



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT NAKURU

ELRC CAUSE NO. 43 OF 2019

JACKSON M. ITALAKUA.....1ST CLAIMANT

ANGELA BIRIR..... 2ND CLAIMANT

VERSUS

KENYA FARMERS ASSOCIATION LIMITED..... RESPONDENT

RULING

1. This ruling is in respect of the applicants/Claimants' application dated 26th April, 2021 filed under certificate of urgency pursuant to Articles, 20, 22, 23, 41(1), 47 and 50 of the Constitution of Kenya and Rule 17 of the Employment and Labour relations Court (Procedure) Rules seeking the following orders;

1) Spent.

2) That this Honourable Court be pleased to compel the Respondent to pay the claimants their outstanding salaries pending the hearing and determination of this Application.

3) That this Honourable Court be pleased to issue an order to the Respondent compelling them to settle the claimants salaries and accrued interest benefits without tagging the ongoing case.

4) That the costs of this Application be provided for.

2. The application is supported by the grounds on the face of the application and the affidavits sworn by the Claimants, **Jackson M. Italakua** and **Angela Birir** on the 21st April, 2020 and based on the following grounds: -

a) THAT, the claimants were employed by the respondent as the marketing manager and the Human Resource manager respectively on 15th October, 2008 on contractual basis which contracts were usually renewed by the respondent on expiry.

b) That the claimants have diligently served the Respondent in the respective positions without any complaints being made or disciplinary action taken against any of them.

c) That the Respondent failed to adhere to the contract of employment and paid them less than what is reflected in their contract causing them to institute this suit sometime on 8th July, 2019 claiming underpayment of salaries and other allowances which case is still pending for hearing in this Court.

d) That while this suit was pending in Court the Respondent terminated the services of the Claimants on 17th March, 2020 without Notice or reasons given and withheld the claimants' salaries and benefits against the law when they had promised to pay the same within the shortest time possible.

e) That the actions of the respondent of withholding their salaries has adversely affected them as they cannot afford to meet their financial obligation.

3. In opposing the application, the Respondent filed grounds of opposition which comes out as follows; -

a) That, subsequent to the institution of this Suit, the claimant exited from the Respondents employment and the respondent commenced payment of the terminal dues in installments leaving only one installment.

b) That the delay to finalize the payments is due to the adverse effects of the Covid-19 pandemic.

c) That the claimants' exit from the Respondent's employment and the issue of terminal dues are not the subject of this suit and therefore the application is an abuse of the proceed of this Honourable Court and should be dismissed with costs.

4. The application herein was disposed of via written submissions with the Applicants filing on 8th June, 2021 while the Respondent filed theirs on 10th June, 2021.

Applicant's submissions

5. The applicants through their advocate submitted that the termination of their employment was triggered by the institution of this Suit and the way the termination was carried out was substantively and procedurally flawed. He argued that the procedure laid out under section 45 and 46 of the Employment Act was not followed as they were not paid their terminal dues neither were they issued with a certificate of service.

6. It was argued that the withholding of the claimants' salaries and benefits exposed them to financial constrains thus their right to dignity as provided for under Article 28 of the Constitution was violated and cited the case of **Republic –V- Kenya National Examination Council and another Ex-parte Audrey Mbugua Ithibu [2014] Eklr** and the case of **Jonathan Sprangler –v- Center of African family studies [2017] eklr** where the Court held that;

“There is something that a salary can do to a man, it gives him job satisfaction. Payment of salary comes with that spring and gait towards the office to accomplish a task. The Job gives one a dignified self and purpose to return each day to accomplish more. When a salary is not paid, an employee become anxious and demoralized and denies him the human dignity and eventually work is not voluntary but servitude so as to be paid his due salary and arrears. This is contrary to Article 31 of the Constitution.”

7. He thus urged this Court to compel the respondent to release the salaries it is withholding and the accrued benefits therefrom.

Respondent's submissions.

8. The respondents on the other hand submitted that the signature of the commissioner of the supporting and supplementary affidavits in support of the application herein are similar to the signature in the Certificate of urgency and the Notice of Motion meaning the commissioner of the affidavits is the same advocate that drew the application herein contrary to the express provisions of section 4 of the Oaths and Statutory Declarations Act Cap 15 of the Laws of Kenya therefore ought to be struck out. He reinforced his argument by citing the case of **Lee Njiru –v- John K. Lokorio and another [2019] eklr** where the Court struck out and expunged from record a verifying affidavit which was commissioned by the same advocate that drew it and the suit having been let without a foundation was struck out as well.

9. Accordingly, counsel submitted that the affidavits were clearly commissioned by the advocate who drew them therefore the same ought to be struck out together with the entire application.

10. The respondent submitted that the current application does not have a foundation in that the Main claim as drawn is only seeking for payment of underpayment and has nothing to do with the procedure in which the claimants' employment was terminated and argued that the claimants are bound by their pleadings and therefore since it lacks any foundation, the same ought to be disallowed. He cited the case of **William Ochanda Onguru –v Housing Finance Co Ltd and Another [2005] eklr** where the Court held that;

“The Plaintiff is not the defendant herein, and sub-rule (1) of Order XXXIX does not apply. However, rule 1 (a) applies in relation to the Plaintiff. In the case of KIHARA VS BARCLAYS BANK [2001]2 EA 420 Ringera J. (as he then was) held that where an application for interlocutory injunction is brought under Order XXXIX rule 1 there is no requirement that the suit in which the temporary injunction is sought must be one which itself seeks any restraining orders, and that under rule 2, it is an express requirement that the suit in which temporary injunction is sought must be one for restraining the Defendant from committing a breach of contract or committing the tort complained of.

My examination of rule 1(a) of Order XXXIX strongly suggests to me that the suit upon which the application is founded must itself have sought the restraining orders for the suit is the foundation of the application. The Plaintiff's suit sought a declaratory order which is not sustainable in an interlocutory application for a declaratory order is in the nature of a final order. In my view the Applicants application would also fail on the ground that it has no foundation in the suit, and cannot consequently be brought up in an interlocutory application.”

11. Accordingly, he argued that the claimants are raising different cause of Action in an application when the same is not reflected in the claim in this suit.

12. The respondent further submitted that the prayers as couched are in the nature of mandatory interlocutory injunction which can only be granted when the court is presented with special circumstance which is likely to dispose of the suit in summary basis and cited the case of **Robai Kadili Agufa and another –v- Kenya power and lighting co. ltd [2015] eklr** where the court held that;

“The considerations for granting interlocutory mandatory injunctions were well stated in the case of Kenya Breweries Ltd & Another vs Washington O. Okeyo [2002] eKLR where the Court of Appeal said:-

“The test whether to grant a mandatory injunction or not is correctly stated in Vol.24 Halsbury’s Laws of England 4th Edition paragraph 948 which read:-

‘A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiffs ... a mandatory injunction will be granted on an interlocutory application.’”

The Court of Appeal quoted with approval an English decision in the case of Locabail International Finance Ltd vs Agroexport and others (1986) 1 ALLER 901 where it was stated:-

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly be granted, that being a different and higher standard than was required for a prohibitory injunction.”

In the recent case of Nation Media Group & 2 others vs John Harun Mwau [2014] eKLR the Court of Appeal said:-

“It is strite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances ... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrated as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.”

The principles of law arising from the above decisions is that a court considering an application for interlocutory mandatory injunction must be satisfied that there are not only special and exceptional circumstances, but also that the case is clear.”

13. The respondent submitted that indeed while this suit was pending and the Claimant having exited its employment, the claimant terminal dues were calculated and paid in installment which cheques were received by the Claimants and duly cashed. Further that only one cheque is remaining on the payment of the terminal dues therefore the application is without any basis and ought to be dismissed.

14. I have considered the averments of the parties herein. The orders sought by the applicants can only be granted upon hearing the entire suit.

15. I therefore find it impracticable to grant order as sought.

16. I dismiss the application accordingly and direct that parties proceed to set the main claim for hearing.

17. Costs in the cause.

Ruling delivered virtually this 22ND day of JULY, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Omae for respondent – present

Kimathi for applicant – present

Court assistants – Fred and Wanyoike