



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

CAUSE NO. 613 OF 2019

Before Hon. Lady Justice Maureen Onyango

ROSE SANG.....CLAIMANT

VERSUS

SIGINON GROUP LIMITED.....RESPONDENT

RULING

The Claimant filed the suit herein on 16th September, 2019 vide her memorandum of claim of even date. In the claim she seeks the following orders;-

(a) A declaration that Claimant's dismissal from the Respondent's employment was unprocedural, unfair and unlawful and unconstitutional.

(b) General Damages on account of discrimination.

(c) An order does issue reinstating the Claimant as the Respondent's Group Human Resource and Administration Manager.

(d) Permanent Injunction restraining the Respondent either by itself, servant and/or agents from headhunting, advertising and recruiting and employing Group Human Resource and Administration Manager to replace the Claimant within employment.

In the alternative to prayer (c) herein:

(e) 12 month's gross salary compensation for unfair termination

(f) 3 month's gross salary in lieu of notice

(g) Costs of this suit.

(h) Any other relief that the court may deem appropriate to grant.

Together with the Memorandum of claim she filed motion under certificate of urgency in which she prays for the following orders;-

1. Spent.

2. That this court be pleased to grant an ex-parte interim injunction restraining the Respondent either by itself, servant and/or agents from headhunting, advertising, carrying out interviews, recruiting and employing Group Human Resource and Administration Manager to replace the Applicant pending the hearing and determination of this application.

3. That this court be pleased to grant an order of injunction restraining the Respondent either by itself, servant and/or agents from headhunting advertising, carrying out interviews, recruiting and employing Group Human Resource and Administration Manager to replace the Applicant pending the hearing and determination of this claim.

4. That in alternative to Prayer 3 herein, this court be pleased to order the Respondent to reinstate the applicant herein in the interim

to the position of Group Human Resource and Administration Manager pending the hearing and determination of the claim.

5. That cost of this application be provided for.

The application is supported by the grounds on the face thereof and the affidavit of the claimant sworn on 16th September, 2019. The thrust of her grounds in both the affidavit and the motion are that her employment was terminated for invalid reasons and fair procedure was not complied with, that she has prayed for the remedy of reinstatement and should the Respondents fill her position she will suffer prejudice hence the need to preserve status quo.

The Respondent opposed the application and filed two replying affidavits both sworn on 11th October 2019. The first is by the Respondent's Managing Director MESHACK KIPTURGO sworn on 11th October, 2019 in which he desposes in his 23 pages with 69 paragraphs that the Claimant has not established a prima facie case, that the balance of convenience favours the Respondent, that the applicant has not and is unlikely to suffer irreparable loss that cannot be compensated by way of costs if she is successful and that the applicant is guilty of material non-disclosure. The rest of the lengthy affidavit contains facts that will be relevant for the main claim but not for the instant application.

In the second affidavit of JEFFERSON KEFA, the Respondent's Human Resource Business Partner, Siginon Group Limited deposes that before the recruitment of the Claimant there was peace and cordial working relations in the department. That everything changed and the peaceful atmosphere ceased within six months of the claimant joining the department as she would be engaged in conflicts with almost the entire Human Resource Team with no proper justification. He further avers in the affidavit that contrary to the claimants deposition in her affidavit that there were other officers whose documents were missing on record namely; Edwin K. Ronoh (Group Manager, Financier), Mr. Job Kemboi (Group Commercial Manager) and Mr. David Yegon (General Manager, Siginon Global Logistics). The Human Resource Department had custody of their documents. KEFA, confirmed the existence of updated personnel profiles for the 3 officers named. He deposes that these profiles, including the academic certificates and curriculum vitae of the said staff were in existence within the Respondent's Human Resource Department.

Kefa averred that on or about the 5th October, 2017, the Respondent requested staff to provide their personal profiles showing their qualifications and work experience among other things, together with their certificates, to either the Group Human Resource and Administration Manager or the Human Resource Shared Services Manager for purposes of conducting a skills audit. At this point, it was established that Mr. Edwin Ronoh had provided his documents in the year 2012.

That he carried out a skills audit using the documents and provided the results to the claimant/applicant in February, 2019.

In response to the replying affidavits, the claimant filed a supplementary affidavit sworn on 13th December, 2019 in which she deposes that she did not intentionally withhold any information in her Curriculum Vitae, that there was no recruitment agency involved in her recruitment. She denies ever being asked to resubmit her curriculum vitae in any particular format. She further deposes that the present application seeks the preservation of her position pending the hearing and determination of her prayer to be reinstated to the position which she was unlawfully and unfairly terminated from.

The claimant deposes that her relationship with the Respondent has not in any manner broken down irreparably as alleged in the replying affidavits. She deposes further that she did not seek orders of interim reinstatement but preservation of her actual position pending the hearing and determination of this suit.

Submissions by Claimant

In her submissions filed on 13th December 2019 the Claimant states that she was employed by the Respondent on 1st November, 2018 as a Group Human Resource Manager on a fixed term contract for a period of 3 years, up until 31st October, 2021. That on 6th August 2019, the Claimant received a Notice to show cause alleging that the respondent had completed background checks on the Claimant and required her to answer to three charges of having failed to complete her Masters Course Work, Omission of specific information concerning her employment history in her curriculum vitae and insubordination and specifically on the charge of omission in her curriculum vitae. That the particular information she was required to address is alleged omission to state that she worked at Eco Bank Limited for three months between January, 2014 to 31st March, 2014.

The Claimant responded to the allegations and was invited for hearing on 30th August, 2019 vide a letter dated 26th August, 2019.

It is submitted that the application raises serious issues of law relating to the extent of disclosures by employees in curriculum vitae at the time of recruitment. The claimant submits that she did not disclose her short work stint at Eco Bank because she did not feel the experience was significant in her curriculum vitae.

The claimant submits that the reasons for termination in the letter of termination were different from the charges in the show cause letter which she responded to and thus she was condemned unheard on the grounds for termination in the letter of termination.

On the charges of insubordination, the claimant submits that she was aware the Respondent had engaged a private investigator to perform a background check on her and she was waiting for the investigator's report before submitting the relevant information. That this was discussed and agreed between her and the Managing Director.

The claimant submitted that she had demonstrated a prima facie case capable of success in the main trial, that the procedure utilized to terminate her employment did not comply with Section 41 of the Employment Act and that having prayed for reinstatement. It is important that her position be preserved, she further submits that the Respondent has stated at paragraph 57 of the replying affidavit that it does not

intend to recruit any person in the said position in the interim.

Submissions by Respondent

For the Respondent it is submitted that the issues for consideration by the court are:-

- a) *Whether the Applicant has a prima facie case with high chances of success*
- b) *Whether the Applicant would suffer irreparable loss*
- c) *Whether the court can decide this case on a balance of convenience*
- d) *Does exceptional circumstances exist that would warrant the grant of an interim/interlocutory injunction*

It is submitted that in the case of **Moses C. Muhia Njoroge & 2 Others v James W. Lesaloi and 5 Others [2014] eKLR** the court while making a determination on the issue of a prima facie case with a probability of success cited the Court of Appeal decision in the case of **Mrao Ltd v First American Bank of Kenya and 2 Others [2003] KLR 125** where the Court of Appeal held that:

“A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”

It is submitted that the claimant admitted to have deliberately omitted her work history at Eco Bank. That during its investigations it transpired that the Claimant’s employment at Eco Bank was terminated because she did not disclose material facts about the termination of her employment by her previous employer Barclays Bank. That had this information been in the knowledge of the Respondent it would probably not have employed her. That the claimant as an experienced Human Resource Practitioner ought to have known the importance of a comprehensive curriculum vitae and background checks.

The Respondent submitted that in the case of **John Njue Nyaga v Nicholas Njiru Nyaga & Another** the Court of Appeal dismissed the suit and stated:-

“It is our considered view that one who comes to equity must come with clean hands and equity frowns upon secrecy and under hand dealings.”

The Respondent further relied on the decision in **Dock Workers Union v Kenya Ports Authority** where the court held –

“Justice and equity follow the law. The maxim that a Person ought not to derive advantage from his own injurious behaviour cuts across all fields of the law. There is a Latin maxim in nearly all the areas of the law, expressing the view that a person ought not to derive advantage from his own wrongdoing.”

It is submitted that the claimant has not disclosed a prima facie case with probability of success.

On the second limb of irreparable loss the Respondent submitted that the applicant has not demonstrated that she will suffer irreparable injury. The Respondent relied on the decision in **Nguruman Limited v Jan Bonde Nielsen & 2 Others** where the Court of Appeal stated:-

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the appellant to demonstrate prima facie, the nature and extent of the injury.”

On the last limb of balance of convenience, the Respondent submitted that the claimant has not demonstrated exceptional circumstance that exist to warrant the grant of interim injunction. It relied on the decision in **Mrao Limited** (Supra) where the Court of Appeal held:-

“The power of the court in an application for an interlocutory injunction is discretionary. Such discretion is judicial. And as is always the case judicial discretion has to be exercised on the basis of law and evidence.”

On the prayer for reinstatement the Respondent urged the court to consider and apply the decision in **Alfred Kimungai v Bomas of Kenya** which the court stated:-

“The Employment Act does not intend that Courts take away managerial prerogatives from employers. To give the interim order would have the effect of stifling the management prerogative in staff administration. It would mean the employer does not have any more say in the contract of employment it has authored. This would be contrary to the intention of the Employment Act, which seeks to merely protect the weaker of the bargaining partners, not deprive the employer the power to run its business altogether.”

The Respondent further urged the court to rely on the decision in **Dorothy Vivian Atieno Ogutu v Mumias Sugar Company Limited** where the court stated:-

"It is my opinion that it would not be possible for the court to determine whether or not the Applicant is entitled to reinstatement until all the evidence is taken and the court finds first, that she was unfairly terminated and secondly, that her circumstances are such that reinstatement would be the most appropriate remedy."

The Respondent further relied on the decision in **Wells Fargo Limited v Cyrus Kioko and 48 Others** where the court of appeal citing the case of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others** stated:-

"The Employment Act does not intend that Courts take away managerial prerogatives from employers. To give the interim order would have the effect of stifling the management prerogative in staff administration. It would mean the employer does not have any more say in the contract of employment it has authored. This would be contrary to the intention of the Employment Act, which seeks to merely protect the weaker of the bargaining partners, not deprive the employer the power to run its business altogether."

The respondent urged the court to dismiss the application with costs.

Determination

I have considered the application together with the grounds and affidavit of the applicant/claimant in support thereof. I have further considered the affidavits filed by the Respondent in opposition thereto and the submissions by the parties as well as the authorities cited. The issues for determination are whether the claimant/applicant has satisfied the conditions for grant of the orders sought and whether the said orders should be granted.

The entire application though seeking several prayers, is anchored on the claimant's prayer for reinstatement in the claim.

The employment Act provides for reinstatement as a remedy where an employee has been unfairly terminated. As stated in the case of **Kenya Airways Limited v Aviation & Allied Workers Union**, reinstatement is not an automatic remedy. The Employment Act requires the court to consider the factors set out in Section 49(4) before deciding whether to grant the remedy. Among the factors to be considered are the extent to which the employee contributed to the termination, the practicability of recommending reinstatement, the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances and the employee's length of service.

Although these can be ascertained from the affidavits and documents on record, this is an issue of determination after hearing evidence of the parties at a full hearing. This therefore means that reinstatement is unavailable as an interim remedy it is only granted after proof of unfair termination as was stated in the case of **Dorothy Vivian Atieno Ogutu** (supra) or if before hearing, in very clear and exceptional circumstances. The applicant herein has not met this threshold. This disposes of the prayer for interim reinstatement in the application.

On the prayer for interim injunction, the case of **Giella v Cassman Brown & Company Limited** sets out the principles to be considered by the court. The applicant must establish a prima facie case with probability of success, or that the applicant will suffer irreparable loss. If in doubt, on a balance of convenience. In the instant application, I find that it is not possible to determine if the applicant has a prima facie case as this would only become determinable after hearing evidence from both parties. I say this because the issues of contention, that is whether the grounds for dismissal were those in the notice to show cause or not is a matter that the parties do not appear to have a mutual interpretation.

The other determinant of a fair termination, that is hearing and an opportunity to respond to the changes, appear not to be contested. Both parties agree that there was a notice to show cause that was responded to by the applicant, and that thereafter there was a disciplinary hearing.

On the second determinant, the applicant has not demonstrated the loss she will suffer that is incapable of remedy by way of costs or monetary compensation should the orders not be granted. In the claim she has sought reinstatement or in the alternative payment of compensation.

On the third limb of balance of convenience, the applicant occupied the position of Group Human Resource Manager. This is no doubt, a very Senior Position in an organization. The applicant has not demonstrated how the roles of that position would be fulfilled if it is left vacant to await the final determination of the suit she has filed. In the opinion of the court, there is no reason for not reinstating the claimant to her original position if she persuades the court that she is entitled to the orders. It would then be the problem of the respondent to deal with the person who would then be occupying that position. I thus find that the balance of convenience tilts in favour of not granting the orders sought.

For the foregoing reasons, I find that the applicant/claimant has not satisfied the conditions for grant of the orders sought with the result that the application is dismissed. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29TH DAY OF MAY 2020

MAUREEN ONYANGO

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 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE