



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO E500 OF 2021

RONO DAVID KOSKEL.....CLAIMANT

VERSUS

BOMAS OF KENYA LIMITED.....RESPONDENT

RULING

1. By his Notice of Motion dated 22nd June 2021, the Claimant seeks an injunctive order restraining the Respondent either by itself, its servants and/or agents from headhunting, advertising, carrying out any interviews and recruiting or employing any person in replacement of the Claimant.

2. The Motion is supported by the Claimant's own affidavit and is based on the following grounds:

- a. That the Claimant has unlawfully and unfairly been terminated from the service of the Respondent through an illegal process as he was never subjected to any disciplinary hearing by the Respondent prior to termination of his employment;
- b. That the letter purporting to terminate the services of the Claimant arose from an unlawful procedure that was allegedly a disciplinary hearing;
- c. That the termination of the Claimant's employment is voidable for want of legal compliance and procedural fairness;
- d. That the Claimant was not taken through the requisite disciplinary processes envisaged under Articles 10, 22, 41 and 47 of the Constitution as well as Sections 41 and 44 of the Employment Act, Section 4 of the Fair Administrative Action Act, 2015 and Regulation 10.15.5 of the Human Resource Policies and Regulations Manual;
- e. That it is in the interest of justice that the prayers sought in the application be granted to uphold the rule of law, fair labour practices and protection of the rights of the Claimant;
- f. That the Claimant stands to suffer great prejudice and loss and stands a high potential of professional bias;
- g. That the acts of the Respondent are entirely in disregard of the law and as such the process was unprocedural, illegal and unlawful *ab initio*. All these processes were unlawfully conducted by flouting the Respondent's own Human Resource Manual, the Claimant's contract of appointment, the employment laws and the Constitution of Kenya;
- h. That the Claimant has established a *prima facie* case against the Respondent;
- i. That the balance of convenience tilts in favour of the Claimant;
- j. That the application has been made in good faith and in the interest of justice as the Respondent will not be prejudiced if the orders sought are granted, which cannot be said of the Claimant who continues to be greatly prejudiced if the same are not granted;
- k. That the application has been made within reasonable time despite the administrative challenges obtaining on the part of the Claimant.

3. By its Grounds of Opposition dated 1st July 2021, the Respondent states:

a. That the application is incompetent, fatally defective and an abuse of the court process;

b. That the prayers sought in the application are oppressive and overreaching, since there is no employment relationship between the Claimant and the Respondent, and to stop the employer from advertising and hiring will amount to interference with the internal administrative prerogative.

4. The Respondent also filed a replying affidavit sworn by its Ag. Human Resource Manager, Jimmy Okidiang'i on 2nd December 2021.

5. In the said affidavit, Okidiang'i sets out the events leading to the Claimant's dismissal and concludes that an order barring recruitment for the position previously held by the Claimant would hinder delivery of services at the Respondent.

6. The Claimants' plea in this application falls within the purview of interlocutory injunctions. The conditions under which such an order may be granted were set in *Giella v Cassman Brown & Company Limited [1973] E.A 358*, as follows:

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide the application on the balance of convenience.”

5. The Court of Appeal has determined that the triple conditions set in *Giella v Cassman Brown* (supra) ought to be considered sequentially (see *Kenya Commercial Finance Co. Ltd v Afraha Education Society Limited [2001] 1 E.A 86* and *Nguruman Limited v Jan Bond Nielsen & 2 others [2014] eKLR*).

6. A *prima facie* case was defined by the Court of Appeal in *Mrao Limited v First American Bank of Kenya Limited & 2 others [2003] KLR 125* as follows:

“.....a case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

7. The Claimant's complaint is that he was wrongfully dismissed and in his main claim, he seeks reinstatement to the position of Finance and Administration Manager. My reading of the pleadings and supporting documents thereof reveal that the legality of the Claimant's dismissal is a highly contested matter; indeed, it forms the basis of the main claim.

8. Additionally, under Section 49 of the Employment Act, reinstatement is a remedy to be granted in exceptional circumstances which have not been established in this case.

9. I therefore find and hold that the Claimant has failed to establish a *prima facie* case to warrant an interlocutory injunction. He has also failed to show that damages would not be an adequate remedy in the event that he succeeds in his claim against the Respondent.

10. Regarding balance of convenience, I will say this; the position of Finance and Administration Manager, which was held by the Claimant, is critical in the Respondent's establishment and it would be unsafe to hold it vacant for long. The balance of convenience therefore tilts in favour of the Respondent.

11. In the ultimate, the Claimant's application dated 22nd June 2021 is declined with costs in the cause.

12. The interim orders granted on 23rd June 2021 are vacated.

13. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 16TH DAY OF DECEMBER, 2021

LINNET NDOLO

JUDGE

Appearance:

Miss Tusiime for the Claimant

Mr. Masese for the Respondent