



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 574 OF 2019

(Before Hon. Lady Justice Hellen S. Wasilwa on 21st May, 2020)

EMMANUEL OSHUMU PARTEYIE.....CLAIMANT

VERSUS

EAST AFRICAN PORTLAND CEMENT PLC.....RESPONDENT

RULING

1. The Application before Court is a Notice of Motion filed by the Applicant on 30/8/2019. The Applicant seeks the following orders:-

1. Spent.

2. That pending the hearing and determination of this Application the Respondent be and is hereby ordered to deposit in court the sum of Kshs. 10,449,625/-.

3. That pending the hearing and determination of this suit the Respondent be and is hereby ordered to deposit in Court the sum of Kshs. 10,449,625/-.

4. A mandatory injunction do issue to compel the Respondent to accept back the Claimant to his previous position of Energy electrician without any loss of benefits, salary, allowances and/or continuity of service.

5. That the Honourable Court do issue such orders and give such direction as it may consider fit and just in the circumstances.

6. That the Respondent do pay costs of this application.

2. The Application is supported on grounds that:

1. The Applicant was employed by the Respondent in the position of Energy Electrician in 2005.

2. By a Judgment of this Court, the Respondent's contract employees including the Applicant were entitled to be governed by the terms and conditions of service as per the CBA. This Judgement was confirmed by the Court of Appeal in Civil Appeal No. 14 of 2016.

3. The Applicant's termination was done in violation of the CBA and judgment of the Employment and Labour Relations Court and Court of Appeal. Further, the Respondent in a letter dated 26/6.2019 terminated the services of the Applicant indicating that the contract would not be renewed.

4. The Respondent underpaid the Applicant as he was paid Kshs. 98,480/- as opposed to Kshs. 131,307/-. It has also failed to pay the Applicant what he is entitled to under the CBA.

5. The Respondent terminated the Applicant without inviting him to show cause why his services should not have been terminated. In addition, it did not give the Applicant the mandatory 2 months' notice prior to termination contrary to section 41 of the Employment Act.

3. The application is supported by the affidavit of Emmanuel Oshumu Parteyie, the Applicant herein, sworn on 22/8/2019. He avers that decision to terminate his services on the alleged lapse of contract is unfair and unlawful.

4. He further avers that he had taken a loan with Barclays Bank of Kenya (now Absa Bank Kenya Plc) which the Respondent approved that he was employed on permanent basis. He avers that the Respondent is in difficult financial situation and unless it deposits the amount due in the Court in a joint account, he stands to suffer irreparable loss and damage.

5. The Respondent filed Grounds of Opposition on 30/9/2019, which state that:-

1. The Applicant's application does not meet the threshold of Order 39 of the Civil Procedure Rules in that the Applicant has not tendered proof that the Respondent by acts or omission is in the process of disposing its assets or doing any act with a view to defeat an outcome in a judgment that could be awarded to him.

2. The Applicant's allegations on the Respondent's inability to satisfy a decree of this Honourable court is based in mere suspicions and is speculative and fictitious to warrant an order for security for cost.

3. The Respondent is a public limited company with the government as its majority shareholder and therefore the Applicant is barred from asking the government to provide security for costs. The Respondent is a going concern whose liquidity has not been put to question hence the applicant is an oppressive and in bad faith.

4. The Respondent stands to be greatly prejudiced if the Application is allowed without granting the Respondent an opportunity to be heard on the claim.

6. The Applicant filed a Supplementary Affidavit on 3/12/2019. He deposes that at the time of his termination, he had not attained the retirement age. He avers that his loan balance continues to accrue since the only repayment plan was through check off which the Respondent violated. He therefore avers that the Respondent should be liable for the whole loan balance.

7. It is the Applicant's submission that his employment contract with the Respondent was governed by the CBA between the Respondent and the Applicant's Union. He submits that he worked for the Respondent with due diligence until 30.6.2019 when he was served with a letter of non-renewal of contract.

8. He avers that his termination was contrary to Section 41 of the Employment Act as he was not invited to show cause why he was not to be dismissed and was not given 2 months' notice prior to his termination.

9. He urges the Court to make a finding that he is a beneficiary of the CBA between the Respondent and his Union and award him the terminal dues sought in his Statement of Claim. In support of this, he relies on the case of **KUDHEIHA v North Coast Beach Hotel [2015] eKLR** where the Court held that the terms contained in the CBA superseded all terms and conditions of employment applicable to the grievants.

10. He relies on Section 47 (5) of the Employment Act and submits that the Respondent has failed to prove it had valid reason to terminate him. He urges the Court to award him his terminal dues which include house allowance, underpayments gratuity for 14 years, shift differential and overtime and 12 months compensation for unfair termination.

Respondent's submissions

11. The Respondent submits that the Applicant has not met the threshold for grant of orders for security of costs as provided under Order 39 Rules 1 and 5 of the Civil Procedure Rules. It submits that the Court in **Godfrey Oduor Odhiambo v Ukwala Supermarket Kisumu Limited [2016] eKLR** held that before a court can grant an order for security for cost, the applicant must demonstrate that:-

1. The Respondent has deliberately taken action to avoid and process, obstruct or delay execution of a decree that such orders may be made.

2. The applicant must therefore show that the action taken by the Respondent has been taken with the sole aim of frustrating the applicant's enjoyment of a decree or anticipated decree.

12. It submits that the Applicant has not produced any evidence to show that its actions fail within the abovementioned conditions. It avers that the Applicant is undeserving of the order of mandatory injunction as he has not met the conditions set out in **Geilla v Cassman Brown**.

13. It further submits that the Applicant has not demonstrated existence of any special circumstance to warrant grant of the mandatory injunction and that the allegation that he took a bank loan is not supported by any documentary evidence.

14. It avers that it was not a party to the contract between the Applicant and the Bank. It submits that granting the Applicant the injunction sought would amount to grant of a major part of the relief claimed in action. It therefore urges the Court to approach the application with caution and relief should be granted after the Court has heard evidence by the parties.

15. I have examined the averments of both Parties. Order 39 rule 1 states as follows:-

“Where at any stage of a suit, other than a suit of the nature referred to in paragraphs (a) to (d) of Section 12 of the Act, the

court is satisfied by affidavit or otherwise:-

a. that the defendant with intent to delay the plaintiff, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against him:-

i. has absconded or left the local limits of the jurisdiction of the court; or

ii. is about to abscond or leave the local limits of the jurisdiction of the court; or

iii. has disposed of or removed from the local limits of the jurisdiction of the court his property or any part thereof;
or

b. that the defendant is about to leave Kenya under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may issue a warrant to arrest the defendant and bring him before the court to show cause why he should not furnish security for his appearance:

Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim; and such sum shall be held in deposit by the court until the suit is disposed of or until the further order of the court".

16. Under this order, conditions to be established before Court grants orders of attachment before judgement are set out.

17. The Applicant in seeking these orders sought has only told Court that he was terminated in violation of the CBA. There is no indication that the Respondent have committed any act or omission that could prejudice any judgement he may get if at all.

18. The Applicant also sought orders of reinstatement to work which this Court cannot without establishing the validity or otherwise of the termination and this can only be established upon hearing both Parties.

19. I find that in the circumstances, the application lacks merit. I decline to grant orders sought and dismiss this application.

20. Costs in the cause.

Dated and delivered in Chambers via zoom this 21st day of May, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Musyoka for Respondent – Present

Nyabena for Applicant – Absent