



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. E538 OF 2020**

**ROSE NJAMBI MWANGI.....APPLICANT**

**VERSUS**

**POINT EAST AFRICA LIMITED.....RESPONDENT**

**RULING**

1. This Ruling relates to the Notice of Motion dated 15.9.2020 which seeks the following orders:

a. *Spent.*

b. *THAT there be a stay of implementation and or execution of the Respondent's letter dated 19.8.2020 titled "Termination Based on Operational Requirements" which is to take effect on 19.9.2020 pending the hearing and determination of this application.*

c. *THAT in alternative to prayer b above, that the Honourable Court do hereby order the Respondent to immediately reinstate the Applicant's employment with the Respondent Company pending the hearing and determination of this Application and subsequently the hearing of this claim.*

d. *THAT this Honourable Court be pleased to direct the Respondent to immediately pay the Applicant Kshs. 44,180 which was illegally withheld by the Respondent in respect of the Applicant's April 2020 salary; Kshs. 73, 633 which was illegally withheld by the Respondent in respect of the Applicant's May 2020 salary; and Kshs. 1,171,579.56 which is the Applicant's salary for the months of June, July, August and September 2020 illegally withheld by the Respondent.*

e. *THAT any other orders that this Honourable Court deems fit to meet the ends of justice.*

f. *THAT costs of the application be provided for.*

2. The application is premised on grounds that the Applicant was employed by the Respondent as a Procurement Specialist from April 2017; that she proceeded on maternity leave in December 2019 and resumed her work in April 2020; that as soon as she proceeded on leave, the Respondent hired Christine Wanjiru to take up her role; that after reporting back to work in April 2020, the respondent unilaterally reduced her salary in contravention of her contract of service and sent her to unpaid leave from June 2020; that on 19.8.2020, the respondent served her with a termination letter on account of redundancy; that her attempt to resolve the matter amicably failed; that the termination of her employment was not in accordance with the mandatory redundancy procedures set out in the Employment Act but was discriminatory due to her pregnancy contrary to Article 27 of the Constitution of Kenya 2010 and Section 5 of the Employment Act 2007.

3. The Application is supported by the affidavit of the Applicant sworn on 15.9.2020 in which she avers that if she is not reinstated, then the Court should direct that the outstanding pay for the months of April 2020 to September 2020 be paid immediately pending the determination of her exit package.

4. The Respondent opposed the application by a Replying Affidavit sworn by its Global Head of Human Resource on 25.9.2020, one Mr. Andre Le Roux who averred that the Applicant's suit is premature and speculative; that the Respondent engaged Christine Wanjiru in January 2020 to manage an account with one of its client's Coca-cola Beverages Africa (CCBA); that the Covid-19 pandemic has had serious adverse effects on the Respondent's business leading to declined volumes of work; that on 15.4.2020, the Respondent issued a global salary reduction notification to its employees across the globe including the Applicant that they would be taking a 15% reduction in salary effective April 2020; that the Applicant she has knowingly failed to disclose the circumstances leading to her salary cut; that a meeting took place on 16.4.2020 and the Applicant acknowledged the resolution reached and agreed with the measures that were to be put in place as a result of the Covid-19 pandemic including unpaid leave for June, July and August 2020.

5. He further contended that the Applicant never complained to the Respondent about her dissatisfaction until she instituted the suit; that at the end of August 2020 the volumes of Unilever Kenya Limited had diminished and it was impractical to retain the Applicant on its payroll as her position became redundant; that the Respondent informed the Applicant of the intended termination on grounds of redundancy and invited her to propose alternatives for consideration to mitigate the effect of the intended termination.

6. He confirmed that the termination took effect on 19.9.2020 and on the same day the Nairobi County Labour office was informed of the intended termination as required under section 40 (1) (b) of the Employment Act. He denied that the Respondent discriminated the Applicant on grounds of pregnancy and averred that it had already paid her Kshs. 914,041.39 as terminal dues.

7. In her rejoinder, the applicant filed an affidavit sworn on 30.9.2020 in which she denied that she was to only work on the Unilever Kenya Limited account and contended that after returning to work her duties overlapped those of Christine Wanjiru; that the notification on deductions was made unilaterally without allowing any counter negotiations or proposals from the employees and denied acquiescing the reduction percentage; that the Respondent had already arbitrarily stopped remitting her salary payments for the months of June and July thus it cannot be true that her termination was based on the decline in business of a totally external entity in August; and that the meeting held on 14.9.2020 did not yield any positive result as the Respondent was keen on terminating her employment without regard to her concerns.

#### **Applicant's submissions**

8. The Applicant reiterated that the Respondent failed to meet the conditions under section 40 of the Employment Act and maliciously proceeded to terminate her employment through discrimination.

9. She argued that the letter to the labour officer was received on 18.9.2020 a day before her termination and it is evident that it was sent only after the Respondent was served with the pleadings. In her view that the letter was an afterthought and only intended to cure an already fatal mistake.

10. She submitted that the Respondent terminated her employment on account of redundancy without regard to her seniority, skill, level of experience, her 3 years' service and retained her successor who had joined the company in January 2020.

11. She admitted that the Respondent paid for accrued leave after this court issued orders on 17.10.2020 and further paid her severance pay on 21.9.2020. She relied on **Jane Khalechi v Oxford University Press EA Limited [2013] eKLR** where the Court held that an employer should not single out an individual for termination and cite re-organisation.

12. She submitted that the unilateral deduction of her salary without consultation was unfair labour practice She relied on Article 41 of the Constitution and section 10 of the Employment Act to submit that by unilaterally deducting her salary, the Respondent willfully failed to make payment or tender her wages contrary to her rights to fair remuneration.

13. She submitted that the employment of Christine Wanjiru coincided with her maternity leave thus her termination was wrongful on account of discrimination based on her pregnancy. Consequently, she contended that the Respondent violated her freedom from discrimination on account of pregnancy under the International Labour Organisation Convention 183 of 2000 on Employment Protection & Non-discrimination and Article 27 (5) of the Constitution.

14. She submitted that in awarding damages for violations of constitutional rights of an employee, this court is not limited by the ceiling of 12 months' salary under section 49 of the Employment Act. To buttress on the award of damages she relied on the decision in **GMV v Bank of Africa Kenya Limited [2013] eKLR** and **Standard Group Limited v Jenny Luesby [2018] eKLR**.

15. She argued that it is practicable to reinstate her and relied on **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR**.

16. She further relied on section 27 (1) of the Civil Procedure Act and **Cecilia Karuru Ngayu v Barclays Bank of Kenya Limited & ano [2016] eKLR** to submitted that she is entitled to costs since the application was necessitated by the Respondent's breach of contractual terms.

#### **Respondent's submissions**

17. The Respondent submitted that the Applicant is not entitled to the orders sought because the application seeks permanent remedies which require the Court to hear and determine the parties' rights and obligations before granting the orders. It relied on **Venansio Mbatu Kariuki v Governor, County Government of Nyandarua & 2 Others [2019] eKLR** where the Court held that reinstatement should be addressed on merit.

18. It further submitted that the order to pay the Applicant the alleged withheld sum is an order for specific performance and may only be considered upon the hearing of the case on merit.

19. It argued that the Applicant is not entitled to the orders sought because she approached the Court ex-parte and failed to disclose all relevant material facts which were within her knowledge. It submitted that where a party is guilty of material disclose the Court will not grant interlocutory orders sought. For emphasis, it relied on **Republic v Kenya Medical Training College & ano ex-parte Kenya Universities and Colleges Central Placement Service [2015] eKLR**, **Gotv Kenya Ltd v royal Media Services Ltd & 2 Others [2015] eKLR** and **The King v The General Commissioners for the purposes of Income Tax Acts for the District of Kensington: Exparte Princess Edmond De Pligac (1971) 1 KB 486**.

20. It maintained that it did not discriminate against the Applicant, she was allowed to proceed on 4 months maternity leave with full pay and that her termination was exclusively because her position became redundant due to reduced business as a result of Covid-19. It relied on **Edgar Maingi Mwinzi v Total Kenya Limited [2020] eKLR** where the Court held that the Applicant did not lead evidence to prove differential treatment.

21. It maintained that it consulted the applicant before effecting the salary reduction of 15% and 25 % in the months of April and May, and before sending her on unpaid leave. According to it the Applicant gave consent to vary her contract.

22. It relied on **Emmanuel Wambua Muthusi & 6 Others v Khoja Shia Ithna Ashari Education Board t/a Jaffery Academy [2020] eKLR** where the Court held that, section 10 (5) of the Employment Act does not require that consultation ends up in agreement and the employer is to consult the employee, revise the contract to reflect the change and notify the employee about the change.

23. It maintained that the Applicant filed the application prematurely and relied on **Geoffrey Mworira v Water Resources Management Authority and 2 Others [2015] eKLR** where the Court held that it would sparingly interfere in the employer's entitlement to perform any human resource function unless the employee shows that there is contravention of the constitution, legislation or breach of the agreement between the parties.

24. In the respondent's view it complied with the notification conditions, the redundancy selection methodology and the requirements for payment of terminal dues set out under section 40 of the Employment Act. Consequently, it argued that the Applicant has not established a prima facie case against it to warrant the Court to issue the orders sought in the application. It also relied on section 27 of the Civil Procedure Act that costs follow the event. It further relied on **Cecilia Karuru Ngayu v Barclays Bank of Kenya & an0 [2016] eKLR** where the Court held that in determining issue of costs the court is entitled to look into , inter alia, the subject of litigation, circumstances that led to the institution of proceedings and the events which led to the termination and the manner in which they were terminated.

25. It submitted that the Applicant avoided negotiations and consultations and if she incurred costs in the suit then she is the author of her misfortune having rushed to court prematurely. It urged the Court to find that the application lacks merit and the Applicant is not entitled to any relief.

#### **Issues for determination**

26. The issues for determination are:

- a. *Whether the court should in the interim reinstate the Applicant.*
- b. *Whether court should order for payment of her withheld dues*

#### **Reinstatement**

27. The Applicant submitted that the Respondent did not comply with section 40 of the Employment Act; that she was discriminated upon on grounds of pregnancy and that the circumstances are practicable to reinstate her. On the other hand, the Respondent submitted that the Applicant seeks permanent remedies which require the Court to hear and determine each party's rights and obligations before granting the orders.

28. Section 49 (3) (a) of the Employment Act provides for reinstatement if the termination or summary dismissal is found to be unfair. However, section 12 (3) (vii) of the Employment and Labour Relations Court Act provides that an order for reinstatement is only permitted within 3 years of the separation. Again under section 49(4) (c) and (d) of the Employment Act, an order for reinstatement can only be issued upon considering its practicability and if there are any exceptional circumstances.

29. The Court of Appeal in **Kenya Tea Growers Association v Kenya Plantation & Agricultural Workers Union [2018] eKLR** held that:

***“We agree entirely with the statement by Rika, J in Alfred Nyungu Kimungii v. Bomas of Kenya [2013] eKLR that “Ordinarily, reinstatement of an employee is a substantive remedy, not a temporary relief. The law does not contemplate that reinstatement issues (sic) as a provisional measure. It is a remedy that should normally be granted upon the full hearing of the employer, and the employee.”***

30. Guided by the foregoing precedent, I am of the view that interlocutory reinstatement should only issue for a good cause or exceptional circumstances and if the same is practicable. However, in the instant case, I find that the applicant has not demonstrated any good cause or exceptional circumstances warranting reinstatement at this stage and consequently, the order for reinstatement pending trial fails.

#### **Withheld dues**

31. The Applicant prays for payment of withheld salary pending trial and submitted that the Respondent unilaterally varied her contract of employment by reducing her salary by 15 % and 25% and directing her to proceed on unpaid leave. The Respondent argued that the Applicant was consulted and consented to the reduction of her salary.

32. I have considered the material presented to the court by both parties. The said order relates to the remedy laid out under section 49 (1) (b) of the Employment Act, namely entitlement to the proportion of the wage due for the period of time for which she had worked before the termination. In addition, the order touches on various contentious issues including unilateral alteration of the Applicant's contract of

employment contrary to Section 10 (5) of the Employment Act.

33. In my view the said issues ought to be fully adjudicated upon before ordering any payment of the alleged withheld salary to avoid prejudicing the opposite party. Consequently, the order is declined and the application is dismissed. Costs in the cause.

**Dated, signed and delivered at Nairobi this 30<sup>th</sup> day of July, 2021.**

**ONESMUS N. MAKAU**

**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 15<sup>th</sup> April 2020, this ruling 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**