can only be granted if the Applicant is likely to be reinstated upon the hearing and determination of the case. Section 49(4) of the Employment Act provides for the matters that the court must take into account before granting the remedy of reinstatement. Among them are: -

(c) the practicability of recommending reinstatement or re-engagement;

(d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;

(e) the employee's length of service with the employer;

(g) the opportunities available to the employee for securing comparable or suitable employment with another employer;

(m) any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee.

This again is a matter that the court would only be in a position to determine after taking evidence from the parties. However, it is obvious that reinstatement is not granted unless there is proof that damages would not be an adequate remedy for the applicant, as was stated in **Giella**. This has not been demonstrated in the application or in the Applicant's submissions. As is stated in **Hulsbury's Laws of England Vol. 24 (4th Edition)** at paragraph 838 which the Applicant has relied on –

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or of the act done is simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff, such as where, on receipt of a notice that an injunction is about to be applied for, the defendant hurries on the work in respect of which the complaint is made so that when he receives notice of the interim injunction it is completed, a mandatory injunction will be granted on an interlocutory application.”

The circumstances in the instant case do not fall within those that would call for a mandatory injunction.

Again, the fact that the Applicant's position has been filled by the Respondent would not stop the court from granting the remedy of reinstatement.

Considering the balance of convenience, a General Manager is a very senior and crucial position in any organisation. Requiring an organisation to operate without one where the likelihood of reinstatement is a chance would be prejudicial to the operations of the Respondent.

For the foregoing reasons, I find that the Applicant does not meet the threshold for grant of the orders sought with the result that the application is dismissed. Costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF FEBRUARY 2021

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE