



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. E582 of 2020

(Before Hon. Lady Justice Maureen Onyango)

DR NAVIN CHANDER RAINA.....CLAIMANT

VERSUS

SOCIAL SERVICES LEAGUE, MP SHAH HOSPITAL.....RESPONDENT

RULING

Before me, for determination are two (2) Notices of Motion Applications dated 25th September, 2020 and 16th October 2020.

The Notice of Motion Dated 25th September 2020 seeks the following orders **THAT**:

1. Spent.

2. Pending the hearing and determination of this Application inter-partes, this Honourable Court be pleased to grant an interim injunction restraining the Respondent whether by itself, servants and/or agents from terminating the claimant's employment as the head of the Respondent's department of surgery, (Gastroenterology and Laparoscopy) or giving effect to the Respondent's termination letter dated **10th June 2020.**

3. Pending the hearing and determination of this Application inter-partes, the Respondent does not have any subsisting employer's obligations in respect of the Claimant.

4. Pending the hearing and determination of this claim, this Honourable Court be pleased to grant an interim injunction restraining the Respondent whether by itself, servants and/or agents from terminating the claimant's employment as the head of the Respondent's department of Surgery and Gastroenterology or giving effect to the Respondent's termination letter dated **10th June 2020.**

5. Pending the hearing and determination of this Claim, the Respondent, its agents, servants and/or whomsoever acting on their behalf be and is hereby restrained from interfering in any manner whatsoever with the Claimant's work permit, Medical Practice License and/or making any representations to the effect that the Respondent does not have any subsisting employer's obligations in respect of the claimant.

6. The costs of this Application be provided for.

The Notice of Motion dated 16th October 2020 seeks the following orders **THAT**:

a. Spent

b. Pending the hearing and determination of this Application inter-partes, the Respondent be and is hereby denied any audience by this Honourable Court and further be restrained from filing any pleadings, documents and/or taking any further steps and/or other proceedings in this matter until they purge their contempt of this Honourable Court Orders issued on 30th September 2020.

c. This Honourable Court be pleased to issue an order of committal to prison of the Respondent's Head of Human Resources Ms Falguni Chudasama, Acting CEO Ms. Toseen Din and Medical Director Dr Vishal Patel for a period of six (6) months or for any

such other period as this Honourable Court may deem just in the circumstances, for the Respondent's and their contempt and disobedience of this Honourable Court Orders issued on 30th September 2020.

d. The Respondent as well as its Head of Human Resources Ms Falguni Chudasama, Acting CEO Ms Toseef Din and Medical Director Dr Vishal Patel be and are hereby jointly and severally fined in the sum of KSHS.10,000,000 each, for their contempt and disobedience of the orders of this Honourable Court Orders issued on 30th September 2020.

e. This Honourable Court be pleased to issue any other orders and reliefs as it shall deem fit just or expedient to grant in the circumstances of this case in the interest of justice and for upholding the authority, dignity and honour of the court.

f. The costs of this Application be provided for.

These Applications are premised on the grounds on the face of the applications and the Supporting affidavits of Dr Navin Chander Raina sworn on 25th September 2020 and 16th October 2020.

In his Supporting Affidavit sworn on 25th September 2020, the Applicant states that he is an expatriate from India and was employed by the Respondent by way of a two (2) year Contract that commenced on 2nd September 2016. That it was a term of the said contract that the Respondent would obtain a work permit, security bond and professional liability insurance for the applicant. That owing to his stellar performances, his contract was extended by a further two years. Further that he has been pivotal to the success of the Respondent's department of surgery and was the first surgeon in Kenya to perform a successful Laparoscopic Splenectomy. He also claims that he was credited by the Respondent for single handedly starting a post graduate teaching program under the College of Surgeons of East Central and Southern Africa (**COSECSA**) which exists to date at the Respondent's hospital and in respect of which he serves as the program director and is central to its operations.

The affiant further avers that despite all the achievements set out above, the Respondent curtly wrote a letter to him informing him that it had decided not to renew his employment contract without giving any reason for that decision. Further that the decision not to extend his employment contract was made in retaliation after he refused to execute a consent for the reduction of his salary due to what the respondent referred to as the effects of COVID-19.

The Applicant therefore avers that the decision not to extend his contract was as a result of extraneous considerations and in particular a punishment for his refusal to consent to alteration of his contractual terms. The Affiant further avers that the Respondent has also declined to compute and communicate his terminal dues or extend his work permit despite knowing that he is an expatriate who may not get any other gainful employment in the country or even leave the country to travel back to India in view of the subsisting ban on flights as a result of the Covid-19 situation. He is therefore apprehensive that unless the Respondent is restrained by an interim order of this court, he will be subjected to an unfair termination of his employment for unlawful reasons and considerations by the Respondent and will not be paid his terminal dues before he is forced to repatriate back to India.

The Respondent did not file any Response to the Application dated 25th September 2020.

The application dated 16th October 2020 is based on the Claimant's allegations that the Respondent is in contempt of the interim orders granted on 30th September 2020.

The Affiant in his supporting affidavit avers that the Respondent in blatant disregard of the aforementioned court orders has instructed its IT Department to remove his name from the IT system of the Hospital's specialists. Further that the Respondent has instructed the Account's department not to pay his rent which was a term of his employment contract. The Applicant further avers that the Respondent does not intend to pay his salary in full and is thus interfering with the employment relationship as it was when the orders of 30th September 2020 were issued.

The Respondent opposed the Application via a Replying Affidavit sworn on 2nd Day of November 2020 by FULGANI CHUDASAMA, the Respondent's Head of Human Resources. In his Affidavit, the Respondent's head of Human Resource avers that the Claimant is still engaged with the Respondent as a consultant after his contract of employment expired on 30th September 2020. He avers that prior to the lapse of the orders issued on 30th September 2020, the parties had agreed to have a different mode of engagement where the Claimant would offer his services as a specialist surgeon on consultancy basis for outpatients and inpatients and would run the clinic for two days per week. He therefore disputes the allegation that the Respondent is in contempt of the Court orders.

The two applications were disposed of by way of written submissions.

Analysis and Determination of the Application Dated 25th September 2020

After careful consideration of the application, affidavits and the submissions by the parties, the main issue for determination is whether the applicant has met the legal threshold for this Court to grant interlocutory injunction pending trial and whether the Applicant has proved contempt by the Alleged Contemnors.

The threshold for granting interlocutory injunction was laid down in the celebrated case in **Giella v Cassman Brown [1973] EA 358** where the following principles were set out:

a) That the applicant must establish a prima facie case with probability of success.

b) That the applicant must demonstrate that he stands to suffer irreparable harm if the order is withheld.

c) If the court is in doubt, it should determine the application on a balance of convenience.

From the parties' submissions, it is evident that the Claimant's prayers for an interim injunction against termination of employment pending hearing of this suit has been overtaken by events as the claimant's tenure as the head of the Respondent's department of surgery came to an end by lapse of his contract.

Prima facie case was defined by the Court of Appeal in **Mrao Limited v First American of Kenya limited & 2 others [2003] e KLR** as follows: -

"...in civil cases is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

In the instant case the Applicant was on a fixed term contract that was to lapse on 30th September 2020. The Applicant claims that the Respondent's decision not to extend his contract was unlawful as the extension of his contract ought to have been a natural consequence owing to his apparent stellar performance at his duties. He further avers that the decision not to extend his contract was made in retaliation and for extraneous purposes after he objected to deduction of his salary due to the financial constraints allegedly brought about by COVID-19 pandemic. The Claimant's main prayer in his claim is a declaration that the refusal to extend the claimant's employment was unlawful and that it should be set aside and he be reinstated in his position as the head of surgery.

The Court of Appeal in **Barclays Bank of Kenya Ltd v Banking, Insurance & Finance Union (Kenya) [2019] eKLR** cited with approval the finding in **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR** where it was stated:

*"We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. **Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case.**"*

[Emphasis added]

In the case of **Habib Bank Ag Zurich v Eugene Marion Yakub, C. A. No. 43 of 1982 (unreported)**, probability of success was taken to mean that; -

"the court is only to gauge the strength of the Plaintiff's case

and not to adjudge the main suit at the stage since proof is only required at the hearing stage."

In the present case, the Claimant/Applicant has not established a prima facie case with a probability of success as his contract has lapsed and the contract does not contain a clause on renewal on its face.

On the issue of irreparable harm, I agree with submissions of Counsel for the Claimant that the termination may well cause irreparable harm. The claimant is an expatriate from India and was the head of the Respondent's Department of Surgery where he earned a remuneration package of approximately Kshs.2,120,000 per month. Damages in this case although an alternative remedy provided by law, may not remedy such a loss.

Having made the above findings, I must now consider the balance of convenience.

From the Replying Affidavit and submissions by both parties, it is clear that the Claimant is no longer the head of the Respondent's Department of Surgery. It is also trite that reinstatement at interlocutory stage can only be granted in special circumstances. I am persuaded by the observation in the case of **Anthony Omari Ongera v Teachers Service Commission [2017] eKLR** where Mbaru J. made the following observations in respect to the rationale for reinstatement –

*"The rationale is that the order of reinstatement is final in nature and should only issue in exceptional cases which warrant specific performance. In the case of **Ahmed Aden Hire versus Natif Jama and County Government of Garissa, Petition No. 121 of 2016**; the Court is analysing the provisions of Section 49 of the Employment Act and Rule 17(10) of the Court Rules with regard to the orders of reinstatement held that; The rationale [of not reinstating an employee at the interlocutory stage] is that the order of reinstatement is a specific performance order with finality. To issue such an order in the interim is essentially to deny the other party a chance to their defence unless there exceptional circumstances that the Court is apprised of to warrant the grant of the same in the interim."*

The balance of convenience would thus militate against granting orders of injunction.

For the foregoing reasons, I decline to grant the orders sought in the claimant's application with the result that the application dated 25th September 2020 fails. The interim orders granted on 30th September are therefore vacated.

Application Dated 16th October 2020

The main issue for determination on this Application is whether the Respondent is in contempt of this Court's Orders issued on 30th September 2020.

The orders that gave rise to this application read inter alia;

“That Interim orders are granted to the effect that the respondent should not interfere with the employment relationship between the applicant and the respondent pending inter-partes hearing of the application.”

Black's Law Dictionary (Ninth Edition) defines contempt of court as:

“Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”

The courts have clearly come out and affirmed that the essence of contempt proceedings is to safeguard the supremacy of the law. In the matter of **Johnson v Grant, 1923 SC 789 at 790 Lord** President Clyde stated that;

“...The law does not exist to protect the personal dignity of the judiciary nor the private rights of parties or litigants. It is not the dignity of the court which is offended. It is the fundamental supremacy of the law which is challenged.”

The reason why courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law. A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed.”

In the matter of **Collins Odumba [2016] eKLR Marete J. stated:-**

“A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option”

It is not in dispute that as at 30th September 2020, the claimant was in an employment relationship with the respondent that was set to expire on the same day. The Claimant has not refuted the Respondent's averment that the parties executed a consent on 14th September 2020 that after expiry of the then subsisting contract the claimant would be engaged in the capacity of a specialist on consultancy basis.

Lastly, the standard of proof in committal proceedings is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt. In **Mutitika v Baharini Farm Limited [1985] KLR 229**, the court stated that:

“... the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature.”

It is quite clear to me, therefore, that the applicant has failed to provide proof of alleged wilful and deliberate disobedience of the court orders to the required standard. He has not established that the Respondents or alleged contemnors have failed to comply with orders of this court of 30th September, 2020. It is worth noting that the court did not order the Respondent to engage the Applicant on a new contract. What was ordered is to sustain that which was in existence. Since the Applicant's contract was lapsing on the date that the orders were granted, the only position that the court ordered to be sustained would therefore be the agreement of 14th September, 2020. The Applicant did not prove that the Respondent has failed to comply with the said agreement. **Accordingly, the application being bereft of merit, is dismissed with no order as to costs.**

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