



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

CAUSE NO. 637 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

ERASTUS CHEGE MWANGI.....CLAIMANT

VERSUS

KENYA RAILWAYS CORPORATION.....RESPONDENT

RULING

The Applicant filed a Notice of Motion on 30th August 2019 seeking the following orders:

1. The following actions/decisions of the Respondent are hereby suspended pending the service, hearing and determination of the claim herein, namely:
 - a) The termination of the Claimant's employment as Principal Land Surveyor;
 - b) The withholding of the Claimant's salaries and benefits for the month of September 2019;
 - c) The withholding of half of the Claimant's monthly salaries and benefits from February 2019 to August 2019;
2. The Claimant shall continue to hold and exercise the functions
of the office of the Respondent's Principal Land Surveyor (without any loss of benefits) pending the service, hearing and determination of the Claim herein;
3. The costs of and incidental to this Application shall abide in the outcome of the claim herein; and
4. Such other, further, incidental and/or alternative orders, injunctions, conservatory orders, directions and/or reliefs as the Court may deem just and expedient.

The application is premised on grounds that:

1. The Respondent has unfairly and arbitrarily and specifically without any lawful justification in flagrant disregard of due process terminated the Applicant's employment as Principal Land Surveyor and withheld his salary and benefits for September, 2019.
2. The termination of the Applicant's employment is unlawful and unfair for want of proper hearing contrary to section 41 of the Employment Act and valid reasons contrary to sections 43 as read together with section 45 of the Employment Act.
3. The Respondent's acts have caused and continue to cause irreparable harm, loss and damage to the Claimant and as they have been exposed to destitution by making it impossible for them to access food, shelter, healthcare and education.

The application is supported by the Affidavit of Erastus Chege Mwangi, the Applicant herein, sworn on 30th August 2019. He avers that the Respondent was in the process of acquiring land through the National Land Commission (NLC) for the construction of the Standard Gauge Railway- Phase 2A. That on 10th August 2018, a team from the Respondent comprising engineers, surveyors and social environmentalists made a site visit to Parcel No. Ngong/Ngong 18549 to determine the extent to which it was affected by the intended SGR Project. He avers

that around 11th January 2019 he proposed to the General Manager for Infrastructure and Development (GMID) that the National Land Commission withhold compensation for the earmarked parcels pending the Respondent's evaluation of the option of its Team's Report.

Subsequently, with the GMID's approval, he drafted a letter (the impugned letter) addressed to the NLC for the Respondent's Acting Managing Director's action making an informal request to the NLC to pend payments for earmarked parcels.

He avers that on 15th January 2019 he was issued with a Memo informing him that he had been charged with gross misconduct arising from the sharing of unauthorised information with the public which he responded to. He contends that on 31st January 2019, he was interdicted from employment pending the finalisation of his case. That on 26th February 2019 he recorded a statement with the DCI requesting them to investigate, *inter alia*: the circumstances surrounding the valuation of report outside the SGR corridor and a possible collusion between the National Land Commission and the Respondent to defraud the public by paying compensation with regards to property outside the SGR corridor.

He contends that on 13th March 2019, the Respondent's Investigation Committee issued him with a Memo directing him to appear before it on 15th March 2019 with a view to shedding light on the allegation of disclosure of confidential information. He avers that he appeared before the Respondent's Human Resource Management Advisory Committee (HRMAC) on 22nd July 2019.

He contends that the commencement of disciplinary proceedings against him was malicious, arbitrary and an act of malfeasance. That the Respondent breached his right to fair and expeditious administrative action when it failed to deal the disciplinary proceedings within 6 months as required under clause 11.14.1(h) of the Human Resource Policy and Article 47(1) of the Constitution.

He avers that on 23rd August 2019, the Respondent's Acting Managing Director purported to terminate his employment. That this action as unfair, wrongful and unfair.

Respondent's case

In response to the application, the Respondent filed a Replying affidavit of Asava Kadima, its Human Resource Manager on 4th November 2019.

She depones that after a series of meetings with the team on the challenges of the allocated parcels of land set for compensation they agreed to hold up the issue for further discussion. That the Applicant drafted the letter to NLC without the managements approval or endorsement and shared the information contained in the letter which was confidential, with the public.

She depones that the Applicant breached the Respondent's Human Resource Policies by sharing the information with the public without approval which offence was categorised as gross misconduct as per Human Resource Policy. She avers that the Applicant's submissions before the HRMAC were unsatisfactory and he was issued with a termination letter dated 31st September 2019.

She avers that the applicant's termination was fair and procedural as he was accorded a proper, fair hearing and all procedures were followed as required by law.

The application was disposed of by way of written submissions but only the Applicant filed his submissions.

Applicant's Submissions

The Applicant submitted that this Court has jurisdiction to grant reinstatement under section 49 and 50 of the Employment Act. He submitted that the application meets the threshold for grant of conservatory orders as he has a prima facie case and he will suffer irreparable harm that is not limited to social stigma/sting of being labelled as having disclosed 'confidential information to the public.

He submitted that interim reinstatement should be granted in cases where the termination is to be patently unfair, that even the ultimate remedies of compensation or reinstatement with back wages, would not redress the injury suffered by the employee in the pendency of the full hearing. He relied on the decision in **Alfred Nyungu Kimungui v Bomas of Kenya Limited [2013] eKLR**.

He submitted that the Respondent terminated his employment unfairly as it had no valid or genuine reason to terminate his employment. That his actions were beyond reproach since they were in consonance with the spirit and intent of the Constitution, Public Officers Ethics Act Leadership and Integrity Act, the Anticorruption & Economic Crimes Act and the Bribery Act.

He submitted that denying him interim reinstatement will have unfortunate consequence of allowing the Respondent which is a public body to circumvent the Constitution and various statutory instruments to accomplish an illegal objective. He further submitted that the Respondent has not alleged that allowing the application will prejudice it in any way.

He submitted that the Court should allow his application and order for his reinstatement pending the hearing and determination of the Claim.

Analysis and Determination

The Applicant seeks an order suspending the termination of his employment and reinstatement of his salary.

The Applicant further seeks interim reinstatement on grounds that his termination was unfair. Under Section 12(3)(vii) of the Employment and Labour Relations Court, this Court has power to grant an order for reinstatement within 3 years if it finds the termination unfair as provided under Section 49(3) of the Employment Act. In instant case, the suit has not been heard thus the Court cannot award such a substantive relief in the interlocutory stage. It is not until the suit is determined that the Court can make a finding whether or not the Applicant shared the confidential information contained in the draft letter and if due process was followed before the termination of his employment.

In **Loice Mutai v Kenya Revenue Authority [2017] eKLR** the Court held:

“No doubt, the Court has wide discretion to grant orders. Discretion must however always be exercised judiciously and with circumspection. This is more so because by ordering reinstatement, the Court is in effect, reversing a management decision. The Court must therefore tread with caution, especially at the interlocutory stage, when not all the facts are on the table. In my view, an employee seeking reinstatement must earn their stripes by going through a full trial.”

The danger of granting the orders of reinstatement sought by the claimant is that the claim would be concluded at the interim stage as the court would not be able to reverse such a decision if it finds the termination valid after full hearing. It is only in very clear circumstances, where there is no doubt about the legality of termination and the facts are not contested, that a court may grant orders for reinstatement at interlocutory stage. This is not the case herein, where the claimant’s and respondent’s pleadings on the facts leading to the termination of the claimant’s employment are yet to be proved.

I find that the claimant has not met the threshold for grant of interim orders as set out in the case of **Giella v Cassman Brown** as he has not demonstrated irreparable loss. This is because the orders sought can be granted by this court after full hearing.

For these reasons the application fails and is hereby dismissed with no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF SEPTEMBER 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