



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.E706 OF 2020

SOLOMON GICHUNG'WA NJUGUNACLAIMANT

VERSUS

SYBRIN KENYA.....RESPONDENT

RULING

The claimant filed Notice of Motion dated 30th October, 2020 seeking for orders that;

1. *Spent.*
2. *This court be pleased to make an order directing the respondent to unconditionally lift the suspension of the claimant from employment and order for his immediate reinstatement pending the inter parte hearing and determination of this application and claim.*
3. *Upon determining prayer 2 hereinabove, this court does hereby make an order for the payment by the respondent the claimant's withheld emoluments during the period of his suspension.*
4. *Pending the hearing and determination of the application and claim, this court does made an order of injunction restraining the respondent either by themselves, employees, servants and/or agents from terminating the employment of the claimant.*
5. *Costs of this application be provided for.*

The application is supported by the annexed affidavit of the claimant and on the grounds that in on 3rd November, 2010 he was employed as a system implementation and support officer but in May, 2011 the respondent suspended the him over alleged fraud and arraignment in court in Criminal Case No.713 in which matter he was heard and acquitted on 6th December, 2019. The claimant remained under suspension over this period.

Other grounds are that during the period of suspension, he could not get new employment since the respondent impliedly blacklisted him from seeking any form of employment within the banking sector. He has suffered loss and damage and with no source of income.

In his affidavit, the claimant avers that he had a legitimate expectation that upon the conclusion of the disciplinary proceedings and subsequent acquittal he would be reinstated and his emoluments paid by the respondent which has not been done. He wrote to the respondent on the outcome of the criminal case but the respondent sought for time to deliberate and there were delays on the grounds that due to COVID pandemic and the head office being in South Africa. The respondent has since lifted the suspension.

The claimant also avers that the respondent refused to restore him back to his former employment status after making him suffer for all the years he was on suspension.

The refusal to reinstate and pay the outstanding emoluments has placed the claimant in limbo as to whether he is still an employee of the respondent or not and therefore seek the court to order the unconditional lifting of the suspension and for the immediate reinstatement back to work and payment of the withheld emoluments.

In reply, the respondent filed the Replying Affidavit of Wilson Some the director and who avers that the claimant was employed on 30th November, 2010 as a system implementation and support and issued with letter of appointment. After allegations of financial impropriety, dishonesty and fraud the respondent decided to suspend the claimant pending the outcome of criminal investigations in Criminal Case No.713 of 2011 – R v Solomon Gichungwa Njuguna.

The suspension was necessary as the allegations against the claimant were serious and it was not desirable for him to be present at the business premises during the criminal investigations and proceedings. He was suspended on 30th May, 2011 and was required to keep in

touch with the respondent for the duration of the criminal proceedings.

Mr Some also avers that they did not receive any update on the criminal proceedings or the status of employment from the claimant. Respondent is unaware that the delay of over 9 years which was orchestrated by the claimant and by other factors.

Mr Some also avers that it came to their knowledge that the claimant was engaged for employment with Radiant Digital Solutions in April, 2015 during the pendency of the criminal proceedings. A search revealed that the claimant is employed at Gold Avenue Africa as head of portfolio and was featured in Gold Avenue's Africa magazine on 13th January, 2020 as their cover model which indicates that he is employed as the CEO for an organisation called Umeme City.

On the revelations noted, the respondent arrived at the conclusion that the claimant had deserted his employment and repudiated his contract of employment with it. The claimant is hence misleading the court that he is unable to secure new employment, has no income and has suffered loss and damage.

The respondent was surprised that upon the claimant being acquitted of the criminal charges in on 9th December, 2019 it was only then that he made demand that his suspension be lifted, all his employment benefits be restored and that his salaries and benefits be paid. Upon such demand the respondent engaged with the claimant and noted the issue of other employment which the claimant refused to address and efforts to resolve the matter have been unsuccessful.

The remedy sought for reinstatement is final and should only be granted upon a full hearing.

The claimant filed his **Supplementary Affidavit** and avers that his employment with the respondent has never been terminated upon his suspension. The respondent was fully aware of the criminal proceedings and his suspension was pending the outcome of such matter. He was not in control of the proceedings as an accused person. The respondent as monitoring the same as an interested party.

The claimant also avers the companies alleged to have employed him, Radiant Digital Solution was where he was trying to start but never registered and did not take off and was without any income. He was not gainfully employed.

The claimant also avers that The respondent has not submitted any evidence of other employment as alleged. Gold Avenue Africa Limited and Umeme City Limited these are businesses registered in May and November, 2019 and owned by his younger brother, Samuel Kuria and the claimant has no stake or role. He has never received any payments therefrom.

He has never secured any employment due to the actions of the respondent.

Both parties agreed to address the application by way of written submissions.

Determination

Upon analysis of the affidavits, the written submissions and authorities upon which the parties have relied upon, The gist of the claimant's application is that there be *an order directing the respondent to unconditional lift the suspension of the claimant from employment and order for his immediate reinstatement pending the hearing and determination of this application and claim*. The claimant is also seeking for the immediate payment of his withheld emoluments during the suspension.

It is common cause that by letter dated 30th May, 2011 the claimant was suspended from his employment by the respondent. the reason for suspension was due to alleged fraud and the on-going criminal investigations and being charged in **Criminal Case No.713 of 2011 – Republic versus Solomon Gichungwa Njuguna & others**. The criminal charges have since ended and the claimant acquitted of any offence(s) on 9th December, 2019.

Under paragraph 19 of his Supporting Affidavit, the claimant avers that the respondent has refused to restore him back to his former employment status. That the refusal of reinstatement has caused him loss and damage.

In the Memorandum of Claim, the issues listed in dispute include;

- a) Lifting of suspension;
- b) Reinstatement to employment with full benefits;
- c) Salary arrears and benefit;
- d) Constructive unfair termination; and
- e) Other benefit arrears.

The response is that during the period of suspension, the claimant secured other employment.

The claimant hence seeking reinstatement, such cannot issue in the interim as this requires specific performance and in its nature a final order regulated under section 12(3)(vii) of the Employment and Labour Relations Court Act, 2011 read together section 49(4) of the Employment

Act, 2007 and Rule 17(10) of the Employment and Labour Relations Court (Procedure) Rules, 2016. Such an order should not issue in the interim. The alleged Constructive and unfair termination of employment are matters which requires the call of evidence before the court can make a finding.

Whereas a suspension is an administrative prerogative of an employer and applied for the given reason and upon being addressed the employer ought to be called to respond to any arising matters or be recalled back to employment, the matters registered as being in dispute between the parties go for over a period of 9 years and should be interrogated at a full hearing to allow the court be seized of all facts and upon which a final decision be issued.

To proceed on the affidavits and submissions by the parties at this stage will deny the court crucial and material evidence and examination. To proceed and issue the orders sought in the interim will not aid the course of justice.

Accordingly, application by the claimant dated 30th October, 2020 shall not be allowed at this instance save the claim shall be heard on priority and the following directions and orders are hereby issued;

(a) The parties are allowed the next 14 days to file their witness statements and list of documents to be relied upon at the hearing;

(b) pleadings to close within 21 days; and

(c) and upon compliance (a) and (b) a hearing date shall be allocated at the registry.

DELIVERED IN OPEN COURT AT NAIROBI THIS 18TH DAY OF FEBRUARY, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

..... and