



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
ELRC E6526 OF 2020
SHADRACK MUSYOKA.....CLAIMANT
VERSUS
MIDDLE EAST BANK KENYA LIMITED.....RESPONDENT

RULING

1. This ruling relates to the claimant's application dated 15.1.2021 seeking the following orders:

- a. That this application herein be certified urgent and be heard Ex-parte in the first instance in respect of prayer 2 herein below.
- b. That the Honourable court be pleased to grant the Applicant a temporary Order by way of injunction directed against the Respondent Bank restraining it from implementing the unlawful termination of the Applicant's services from its employment pending the hearing and determination of this suit.
- c. That the Honourable Court be pleased to make an order restraining the Respondent from enforcing its letter of 23rd October, 2020 purporting to terminate the Applicant's employment that is still in force up to his lawful retirement age in April 2025 without valid reasons for so doing.
- d. That the costs of this application be provided for.

2. The application is supported by the affidavit sworn by the claimant on 15.1.2021 and it is opposed by the respondent vide the Grounds of objection dated 20.1.2021 and verified by the Affidavit sworn on 9.2.2021 by the respondent's Managing Director Mr Isaac Mwirigi. The application was argued by the counsel for two parties on 18.2.2021.

Applicant's Case

3. The applicant contends that he was served with a 3 months' notice terminating his employment with effect from 21.1.2021 on account of poor performance. However he brought this suit contending that the cited reason for the termination is not valid and prayed for reinstatement. In the meanwhile by the instant application, he seeks protection or safeguarding of his position in the bank from being filled pending the hearing and determination of the suit. According to him, he was maliciously targeted, frustrated and sacked without any valid reason and without following a fair procedure including failure to place him under Performance Improvement Plan (PIP) and according him a fair hearing as in section 41 of the Employment Act.

4. He contended further that, unless his position in the bank is protected, he will suffer irreparable loss and the reinstatement sought in the suit will be prejudiced. He also contended that the application is properly brought with the purview of rule 17 of the Employment and Labour Relations Court (ELRC) procedure Rules and there is no evidence that his position has been filled. He further argued that he is above 55 years and as such he cannot secure another employment if the order sought is denied.

5. Finally he contended that even though he has sought compensatory damages in his suit, he maintained that his position in the bank should be preserved pending the trial. To fortify his case, he relied on **Stephen Mbugua Chege Vs Nairobi City Water & Sewerage Co Ltd [2017] eKLR** and **Jediah M. Mwarania Vs Kenya Reinsurance Corporation Ltd 2016 eKLR** where the company reinstated the employees to their positions for being unfairly dismissed.

Respondent's Case

6. The Respondent opposed the application for being incompetent in law, order Rule 17 of the ELRC procedure rules, and further for failure to meet the threshold for granting of interlocutory injunction established by **Giella Vs Cessman Brown [1973] EA 358** and **Mrao Vs First American Bank of Kenya [2003] KLR 125**. On the preliminary objection, the respondent urged that the jurisdiction of the court to grant temporary injunction is only excusable in a suit where injunction is sought as a relief. Accordingly, since injunction is not in the pending suit the court is restricted by Rule 17(5) of the ELRC Rules from granting any injunction sought in the instant application. It further argued that if there is any other enabling provision of the law, then the same have not been cited and identified by the applicant.

7. As regards the merits of the application the respondent contends that injunction is an equitable relief which may only be granted at the discretion of the court upon well settled principles set out by the court of Appeal in **Giella Vs Cessman Brown case**. First the applicant must show a prima facie case with a probability of success; and second an interlocutory injunction will not normally be granted unless the applicant might suffer irreparable injury which cannot be adequately compensated by an award of damages.

8. The respondent contended that in the instant case, the only evidence presented in support of the application is the claimant's affidavit sworn on 15.1.2021 and in its view the material presented does not discharge the burden of proving a prima facie case. According to the respondent, all what the applicant has said is that injunction should issue because his employment was unlawfully and prematurely terminated in breach of Article 47 and 50 of the Constitution. It contended that the provision of Article 49 and 50 of the constitution are no application to disciplinary process but observed that the correspondences exhibited by applicant is proof that due process was followed and termination was lawful.

9. The respondent further contended that the applicant has not produced any evidence or deposited in his affidavit that his contract of employment was to subsist until 2025 when he would attain age of 60 years. It therefore argued that the material presented by the applicant does not establish any prima facie case of that he stands to suffer any irreparable harm. On the contrary, the respondent argued that the claimant's pleadings have confirmed that damages are more than sufficient remedy from alleged unlawful termination if injunction is denied since he has quantified his claim compensatory damages of 12 months' salary and full salary for years from January 2021 at Kshs.54, 277,524.

10. As regards reinstatement or specific performance of contract of employment the respondent contended that the applicant has not made any averment in his affidavit or written submissions that this is an exceptional case deserving special treatment it relied on the Court of Appeal decision in **Kenya Power & Lighting Company Limited Vs Aggrey Wasika [2017] eKLR** and **Kenya Airways Limited Vs Aviation & Allied Workers Union [2014] eKLR** where the court held that reinstatement is not an automatic remedy but it is only granted in exceptional circumstances peculiar to the facts of each case and the court must consider the practicalities of such orders and whether compensation can be an alternative remedy.

11. The respondent observed that the correspondence exhibited by the applicant indicates that love is lost between the parties herein with applicant accusing its officers of malice, irregularities, illegalities and discrimination among other misdeeds. It maintained that the huge claim for special damages clearly indicates that the alternative remedy of compensation is an appropriate one for the claimant.

12. The respondent distinguished the **Stephen Chege case** cited by the applicant from the present case in that in the said case, the dismissal was done without citing any reason for the dismissal. It further argued that the decision was done contrary to the binding decision of the Court of Appeal in both **Kenya Airways Case and Kenya Power & Lighting case** aforesaid. It further distinguished the **Jediah Mwarania case** from the instant case in that the decision in the cited case was a final judgement reached after trial as opposed to the present interlocutory application. Consequently, the respondent prayed for the dismissal of the application with costs.

Issues for determination

13. The issues for determination are:

- a. Whether the application is incompetent by dint of Rule 17 (5) of the ELRC Procedure Rules.
- b. Whether the application meets the threshold for granting interlocutory injunction.

Incompetent Motion

14. Rule 17(5) of the ELRC Procedure Rules provides that:

“In a suit where an injunction is sought a claimant or applicant may at any in the suit, apply to the court for an interim or temporary injunction to restrain the respondent from committing a breach of contract or an injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right”.

15. The literal interpretation of the foregoing rule is that interim or temporary injunction can only be sought and granted if the applicant has sought injunction order in the suit. Of course interim injunction subsists pending service of the application to all the parties while temporary or interlocutory injunction subsists pending trial. In either case, the drafters of rule 17(5) of the ELRC procedure Rules intended to bar a party who has not sought injunction in his suit from seeking interim interlocutory injunction.

16. In this case the applicant has sought both temporary and permanent injunction in the instant motion and not in the suit. Consequently since the claimant herein has not sought injunction in his suit to restrain his employer from terminating his employment contract, I agree with the respondent' objection that the application herein is incompetent *vis-a-vis* Rule 17(5) of the ELRC procedure Rules.

Threshold for Interlocutory Injunction

17. The threshold for granting interlocutory injunction was enunciated in **Giella Vs Cessman Brown [1973] EA 358** where the Court of Appeal held that:

- a. The applicant must show a prima facie case with a probability of success.
- b. The applicant must show that irreparable harm will befall him if injunction is withheld.
- c. If the court is in doubt to determine the application on a balance of convenience.

Prima facie Case.

18. Prima facie case was described by the Court of appeal in **Mrao Vs The First American Bank of Kenya Ltd [2003] KLR** as follows:

“A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has been infringed by the opposite party as to call for an explanation or rebuttal from the letter”

19. In this case the applicant alleges that he is the subject of an unfair termination because the reason cited for dismissal is not valid and the procedure followed was unfair. He contends that his performance in the new position to which he was transferred was not properly measured; he maintained that there were no mutually set targets between him and his supervisor; he had not been provided with the required staff and facilities; he was not accorded any hearing; he was never placed under any PIP and training and failed to improve his performance before the termination.

20. The foregoing factual allegations have not been rebutted by the respondent by way of Replying Affidavit. Therefore they remain the subject for rebuttal at the hearing and as such I agree that the applicant has established a prima facie case with chances of success.

Irreparable harm

21. It is now trite law that irreparable harm refers to some injury which cannot be quantified in monetary value or one which cannot be adequately compensated by an award of damages. It also refers to harm which cannot be cured or reversed.

22. In this case the harm that the claimant stands to suffer is unfair and unlawful termination of his contract of service. He has quantified the loss in monetary terms being Kshs 54,277,524 made up of 12 months' salary as compensation for unfair termination plus salary for the period between the date of termination and April 2025 when he was scheduled to retire lawfully upon attainment of 60 years. I therefore agree with the respondent that the applicant has not proved that he stands to suffer, irreparable harm if injunction is denied.

Balance of convenience

23. The effect of the application if granted is to order specific performance of the contract of service against the employer's wish. Section 49 (d) of the Employment Act provides that specific performance is only to be ordered in exceptional circumstances. In this case the applicant has not demonstrated any exceptional circumstances or reasons that warrant granting an order of specific performance of the contract herein nor has he established that it is practicable.

24. Having carefully considered the correspondences exchanged between the parties herein, few months before the termination notice was served, it is clear that their relationship has become toxic and probably broken down beyond repair. Consequently, I find and hold that, although I am not harboring any doubt as to whether the claimant stands to suffer irreparable loss, it is plain clear that the burden of convenience does not tilt in favour of the applicant.

25. In the end, the court agrees with the respondent that the application is not only incompetent but also fails short of meeting the threshold for granting interlocutory injunction and it is therefore dismissed. Costs shall be in the cause.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF APRIL, 2021

ONESMUS MAKAU

JUDGE

In the presence of:-

Ms Guserwa Advocate for the Claimant, and

Mr. Eshmael for the Respondent.

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE