



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 178 OF 2020**

**(Before Hon. Justice Hellen S. Wasilwa on 16<sup>th</sup> September, 2020)**

**ROSEMARY NDINDA NDIVO.....CLAIMANT**

**VERSUS**

**HENKEL KENYA LIMITED.....RESPONDENT**

**RULING**

1. There are two applications before Court, that is the Claimant's Application dated 27<sup>th</sup> April 2020 and the Respondent's Application dated 13<sup>th</sup> May 2020. On 14<sup>th</sup> May 2020, this Honourable Court directed that the two applications be heard together.

2. In the Notice of Motion application dated 27<sup>th</sup> April 2020, the Claimant, Rosemary Ndinda Ndivo seeks to be heard for orders that:-

**1. Spent**

**2. Pending the interparty hearing and determination of this application this Honourable Court be pleased to issue a temporary order of injunction stopping the Respondents whether by themselves, their employees, their agents, or any other person authorized by them herein from advertising, hiring or recruiting any employee as Divisional Manager Ac-East Africa, a position held by the applicant prior to her purported dismissal on 16th April, 2020.**

**3. Pending the hearing of the main claim herein this Honourable Court be pleased to issue a temporary order of injunction stopping the Respondents whether by themselves, their employees, their agents, or any other person authorized by them herein from advertising, hiring, recruiting any employee as Divisional Manager Ac-East Africa, a position held by the applicant prior to her purported dismissal on 16th April, 2020 and a further order reinstating the applicant to her employment so as to continue discharging her duties.**

**4. An order that the Respondent be restrained by a way of injunction from giving any negative recommendation to potential employers of the Applicant.**

**5. The costs of this application be provided for.**

3. She also filed a Supporting Affidavit wherein she avers that she was employed by the Respondent in 2011 and has been working for it in different capacities, the latest being Divisional Manager AC- East Africa on a permanent and pensionable basis. That on 31/03/2020, she was issued with a letter to show cause and invitation to disciplinary hearing and that the allegations she was to answer to included *fictitious payments of invoices, conflict of interest and insubordination*. She responded to the show cause letter on 06/04/2020 as elaborated under paragraph 9 of the Supporting Affidavit and that on 16/04/2020, she was summarily dismissed from her employment without any justifiable cause.

4. She contends there was no investigation report as provided for by the law and that contrary to the law, the person who purported to investigate her and is also her accuser, one Philippe Huenermann is the same person who conducted her disciplinary hearing. Further, that one Betty Njagi who signed her summary dismissal letter as Human Resource Manager is not qualified, as she has never been trained in human resource and neither is she registered by the Institute of Human Resource Management (IHRM) but was just picked from the IT department. That this renders her dismissal letter null and void.

5. She further avers that notably, the show cause letter presents very serious allegations of a criminal nature of theft of funds from a sales agency with the only proof/supporting documentation provided for the allegation being an email/statement that has several material falsities. She contends that issuing her with a summary dismissal on account of a conflict that she wilfully disclosed to the Respondent by signing the Conflict of Interest Declaration Forms is punitive, unfair and discriminatory and that it is in the interest of justice that the prayers sought

herein are granted as the respondent shall not suffer any prejudice.

6. In the Notice of Motion application dated 13<sup>th</sup> May 2020, the Respondent, Henkel Kenya Limited seeks to be heard for Orders that: the Court sets aside the order of 4<sup>th</sup> May 2020 in its entirety; the Claimant's Statement of Claim be struck out; the Court be pleased to grant any orders that is just to be granted in the circumstances; and for the costs of its application and of the suit to be borne by the Claimant on a full indemnity basis. The Respondent's Application is based on the grounds that the Claimant has not come to this Court with clean hands as she has not disclosed essential/material facts and has also misrepresented facts in that:-

*a. The Claimant has not disclosed **a very material fact** that after the disciplinary hearing was held on 7th April 2020 and after the Claimant had signed the disciplinary hearing minutes on 14th April 2020, she offered on 15 April 2020 to mutually separate with the Respondent. She asked for an exit package but given the seriousness of the disciplinary issues facing her, the Respondent did not consider nor accept her offer on mutual separation.*

*b. The Claimant noted the seriousness of her misconduct after the disciplinary hearing and offered to exit before a decision was made by the Respondent.*

*c. The Claimant filed these proceedings only as an afterthought after the Respondent declined to consider her offer to mutually exit.*

*d. It is not tenable for this Court to consider an application or claim for reinstatement and any of the other orders sought by the Claimant considering that she was ready to exit the Respondent on her own volition.*

*e. The Claimant has not disclosed that she failed and/or refused to appeal against her dismissal and is thus not deserving of the orders sought.*

*f. The Claimant's claim is also based on falsehood and misrepresentation such as her last monthly salary which has been falsely stated as Kshs. 832,053/=.*

*g. The Claimant has also made outrageous claims such as accrued on leave, alleged breach of contract, damages for alleged defamation among others that are absolutely baseless in law.*

7. That the Claimant's application dated 27/04/2020 upon which the interim order was issued on 4th May 2020 and the suit are scandalous, vexatious and frivolous and otherwise constitute a blatant abuse of the Court process which this Court should not entertain.

8. The Respondent's Application is supported by the Affidavit of the Respondent's Managing Director Philippe Huenermann, sworn on 13/05/2020 and which affidavit also doubles up as a Replying Affidavit to the Claimant's Application dated 27/04/2020. He avers that in early 2020, the Respondent learnt that the Claimant had engaged in activities that appeared to be in breach of its policies and practices as well as the Claimant's contract of employment. That in line with its Human Resource Management Policy, the Respondent investigated and inquired on the suspected misconduct and once the investigations were complete, the Respondent instituted disciplinary action against the Claimant. Mr. Philippe particularises the Claimant's suspected misconduct under paragraph 11 of his affidavit as captured in the show cause letter of 31/03/2020.

9. He further avers that the Claimant did not give satisfactory explanations to the issues and that the Claimant's show cause letter was very elaborate as it even provided annexures with sufficient details upon which the Claimant was being subjected to disciplinary action. Further, that their advocates have advised that unless it is specifically provided for in a Human Resource Procedure Manual, there is no law that makes it mandatory for an investigation report be given to an employee during disciplinary proceedings. He also notes that the Claimant did not object to his involvement and participation at any point during the disciplinary hearing proceedings and that the same is therefore raised as an afterthought. That in any event, he was the Claimant's Line Manager at the material time and that also as the Managing Director, he is the Respondent's Compliance Officer in Kenya and had to therefore be engaged in the Claimant's disciplinary process.

10. Mr. Philippe avers that the Respondent summarily dismissed the Claimant for gross misconduct in line with the Respondent's Disciplinary Committee findings as well as **Clause 27 of the Respondent's Human Resource Manual**. That the Claimant was subsequently by an email of 23/04/2020 informed of an avenue for appeal against her dismissal which she responded to asserting that she would not appeal against her dismissal because the procedure ought to have been outlined in her summary dismissal letter. That there being no criminal proceedings instituted against the Claimant does not mean that disciplinary issues raised against her are unsubstantiated and he contends that the Respondent reserves the right to make a complaint to the relevant authorities with a view of instituting criminal proceedings. That in any event, their advocates have advised that criminal trial and internal disciplinary proceedings initiated by the Respondent against the Claimant are two distinct processes with different procedural and standard of proof requirements.

11. He also avers that the person who signed the dismissal letter did so within the Respondent's prerogative and delegation from the Respondent's Regional Human Resource Officer. That their advocate has advised that there is no requirement in law that a person signing a dismissal letter has to be human resource practitioner registered by the Institute of Human Resource Management. He avers that their advocates have advised that if the orders sought by the Claimant are granted at this interlocutory stage, it will effectively dispose off a substantial part of the main suit and render it an academic exercise. He produced **Exhibit PH1**.

12. The Claimant filed a Replying Affidavit dated 29<sup>th</sup> May 2020 to the Respondent's Application averring that the Respondent has not proved she is concealing information/misrepresenting facts to this Court. That a suit cannot be struck out for failure to disclose material facts and that the decision by a court whether or not to dismiss a suit for non-disclosure of material facts has to be based on the circumstances of a case. Further, that in dismissing a suit, the courts are guided by the overriding objective, which overshadows all technicalities, precedents and rules, which may stand in the way of substantive justice. She contends that the claim raises triable issues that can only be addressed in a full

trial and that the balance of convenience lies in her favour as she will suffer colossal and irreparable harm and loss not able to be recovered if the Respondent's application is allowed. She prays for the Respondent's application to be dismissed with costs.

13. The Claimant also filed a Further Supporting Affidavit to her Application dated 27/04/2020 denying that she offered to mutually separate from the Respondent and states that the same is meant to mislead the Court from the real issues. That after the disciplinary hearing of 7/04/2020, Mr. Philippe initiated an "off the record" meeting and proposed to her that he had a lee way and that he would reward her for her services to the company if she chose to resign but she chose instead to wait for feedback from the disciplinary hearing. She avers that the option for appeal was given to her on 23/04/2020 when she had no access to internal documentation that was key in supporting her appeal and that it would be an exercise in futility to appeal to the same panellists who made the decision to dismiss her summarily. She further avers that the alleged disciplinary hearing was a sham and a nullity because it contravenes **Section 41 of the Employment Act**.

14. In a Further and Supplementary Affidavit sworn by the Respondent's Mr. Philippe on 11<sup>th</sup> June 2020, he avers that his affidavit sworn on 13/05/2020 annexed evidence of the Claimant's offer to resign in detail at *paragraphs 45 to 47* and at *pages 276 to 279 of the exhibit annexed to the said affidavit*. He further denies that he coerced the Claimant to resign as alleged and that the email correspondence by which the Claimant requested for an exit package and clearly referring to the disciplinary proceedings inferred guilt on the Claimant's part. That notably in the *email at pages 266 of his relying affidavit* the Claimant was asked to appeal against her dismissal through the Respondent's Head of the Regional Compliance, Mona Madi who was not part of the disciplinary panel. He avers that the Claimant chose not to appeal and never asked for any documentary evidence.

15. He contends that failure to disclose material facts is not a procedural technicality and as such, the Claimant should not hide behind it to mislead the court and that where a party, at the ex parte stage of an application fails to disclose relevant material to court and obtains an order from the court by disguise, the court can set aside the ex parte orders so obtained. That the Claimant's further Supporting Affidavit and Replying Affidavit are full of her personal opinion of him as well as irrelevant and broad accusatory matters and should be struck out in line with the provisions of **Order 19 Rule 6 of the Civil Procedure Rules**. He produced **Exhibit PH2**.

16. The Respondent also filed a Supplementary Affidavit sworn by its former employee Titus Kajume on 19<sup>th</sup> June 2020 in relation to the allegation of kickbacks to members of staff. He avers that while working in the Respondent's Adhesives Department, he reported to the Claimant who was his line manager and that he separated with the Respondent through a mutual agreement. He gives evidence in favour of the Respondent at paragraph 14 of his affidavit with respect to the allegations raised against the Claimant of fictitious payments and conflict of interest.

#### **Respondent's Submissions**

17. The Respondent filed two Submissions dated 7<sup>th</sup> July 2020 and 22<sup>nd</sup> July 2020, in support of its Application dated 13/05/2020 and against the Claimant's Application dated 27/04/2020 respectively.

18. The Respondent submits that the Claimant's Application and statement of claim dated 27/04/2020 are incompetent, scandalous and amount to an abuse of Court process and should therefore be struck out with costs to the Respondent pursuant to **Order 2 Rule 15 of the Civil Procedure Rules**. It cites the Court of Appeal case of **Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 Others [2009] eKLR** which defined abuse of the Court process as when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. That if the Court is not minded to strike out the suit and application, it should discharge the Order of 4/05/2020 as it lapsed automatically when it was not extended on 11<sup>th</sup> June 2020 with the Claimant's advocates not being in Court.

19. It submits that the Respondent has made a case to warrant setting aside ex-parte orders of 4th May 2020 on account of the Claimant's failure to make full disclosure of all material facts. It relies on the case of **Uhuru Highway development limited vs Central Bank of Kenya & others [1995] eKLR** where the Court of Appeal adopted the principles set out in **The King vs The General Commissioners for the Purposes of the Income tax for the District of Kensington [1917] 1K.B 486** to uphold the decision of the High Court of declining an ex-parte injunction due to non-disclosure of material facts.

20. The Respondent further submits that the Claimant has not met the test for the grant of interlocutory order for reinstatement which is a summative and substantive remedy granted after hearing the full case of the parties and only in very exceptional circumstances such as pregnancy, race or religious discrimination, which in this case do not exist. To that end, it relies on the case of **Joan Wairimu Wanyutu vs. Social Service League, MP Shah Hospital [2019] eKLR** where the court held that reinstatement of an employee is a substantive issue which before being allowed by a Court, both parties should be given opportunity to present their set of facts tested on cross examination at trial.

21. The Respondent submits that the Claimant has not established a prima facie case with a high chance of success in that she has failed to demonstrate by way of evidence that she was unfairly or unlawfully dismissed from employment. That Mbaru J in the case of **Rajab Barasa & 4 others v Kenya Meat Commission [2016] eKLR** held that there was no reason whatsoever to stop the respondent from filling the position and that granting such a prayer would amount to holding the respondent at ransom.

22. It is submitted by the Respondent that the Claimant ought to have sought substantive Orders of Injunction similar to those sought in the interlocutory application dated 27/04/2020 for this Court's jurisdiction to be invoked. That this court thus lacks the jurisdiction to grant the orders sought in the Claimant's application which is not anchored on the substantive suit as required by **Rule 17(5) of the Employment and Labour Relations Rules 2016**. It cites the case of **Abdi Mohammed Daib v Kenya Ports Authority [2015] eKLR** where this court held as follows:-

***"In this case, rule 16 (3) of ICPR does not only prescribe the procedure for seeking interlocutory injunction but is also a substantive legal provision going to the jurisdiction of the Court to grant the order. That the provision limits the jurisdiction of***

*the Court to grant injunction only to suits where the Applicant has sought injunction as a relief in the main suit. The corollary to the foregoing is that the Court has no jurisdiction to order interlocutory injunction in a suit where the Applicant has not prayed for injunction in the main suit. For the foregoing reason, the Court finds that the notice of motion dated 7.10.2015 is incompetent and must fail.”*

23. Further, that since the Court lacked jurisdiction to make such orders or continue maintaining the orders, it prays that the Orders of 04/05/2020 be set aside and the Application dated 27<sup>th</sup> April 2020 be struck out with costs to the Respondent and the Respondent's application dated 13<sup>th</sup> May 2020 be allowed with costs.

24. I have examined the averments of the Parties and submissions filed herein.

25. The Applicant was awarded ex parte orders injuncting the Respondent from filling the post previously occupied by the Applicant before her dismissal.

26. I have now reconsidered the order in force and the fact that the Applicant still has avenues to gain readdress if the actions of the Respondents are found to be unfair and unjustified. Her chances of being reinstated notwithstanding, I do not find it justifiable to have the injunction confirmed.

27. I therefore set aside the injunctive orders in place and direct the Parties to proceed with the Main Claim.

28. Costs in the cause.

**Dated and delivered in Chambers via zoom this 16<sup>th</sup> day of September, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Kahindi for Respondent – Present

Applicants – Absent