



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 81 OF 2020

(Before Hon. Lady Justice Hellen S. Wasilwa on 28th May, 2020)

SANTAI PUNYUA KIMAKEKE.....CLAIMANT

-VERSUS-

FREE THE CHILDREN.....RESPONDENT

RULING

1. Pending before me for determination is the Notice of Motion Application dated 24th January, 2020. The same is brought under Certificate of Urgency under the Under Article 41 (1) and 47 (1) of the Constitution of Kenya, 2010, Section 45 (1) and 46 (h) of the Employment Act, 2007 and Rule 17 of the Employment and Labour Relations Court Rules seeking orders that:-

- 1. This Application be certified urgent and heard on ex parte in the first instance (spent).***
- 2. A temporary injunction be issued preventing the Respondent from evicting the Claimant from his residential house pending hearing and determination of this Application.***
- 3. A temporary injunction be issued preventing the Respondent from evicting the Claimant from his residential house pending the hearing and determination of the Claimant's Statement of Claim.***
- 4. This Honourable Court be pleased to issue any other orders it may deem fit.***
- 5. Costs of this Application be borne by the Respondent.***

2. The Application which is premised on the grounds that:-

- 1. The Claimant and the Respondent had negotiated an agreement to allow the Claimant to continue occupying the Respondent's residential premises for a period of six months commencing January 2020.***
- 2. The Respondent unlawfully terminated the Claimant's employment package and gave the Claimant a grace period within which to move out of the Respondent's residential premises and hand over the Respondent's properties.***
- 3. The Respondent upon being served with a Constitutional Petition challenging the Claimant's malicious prosecution at the behest of the Respondent, has capriciously moved and instructed the Claimant to move out of the premises within 6 hours which expired on the 23/1/2020.***
- 4. The notice period granted is unreasonably short and would expose the Claimant to inhumane conditions by rendering him homeless.***
- 5. As a matter of natural justice, the Claimant is entitled to ample notice to make alternative accommodation arrangements which right the Respondent has capriciously violated.***
- 6. Unless the Honourable Court intervenes, the Claimant is likely to be unlawfully evicted without notice or even arrested and charged for trespass.***

7. In the circumstances its only fair and just that the Orders sought herein be granted obviate injustice being conducted to the detriment of the Claimant.

3. The Application further supported by the Affidavit of **SANTAI PUNYUA KIMAKEKE** sworn on 24th January, 2020, in which he reiterates the averments made in the Notice of Motion Application.

4. In response to the Application the Respondent filed Grounds of Opposition dated 6th February, 2020 and filed in Court on 7th February, 2020 raising the following grounds:-

1. THAT this Honourable Court lacks jurisdiction to preside over this Claim pursuant to Gazette Notice No. 6024 of 2018 given that the Claimant's monthly gross salary was Kshs. 488,330/-.

2. THAT the Application is an abuse of the process of this Honourable Court and should be dismissed with costs to the Respondent.

3. THAT the Claimant has not displayed a prima facie case warranting the interim injunction sought and thereafter granted.

4. THAT the Claimant has not demonstrated that he stands to suffer irreparable injury should the injunction not be granted as sought.

5. THAT the Claimant's summary dismissal was completed following due process as provided by the Employment Act and the Respondent's employee handbook.

6. THAT the Claimant has since been found criminally liable for his conduct during his employment by the Respondent and has been charged in Criminal Case No. 87 of 2020.

7. THAT the Claimant has not supplied any evidence to support his claim that his request to retain the Company house until June 2020 was acceded to by the Respondent.

5. In further response to the instant Application the Respondent filed a Replying Affidavit deponed by Robin Wiszowaty, the Respondent's Country Director, in which he maintains that the Claimant was lawfully and legally terminated by the Respondent for alleged misconduct.

6. He further maintained that the Claimant was accorded a hearing in line with its Policy and Procedures on 11th December, 2019. He further avers that following investigations conducted by the Police the Claimant was arrested and charged in criminal case no. 87 of 2020.

7. Mr. Wiszowaty further averred that the disciplinary panel also reached a decision to terminate the Claimant's employment and its' decision communicated to the Claimant vide the letter dated 16th January, 2020.

8. The Respondent further confirmed that the Claimant did appeal the decision to terminate his employment vide his letter dated 23rd January, 2020 and an appeal hearing was scheduled for 3rd February, 2020 in accordance with the Respondent's employee handbook. He further maintained that the Claimant was allowed to make his representation fully at the hearing which upheld the decision to terminate his employment.

9. The Respondent further states that the Claimant having ceased being an employee of the Respondent is not entitled to housing or car benefits that are only available to employees by dint of Clause 9.6 of his employment contract that provides:-

"Upon termination of the Employee's employment for any reason, the employee shall immediately return all property belonging to the employer in his possession."

10. The Respondent maintained that the instant Application is void of merit, is baseless and an abuse to the Court process and urged this Honourable Court to dismiss the same with costs to the Respondent.

11. In a brief rejoinder the Claimant filed a Supplementary Affidavit deponed by **SANTAI PUNYUA KIMAKEKE** on 28th February, 2020, in which he avers that his exit from the Respondent was fully discussed and agreed upon by the parties and therefore the Respondent cannot unilaterally repudiate the same.

12. He further maintained that the disciplinary process alluded to by the Respondent was a sham as the decision to terminate his services had already been arrived at.

13. He further averred that the Respondent having agreed to the exit package which included use of the Respondent's car and continued stay in its premises post termination amounted into a benefit and the Respondent is estopped from denying him the same.

14. The Claimant urged this Honourable Court to allow his Application in terms of the prayers sought therein.

15. Parties agreed to dispose of the Application by way of written submissions.

Submissions by the Parties

16. In his Submissions the Claimant maintained that he has met the threshold for grant of the orders sought in his Application as set out in the case of **Giella Vs Cassman Brown (1973) EA 358** and therefore urged this Honourable Court to allow his Application as prayed.
17. He further submitted that the Respondent is estopped from going against the exit package as agreed that allowed the Claimant's continued stay at the Respondent's premises post termination. To fortify this argument the Claimant cited and relied on the case of **Titus Muiruri Doge Vs Kenya Cannery Limited (1988) eKLR**.
18. The Claimant further submitted that the parties are bound to the exit agreement and the Court has a duty to give effect to the parties' intention as expressed in the said agreement. To buttress this argument the Claimant cited the Court of Appeal decision in the case of **748 Air Services Limited Vs Theuri Munyi (2017) eKLR** where the Court opined that the Courts have a duty to enforce and give effect to the intention of parties as agreed upon in their agreements.
19. The Claimant further submitted that he has been able to show a prima facie case and relied on the judicial decision in the case of **Fredrick Saundu Amolo Vs Principal Namanga Mixed Day Secondary School & 2 Others (2014) eKLR**.
20. The Claimant further submitted that his right to fair labour practices as enshrined under Article 41 of the Constitution of Kenya, 2010 have been violated by the Respondent who purports to repudiate the agreed exit package in a disciplinary process that is a sham. For emphasis the Claimant cited the case of **Jane Consolata Adhiambo Vs Teachers Service Commission & Another (2017) eKLR**.
21. In conclusion the Claimant submitted that having met the threshold for granting of the Orders sought he urged this Honourable Court to allow his Application in terms of the orders sought therein. To buttress this argument the Claimant cited and relied on the case of **Brown Tsuma Mukanda Vs National Gender and Equality Commission (2015) eKLR**.
22. There are no submissions on record filed by the Respondent.
23. I have examined the averments of the Parties herein. This Court granted interim orders allowing the application to stay in the premises of the Respondent pending further directions from this Court.
24. However, it now emerges that the Claimant/Applicant sought to stay in the Respondent's house for 6 months from January 2020, which 6 months will expire in June 2020.
25. The relationship between the Claimant and the Respondent has however been severed and therefore there is no reason to warrant the Claimant's stay in the Respondent's premises. I find that the application has no merit in the circumstances.
26. I decline to grant further stay of Claimant in Respondent's premises and I will only extend the stay to 30th June 2020 whereupon expiry, the Claimant should henceforth vacate the premises of the Respondent.
27. Costs in the cause.

Dated and delivered in Chambers via zoom this 27th day of May, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kariuki for Claimant/Applicant

Mwai for Respondent – Present