



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 53 OF 2019

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

JAMES COLLINS MBURU.....CLAIMANT

VERSUS

CIC GENERAL INSURANCE LIMITED.....RESPONDENT

RULING

1. The Respondent/Applicant, CIC General Insurance Limited filed a Notice of Motion application dated 11th November 2019 against the Claimant/Respondent James Collins Mburu seeking to be heard for orders that the Claim dated 22nd January 2019 be struck out and for costs of the applications to be borne by the Claimant.
2. The Application is made on the grounds that the Claim herein followed termination of the Claimant's employment by the Respondent on grounds of gross misconduct and that it was prematurely instituted as the Claimant failed to exhaust all the available internal dispute resolution mechanisms.
3. That the Respondent has a comprehensive Human Resource Policy and Procedural Manual which provides for an elaborate disciplinary process and that the Claimant ought to have filed an appeal to the Respondent's Group Executive within 14 days of receiving the letter of termination. That where a party fails to utilize the internal dispute resolution mechanisms established by an employer to rush to Court, the same is to akin to rendering the administrative disciplinary mechanisms as mandated by the law ineffective and of no-consequence whatsoever.
4. That as an employer is bound by the provisions of Section 41 of the Employment Act on a fair disciplinary process an employee cannot purport to subject himself to disciplinary only when it is convenient to them. That there is no justifiable cause as to why the Claimant decided to by-pass the appeal process and that his suit is thus frivolous, vexatious and an abuse of the court process.
5. The Applicant also filed a Supporting Affidavit sworn by its Human Resource Manager, Mwenda Itumbiri who annexes a copy of the **HR Procedures Manual** marked **MPI-1** and refers to **sub-clause 11.5.6** providing for the appeal process. He avers that under **Sections 5 and 6 of the Employment Act**, HR Manuals are developed to represent custodian aspects of human resource management and further expound on workplace policies to be observed by all employees.
6. That being an employee of the Respondent, the Claimant was bound by the provisions of the Respondent's HR Manual and should have explored and exhausted the disciplinary mechanisms provided therein before moving to Court. That the Claimant would not have suffered any prejudice whatsoever had he appealed as the manual specifically stipulates that the appeal shall be referred to the next higher level of management that were not involved in hearing and determination of the matter.
7. The Claimant/Respondent filed a Replying Affidavit dated 22nd December 2019 and filed on 22/05/2020 opposing the Application for reasons that he pursued all the necessary avenues under the Respondent's Human Resource Policy in relation to the disciplinary process.
8. He avers that an employee is not mandatorily obligated to take up the right to appeal which was available to him under the said Respondent's staff manual. That after termination, he expressly wrote to the Respondent on 11th December 2018 stating he was dissatisfied with the manner and process of the Disciplinary Committee and their final outcome and he sought an opportunity to address the grounds set out in the termination.
9. That the Human Resource Policy does not provide for a specific mode of instituting an Appeal and contends that his letter of 11/12/2018 met the criteria for appeal set out in the said Human Resource Policy yet the Respondent did not respond to acknowledge the same as an

appeal or notify him to appeal in a given manner or form.

10. Further, that the letter of termination by the Respondent did not also allude to any appeal process being available to him and neither was his demand letter setting out his concerns responded to.

11. He continues to aver that he lodged the Claim herein on 30th January, 2019 which was 42 days after the demand letter was served on the Respondents and contends that had the Respondent been keen on advancing justice, it could have notified him to take up the right to appeal and/or addressed the matter.

12. He avers that the application herein is in bad faith and meant to deny him the opportunity to seek redress for wrongs done to him by the Respondent. That the Respondent has not shown in what way the Claim has prejudiced them and that the orders sought in its application are drastic and over-reaching. He urges this Court to dismiss the Application.

Claimant/Respondent's Submissions

13. The Claimant/Respondent submits that **Clause 11.5.6** states:-

"Where an employee is not satisfied with a disciplinary action taken on him, he has the right to appeal to the next higher level of management that were not involved in hearing and determination of the matter.

The GCEO shall handle appeals lodged by all employees under him beginning from his immediate reports.

The Board of Directors shall handle appeals where the GCEO or MD is involved; including a case that was presided by the GCEO.

The Appeal shall:-

- a. ***Be made within a reasonable time frame; at least within fourteen (14) working days of the notification of the decision;***
- b. ***Be signed by the employee;***
- c. ***Set the grounds of Appeal in sufficient details."***

14. He submits that the Respondent through its action and conduct had demonstrated to him that it was resistant to further open an impartial discussions on the nature of his termination. That in **Aboud Suleiman Salim v Kenya Power & Lighting Company Limited [2020] eKLR**, Rika J expressed that:-

"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?...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"

15. That in the present case, he has demonstrated that despite his communication of dissatisfaction with the way his disciplinary issue was handled, the Respondent did not take any action. Further, that the Respondent had an opportunity to set into motion the appeal mechanisms upon service of the demand letter but it did not and that this was an effective barrier to his efforts of a resolution using the internal disciplinary mechanisms.

16. That the very lengthy period of time that has passed since when the appeal would have been an effective remedy renders referral of this matter back to the Respondent for a purported appeal impracticable.

17. He further submits that holding that a person who did not exercise the right to an internal remedy may invariably not turn to the courts is an unconstitutional ouster of a Court's jurisdiction contrary to **Article 50 of the Constitution**. That the exhaustion doctrine is a sound one and statutory provisions ousting Court's jurisdiction must be construed restrictively and the Claimant cites the case of **Republic v Council for Legal Education ex-parte Desmond Tutu Owuoth [2019] eKLR** where Mativo J identifies exceptions to exhaustion of internal dispute resolution mechanisms before coming before the Court as follows:-

"The other principle suggested by case law for limiting the applicability of the doctrine of exhaustion in appropriate cases is that a statutory provision providing an alternative forum for dispute resolution must be carefully read so as not to oust the jurisdiction of the court to consider valid grievances from parties who may not have audience before the forum created, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance a suit. The rationale behind this reasoning is that statutory provisions ousting court's jurisdiction must be construed restrictively.

18. The Claimant urges this Court to find that it has jurisdiction to hear and determine the Claim in the interests of justice and he cites the case of **Kenya Plantation & Agricultural Workers Union v Finlays Horticultural Kenya Ltd (2015) eKLR** where Radido J while relying on **Joseph Mutura Mberia & Ar v Council of Jomo Kenyatta University of Agriculture and Technology (JKUAT) (2013) eKLR**, states that:-

"Mbaru J held that the Court has jurisdiction to interdict any unfair conduct including disciplinary action but such intervention should be in compelling or exceptional cases.

Among the factors Mbaru J outlined as relevant was whether failure to intervene would lead to grave injustice or whether justice could be attained through other means.

According to Mbaru J, in intervening in the disciplinary process, the Court would not be usurping or participating in an employer's administrative disciplinary process but exercising its constitutional and statutory powers."

19. It is submitted by the Claimant that **Article 159 2(d) of the Constitution of Kenya** provides that the Courts ought to give primacy to substantive justice as opposed to technicalities of the law and that in **Dev Surinder Kumar Bij v Agility Logistics Limited [2014] eKLR** it was held, inter alia, that:-

“For a pleading to be dismissed pursuant to the provisions of Order 2 rule 15(1), it should be made clear and obvious that the issues raised by the Plaintiff can neither be substantiated, nor disclose any reasonable or justifiable an action as against the Defendant.”

20. The Claimant submits that his suit is neither frivolous, vexatious nor an abuse of the Court process because there exists a cause of action, triable issues and a reasoned argument as evinced by the particulars of the Memorandum of Claim. That therefore his failure to appeal cannot be considered a fatal defect of the suit and that the application being misconceived, this Court should dismiss the same costs.

21. I have considered the averments and submissions filed herein.

22. The Respondent's contention is that this claim should be struck out at this stage because the Claimant failed to exhaust the appeal process provided for him under the Respondent's Human Resource Manual.

23. The Claimant has submitted that he actually filed his appeal, which the Respondent never responded to. The Respondent's contend that the failure by the Claimant to exhaust the disciplinary process render this claim premature and so should be struck out.

24. The Claimant submitted that he filed his appeal as expected by writing a letter dated 11th December 2018 indicating that he was not satisfied with the termination.

25. I have looked at the letter in question in which the Claimant indeed expressed dissatisfaction at the way he was terminated and indicating that he would like to know whether the action he was accused of doing amounted to a fraud.

26. There was no reply to this letter and neither was there any reply to the demand notice. Other than this fact, the termination letter issued to the Claimant dated 26th November 2018, did not inform him that he was expected to appeal the termination and neither was he informed of how the appeal, if any was to be lodged.

27. In this Court's view, the Claimant indeed lodged his appeal, which the Respondent failed to consider.

28. Failure to lodge an appeal would also not render a claim null and void and warrant the drastic action the Respondent seek before this Court. I find this application without merit and I dismiss it accordingly.

29. 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 Okatch - Present