



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. E620 OF 2020

CHRISPIN ODHIAMBO.....CLAIMANT

VERSUS

KENYA POWER & LIGHTING COMPANY LIMITED.....RESPONDENT

RULING

1. The Notice of Motion Application dated 5/10/2020 seeks an order in the following terms:-

1. Spent

2. Spent

3. Spent

4. **THAT** this Honourable Court be pleased to grant an order of temporary injunction restraining the Respondent by itself, agents, employees and/or assignees from initiating the process of recruitment and/or hiring any other person in the position of technician or in any other position purporting to carry out similar roles as those of a technician pending hearing and determination of this Application.

5. **THAT** the Respondent be ordered to allow the claimant to resume work in the position of technician pending hearing and determination of this suit.

6. **THAT** costs of this Application be borne by the Respondent.

2. The application is premised on grounds set out on the face of the Notice of Motion which may be summarized that, the Claimant/Applicant was employed by the respondent in the year 2009 as a Customer Service Assistant and was later promoted to the position of a Technician in the year 2011.

3. That on 5/3/2020, the Applicant was summoned to appear before the Head of Security Department on 6/3/2020 at 8 a.m. but since he was away from office he requested for extension of time in which to appear.

4. That he was asked to appear on 9/3/2020 which he did and upon arrival he found an officer from the Directorate of Criminal Investigations who proceeded to record a statement from him with regard to an alleged illegal power connection at his residential home.

5. That on 10/3/2020, the claimant was arrested by a team of police officers on allegations that he had a direct power supply.

6. That on 11/3/2020, the Applicant was arraigned in Court and took a plea of not guilty to the charge read to him in Court.

7. On 11/3/2020, he was released on cash bail of Kshs.100,000 pending hearing and determination of the case.

8. That on 13/3/2020, the Applicant was served with a Show Cause Letter to respond to allegations raised therein within 72 hours. That the Applicant responded to the letter as requested.

9. That on 12/6/2020, the Applicant received a letter terminating his employment of even date. The reasons for the termination were given in the letter that he had connected 3 – phase power cable to his house despite having applied for a single phase connection; that he had tampered with the company installation by moving the meter from the meter box; that he was on direct supply of electricity hence was defrauding the company and that he was involved in the construction of own power connection, by generating the material reservation.

10. The applicant was informed of his right to appeal the decision within 90 days which he did on 30/6/2020. On 2/9/2020 he attended the appeal hearing but the same did not proceed. The applicant was told the Appeal should not take place whilst the criminal case was pending.

11. The Applicant state that the denial of Appeal was prejudicial to his case and the termination was unlawful and unfair. The applicant prays for the reliefs sought.

12. The respondent filed a replying affidavit deposed to by Martin Makasa on 8/2/2021 in which he deposes *inter alia* that the applicant was charged with the criminal offence as he states in his application and was subjected to disciplinary action and that he was summarily dismissed with effect from 16th June, 2020 and the decision was communicated to him by a letter dated 12/6/2020.

13. That a fair disciplinary process was conducted before the claimant was summarily dismissed for being involved in fraudulent/dishonest conduct against the employer. That the Respondent's employment Code of Conduct and Ethics provides for a Zero tolerance policy to corruption, bribery and fraud which the applicant was evidently involved in from the evidence placed before the respondent.

14. That the applicant received a show cause letter to which he responded.

That the applicant appeared before a disciplinary committee where he was given a hearing.

15. That the explanation given by the applicant was not satisfactory and he did not call any witness to collaborate his story though he had been informed of that right.

16. That the Respondent followed the Respondent's Human Resource Staff Regulations and Procedures and the Employment Law in arriving at the decision to terminate the employment of the claimant.

17. That the criminal case pending against the applicant was not a bar to the conduct of the disciplinary process and eventual summary dismissal of the applicant since those are two (2) separate processes.

18. That the application lacks merit and same be dismissed.

Determination

19. The issue for determination is whether the applicant has satisfied the requirements for grant of an injunction pending the hearing and determination of the suit.

20. The grant on injunction is guided by the case of **Gielle –vs- Cassman Brown & Co. Limited [1973] E.A. 358** that an applicant must firstly establish a *prima facie* case with a probability of success; secondly, the applicant must demonstrate that he/she would suffer irreparable harm not capable of remedy by way of damages, if the injunction is not granted and the suit is eventually successful, and thirdly, if the Court is in doubt, to be guided by the balance of convenience.

21. It is apparent that, the Applicant was already summarily dismissed by the time he filed this suit on 7/10/2020. The applicant has in his Statement of Claim set out various reliefs, he prays the Court to grant upon hearing the case on the merit. These reliefs include, a declaration that the termination of the claimant's employment was unfair, wrongful, prejudicial and unprocedural. That the Court to award the Claimant/Applicant, equivalent of 12 months' compensation upon finding that the termination was unlawful and wrongful and that the Court award the claimant two months' salary in lieu of notice' and finally the Court do award the claimant interest on the stated awards and costs of the suit.

22. In consideration of the above, the application fails on two fronts, being that the applicant sought to be stayed by way of injunction that which had already taken place and the applicant did not demonstrate a *prima facie* case that warranted the Court to grant a mandatory injunction to reinstate him back to his employment pending the hearing and determination of the suit on the merits.

23. The application clearly lacks merit and is dismissed with costs in the cause.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF MAY, 2021.

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. 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 18 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.

MATHEWS N. NDUMA

JUDGE

Appearances

Matheka Oketch & Co. Advocates for the Claimant/Applicant

M/s Tusiime for Respondent

Ekale – Court Assistant