



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 54 OF 2019

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

DUNCAN GITUNGO KITHINJI.....CLAIMANT

VERSUS

CIC GENERAL INSURANCE LIMITED.....RESPONDENT

RULING

1. The Application before me is the Applicant's Notice of Motion filed on 14/11/2019 seeking that the Claim dated 22/1/2019 be struck out and costs of the application be borne by the Respondent.

2. The Application is based on grounds that:

1. The Claim dated 22/1/2019 followed the termination of the Respondent's employment by the Applicant on 26/11/2018 on grounds of gross misconduct to wit circumvention of the Applicant's reporting procedures.

2. The Claim herein was premature on account of the fact that the Respondent failed to exhaust all the available internal dispute resolution mechanisms being the disciplinary process under Clause 11.5 of the Human Resource Policy and Procedure Manual before rushing to Court.

3. Upon issuance with the letter of termination, the Respondent ought to have within 14 days filed an appeal to the Applicant's Group Executive Officer as provided under Clause 11.5.6 of the Human Resource Policy and Procedure Manual (the HR Manual).

4. By dint of being an employee of the Applicant, the Respondent was bound by the provisions of the Applicant's HR Manual and should have explored and exhausted the disciplinary mechanisms provided therein before moving to Court.

5. The appeal in question is time bound as it ought to have been conducted within 14 days. In addition, the manual specifically stipulates that the appeal shall be referred to the next higher level of management that were not involved in the hearing and determination of the matter.

6. Article 50 of the Constitution recognises that every person has the right to have any dispute that is to be resolved by application of the law to be decided by a fair hearing by an impartial tribunal or body.

7. Where a party fails to utilise the available internal dispute resolution mechanisms to rush to court by by-passing internal appeal mechanisms the same is akin to rendering the administrative disciplinary mechanism established by an employer as mandated by the law.

8. The same way an employer is bound by section 41 of the Employment Act, an employee cannot purport to choose to subject himself to disciplinary when it's only convenient for him. The Respondent subjected himself to the disciplinary process and there is no justifiable cause as to why he decided to by-pass the appeal process.

3. The Application is supported by the Affidavit of Mwenda P. Itumbiri, the Applicant's Human Resource Manager sworn on 11/11/2019 in which he reiterates the grounds set out in the application.

4. In response to the Application, Respondent filed a Replying Affidavit sworn on 16/12/2019. He avers that the Applicant is being economical with the truth and that he pursued all necessary avenues available to him under the Applicant's HR Manual. He avers that the right of appeal set out under Clause 11.5.5 of the Manual is a right available to the employee and which the employee is not mandatorily obligated to take up.

5. He avers that after his termination, he wrote to the Respondent on 7/12/2018 stating that he was dissatisfied with the manner and process of the Disciplinary Committee and its outcome. However, his letter was not responded to.

6. He avers that the Application is in bad faith and is not meant in any way to advance the course of justice but merely meant to deny him the opportunity to seek redress for the wrongs done to him.

7. He avers that the Applicant has not shown what way the lodging of the claim has prejudiced it and in any event, they will have an opportunity to fully respond to his claim in these proceedings.

8. The Application was disposed of by way of written submissions.

Applicant's submissions

9. The Applicant submitted that Clause 11.5 of the HR Manual provides for an elaborate disciplinary procedure and that section 5 and 6 of the Employment Act provides for development of human resource policy manuals that expound on workplace policies.

10. It submitted that the Respondent's letter was not an appeal thus undefined. It averred that the Court ought to decide whether the Respondent's failure to exhaust the laid down internal dispute resolution mechanism is fatal to this suit.

11. It submitted that the law permits a matter to be litigated in Court only when all available administrative proceedings fail to produce a satisfactory resolution to a litigant who has exhausted and followed the said procedures. It relied on the case of **Speaker of the National Assembly v James Njenga Karume [1992] eKLR** where the Court held that procedure should strictly be followed where it is prescribed by the Constitution or an Act of Parliament. He further relied on the case of **Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others [2015] eKLR**.

12. He submitted that the Respondent has not produced any reason or an iota of evidence on why there was a total disregard of the laid down guidelines and procedures in dealing with a dispute. In conclusion, urged the Court to strike out the suit for failure to exhaust the laid down internal resolution mechanism.

Respondent's submissions

13. The Respondent submitted that the Applicant through its action and conduct had demonstrated to him that it is resistant to open and impartial discussions on the nature of the Respondent's termination. It submitted that the Court in **Aboud Suleiman Salim v Kenya Power & Lighting Company Limited [2020] eKLR** where the Court held:-

“Where a Party makes it impossible for a dispute to be taken through an internal dispute resolution mechanism, should that Party argue in Court that such mechanism was not exhausted? CBAs are meant to be implemented with the co-operation of the Parties. The Court must step in and assume its constitutional mandate, to protect Parties from the likelihood of being closed out from fair access to justice.”

14. He submitted that the lack of a response by the Applicant was an effective barrier to his efforts to reach a resolution using the internal disciplinary mechanism. He relied on the decision in **Rebecca Ann Maina & 2 Others v Jomo Kenyatta University of Agriculture and Technology [2015] eKLR** where the Court held that having a disciplinary process hanging over the head of an employee for close to a year amounts to unfair labour practice within Article 41 of the Constitution.

15. He relied on the case of **Republic v Council of Legal Education ex-parte Desmond Tutu Owuoth [2019] eKLR** where the Court held that from case law one of the principles limiting the applicability of the doctrine of exhaustion is that, a statutory provision providing for an alternative forum of dispute resolution must be carefully read so as not to oust the jurisdiction of the Court to consider grievances of parties who may not have audience from the forum created.

16. He submitted that the holding that a person who does not exercise the right to an internal remedy may not turn to the Court results in an unconstitutional ouster of a court's jurisdiction contrary to Article 50 of the Constitution.

17. He submitted that the substantive law governing striking out pleadings is provided under Order 2 Rule 15 of the Civil Procedure Rules and that his claim clearly shows a cause of action and the Court should therefore only use its power to strike out the suit with extreme caution. He relied on the cases of **Transcend Media Group Limited v Independent Electoral Boundaries Commission (IEBC) [2015] eKLR** where the court cited the decision in **DT Dobie & Company (Kenya) Ltd v Muchina (1982) KLR** that no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action.

18. He argued that the case is also not frivolous or vexatious and an abuse of the Court. He urged the court to dismiss the application with costs in its favour.

19. I have considered the averments of the Parties herein and submissions on record.

20. The contention by the Respondent that the Claimant did not pursue his appeal is opposed by the Claimant who avers that on 7th December 2018, he wrote a letter to the Respondent expressing dissatisfaction with the manner, process and outcome of the disciplinary committee. The Respondent did not respond to this letter.

21. Indeed the letter in question referred to by the Claimant shows that the Claimant expressed dissatisfaction with the manner the Respondent treated him.

22. The Respondents have not denied receipt of this letter in question.

23. I have also considered the termination letter issued to the Claimant which also omitted to inform him that he had a right to appeal and also failed to inform him of the manner of the appeal if at all, which is in contravention of Section 1(d)(iii) of the Fair Administrative Action Act 2015, which mandates the administrator of an administration action to “specify the manner and period within which such appeal shall be lodged”.

24. In the current case, the Respondent failed on their part by not performing their own obligation towards the Claimant. In the circumstances, I find this application lacks merit. I therefore dismiss it accordingly.

25. Costs in the cause.

Dated and delivered in Chambers via zoom this 28th day of July, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Makori for Claimant- Present

Mabeya holding brief Okoth for Respondents – Present