



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

Cause No. E091 Of 2021

JEREMIAH MWAROCHA MWARANDU.....CLAIMANT

VERSUS

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS.....RESPONDENT

AND

BENARD MOGESA

CATHERINE MWIKALI

BRENDA DOSIO.....INTERESTED PARTY

R U L I N G

1. The application before me is the Claimant's Notice of Motion dated 27/9/2021 and expressed to be brought under Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016. The Claimant prays:-

- a. that this Honourable Court do certify the application as urgent and dispense with service at the first instance and hear it *ex parte*.
- b. that pending hearing and subsequent determination of this application *inter-partes*, the Honourable Court be pleased to issue an order of temporary injunction restraining the Respondent and Interested Parties from jointly and severally either through themselves, their agents or servants from conducting any recruitment process of the Claimant/Applicant's position.
- c. that as a consequence of grant of prayer 2 above, an order to unconditionally reinstate the Claimant to his previous employment with no loss of benefit pending hearing and subsequent determination of the entire suit.
- d. that costs of the application be provided for.

2. The application is based on the Claimant/Applicant's supporting affidavit sworn on 27/9/2021.

3. The application was filed contemporaneously with the Claimant/Applicant's Statement of Claim dated 27th September 2021 in which the following reliefs are sought:-

- a. a declaration that the dismissal of the Claimant through a process which did not involve the procedural safeguards afforded by Section 41 of the Employment Act as read with Section 42 of the Employment Act was unconstitutional and thus null and void.
- b. A declaration that the Respondent's termination/dismissal of the Claimant's employment was illegal and/or unlawful and/or unfair.
- c. an order to unconditionally reinstate the Claimant to his previous employment with no loss of benefit.
- d. in the alternative 12 months' gross salary in compensation for unfair and/or unlawful termination at ksh.1,203,000.

e. one month in lieu of noticeksh.100,250

f. accrued leave daysKsh.150,375

g. costs of the suit and interest at Court rates.

h. any other relief that the Court may deem fit to grant.

4. In his affidavit sworn in support of the application, the Claimant/Applicant deponed that on 16/8/2020, while on a sick leave which the Respondent and the Interested Parties had duly approved, the Claimant received an appraisal tool by email sent to him by the 3rd Interested party directing the claimant to fill it ahead of an appraisal session scheduled for 2/9/2020.

5. The Claimant/Applicant further deponed:-

a. that without due process, the Respondent and the Interested Parties summarily terminated the Claimant/Applicant's employment vide a letter dated 16/9/2020.

b. that the Claimant/Applicant appealed against the termination which later was quashed by an appeal panel on 3/11/2020 by extending the Claimant's probationary contract by four (4) more months, at the end of which a 2nd appraisal would be conducted.

c. that pursuant to the 2nd appraisal which occurred on 21/12/2020, the Claimant was issued with a show cause letter on 14/1/2021, and ultimately a termination letter on 21/1/2021.

6. The Claimant/Applicant further deponed that the letter to show cause issued on 14/1/2021 after the 2nd appraisal was only a mirage (meant) to sanitize the illegal misdeeds of the Respondent through the Interested Parties, having pre-determined the Claimant's exit while he was on sick leave. That the termination was unfair, malicious, pre-determined and fell short of the thresholds (set) under Articles 28,42,47 and Sections 43 and 45 of the Employment Act.

7. A look at the Claimant/Applicant's contract of employment dated 13th February 2020 shows that the Claimant was employed with effect from 2nd March 2020, on permanent and pensionable terms, and that the contract was subject to six months' probation period from the date of commencement thereof.

8. Counting from the date of commencement of the Claimant's contract of employment, which was 2nd March 2020, the six months probationary period lapsed on 1/9/2020. The purported extension of the Claimant's probation period in November 2020 by a further four (4) months after quashing a purported termination of a probationary contract effected vide a letter dated 16/9/2020 may have been obvious illegalities. Section 42(2) of the Employment Act 2007 provides as follows:-

"A Probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee".

9. The questions as to whether a lapsed probationary period can be extended in retrospect, whether or not the Claimant had agreed to the purported retrospective extension of the lapsed probationary period and whether there was a probationary contract capable of being terminated as such on 21/1/2021 can only be determined upon full trial.

10. The Respondent and the Interested Parties have, vide the Replying Affidavit of Dr. Bernard Mogesa sworn on 15th October 2021 and filed in Court on 19th October 2021, demonstrated that the recruitment process to fill the post previously held by the Claimant was commenced on 8th April 2021, that interviews were conducted on 11th August 2021, and the identified officer given the job on 1st September 2021. This position has not been controverted by the Claimant/Applicant.

11. The Claimant's claim herein and Notice of Motion dated 27th September 2021 were filed almost a month after completion of the recruitment process in respect of which an injunctive order is sought. The Court cannot give orders in vain.

12. The Claimant's prayer for unconditional reinstatement to his previous employment with no loss of benefit pending hearing and determination of the suit herein is depended on success of the prayer for a temporary order of injunction restraining the Respondent and the Interested Parties from undertaking a recruitment process to fill the position previously held by the Claimant/Applicant. As already stated in paragraph 11 of this Ruling, the recruitment process is shown to have been completed almost a month before the Claimant's claim and application were filed in Court.

13. Although the Claimant/Applicant has, in my view, established to some extent that he has a *prima facie* case with probability of success as set out in the case of **Giella -vs- Cassman Brown & Co. Ltd [1973] E.A.358**, the interlocutory injunction sought cannot issue. The main suit should be fast tracked and fixed for hearing on priority basis.

14. Consequently, and having considered written submissions filed by counsel for parties herein, I order that the Notice of Motion dated 27th September 2021 be, and is hereby dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 18TH DAY OF NOVEMBER, 2021

AGNES M.K. NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES M.K. NZEI

JUDGE

Appearance:

Mr. Mwangunya for Claimant/Applicant

Mr. Kamau Respondents