



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 495 OF 2019

JUSTUS MUTUA.....CLAIMANT

VERSUS

VERT LIMITED.....RESPONDENT

RULING

1. The application before the court is the Respondent's Notice of Motion dated 10.9.2019 brought under section 3A of the Civil Procedure Rules 2010. It seeks the following orders:

(a) The Statement of Claim dated 29th July, 2019 and filed in Court on 30th July, 2019 and the entire suit in the Employment and Labour Relations Court Cause No. 495 of 2019 be struck out.

(b) The costs of the application be awarded to the Respondent/Applicant herein.

2. The grounds upon which the application stands are:

(a) The Claim herein discloses no reasonable cause of action.

(b) The entire suit is an abuse of the process of this court.

(c) The Honourable Court lacks jurisdiction to hear this claim

(d) The Claimant herein was appointed with effect from 11th February, 2019 and was still serving his probationary period therefore this suit has no legal basis on which it is founded.

(e) The Claimant was terminated as per the terms of his contract.

3. The application is supported by the supporting affidavit sworn by the respondent's Managing Director Ms. Jane Maina on 10.9.2019.

4. The application is opposed by the claimant vide his Replying Affidavit sworn on 2.10.2019.

Factual background.

5. The salient facts of the case are that the claimant was employed by the respondent as the Head of Finance Administration vide the letter of Appointment dated 2.1.2019. The appointment was effective from 11.2.2019 but the first 3 months were to be served on probationary basis. On 30.3.2019, the respondent terminated the claimants services on ground that his suitability and overall performance in the role of General Manager was assessed and found to be below expectation. The termination took effect immediately e but the claimant was offered salary in lieu of notice for 7 days.

6. The claimant was aggrieved by the termination contending that he never served in the position of General Manager but as Head of Finance and Administration. He therefore brought the suit herein contending that his employment as Head of Finance and Administration was unlawfully terminated and prayed for compensation.

Arguments

7. The respondent did not file defence but instead filed the instant application. She contended that the claimant's job title was changed to General Manager and as such the suit does not disclose reasonable cause of action because the termination was done lawfully in accordance

with the terms of his contract of service. She contended that Clause 7 of the contract of service provided that during his probation period, either party could terminate the contract by serving 7 days notice or paying 7 days salary in lieu of notice to the other. She also contended that upon termination, she paid the claimant Kshs. 99600 being salary in lieu of notice plus accrued leave.

8. However in opposing the application, the claimant maintained that the termination of his services was unlawful and unfair because he was dismissed for alleged failure to perform as expected in the role of General Manager when he was appointed to serve as Head of Finance and Administration. He contended that the termination was unfair because it was done unprocedurally. He further contended that the motion was incompetent because the suit is undefended.

Issues for determination

9. There is no dispute that the claimant was appointed to serve in the position of Head of Finance and Administration and that his first 3 months were to constitute probation period. There is further no dispute that claimant was dismissed before the expiry of his probation period without prior notice of 7 days as required under Clause 7 of the contract of service, but he was paid 7 days salary in lieu of notice. The issues for determination are:

- (a) Whether the court lacks jurisdiction to determine the suit.
- (b) Whether the suit disclosed no reasonable cause of action
- (c) Whether the suit is an abuse of the process of the court.

Jurisdiction

10. The jurisdiction of this court is set out under section 12 of the Employment and Labour Relations Court Act and it includes determination of a dispute between an employer and his employee. The dispute herein concerns alleged unlawful termination of claimant's employment contract by the respondent. Consequently, I return that the court enjoys exclusive jurisdiction over the suit herein.

Reasonable cause of action

11. The claimant challenges the termination of his employment as the Head of Finance and Administration on grounds that he did not perform to the expectation in the role of General Manager. He denies that he was employed as General Manager and further contends that he was not accorded any hearing before the termination. He therefore contends that the termination was unfair and unlawful.

12. The respondent contends that the claimant's job title was changed to General Manager and relied on his email address which had "gm" in it. The claimant has however denied that allegation and maintained that he was never notified of any change of appointment as alleged by the respondent.

13. The respondent suggests that termination of contract of service during probation period like the instant case entitled the employee to no fair treatment. However, I am of a different view considering the fact that section 42 of the Employment Act only takes away the right to hearing under section 41 of the Act and nothing more.

Section 42 provides that:-

“(1) The provisions of section 41 shall not apply where a termination of employment terminates a probationary contract.

...

(4) A party to a contract for a probationary period may terminate the contract by giving not less than seven days notice of termination of the contract, or by payment by the employer or the employee, seven days wages in lieu of notice.”

14. The above provision does not seem to give the employer any right to dismiss the employee for no valid and fair reason. It only disentitles the employee a hearing before the separation. In this case the claimant is challenging the termination of his employment on ground that it was not for a valid reason because he was dismissed for role that he was not serving and without being evaluated on the performance. He is also seeking compensation for unfair termination of his contract of service.

15. The respondent has not filed any defence to deny the claimants averments and prayers. It follows that there is no joinder of issues so far. The respondent seems confident that claimant cannot sue for unfair termination of his services because he was serving under probationary contract.

16. However, it seems to me that, after the nullification of Section 45 (3) of the Employment Act, there is no limitation of the length of service required before an employee can to sue for unfair termination. The repealed subsection (3) barred employees who had served for less than 13 months from suing for unfair termination. Likewise section 49 (1) of the Act does not also seem to disqualify any employee from seeking compensation for unfair termination during probation.

17. In view of the foregoing observations that the law does not seem to, expressly, disqualify the claimant from filing the instant suit, and the contention that there was no valid reasons for terminating claimants' employment, I return that the suit disclosed reasonable cause of action warranting trial by the court. I also find that it is not an abuse of the process of the court.

Conclusion

18. The respondent has cited several precedents, which seem to support his view that an employee can be dismissed during probation period without the benefits of procedural and substantive fairness. However, the facts of the instant case are distinguishable from the said precedents because in those precedents, the employees were terminated for poor performance of their rightful roles under the contract of service.

19. In view of the foregoing I dismiss the application dated 10.9.2019 with costs. The respondent is at liberty to file and serve defence within 14 days of today.

Dated, signed and delivered in open court at Nairobi this 31st day of January, 2020.

ONESMUS M. MAKAU

JUDGE