



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. E501 OF 2020

(Before Hon. Justice Hellen S. Wasilwa on 6th October, 2020)

MRIDUL CHAKRABORTY.....CLAIMANT

VERSUS

CHEMIGAS LIMITED.....RESPONDENT

RULING

1. Before me is the Notice of Motion dated 8/9/2020 seeking the following orders:-

- 1. The application be heard ex-parte in the first instance during the court's vacation.***
- 2. The matter be certified urgent and be heard on priority basis.***
- 3. The Honourable Court deem it fit and just to issue interim orders to restrain the respondent from unlawfully terminating the Claimant's employments before meeting its contractual obligations under the contract herein and under the Employment Act, 2007 (i.e before paying his terminal dues).***
- 4. The Honourable Court be pleased to issue a restraining order against the Respondent from denying the Claimant his fundamental benefits provided under the contract including housing, company car and driver, medical facility, sick leave pending the hearing and determination of his application.***
- 5. The Respondent be restrained from forcibly repatriating the Claimant before the hearing and disposal of this matter.***
- 6. Costs of this application, be provided for and be borne by the Respondent in any event.***

2. The application is based on grounds that:-

- 1. The Applicant is the Respondent's bonafide employee as an expatriate chemical engineer pursuant to an employment contract entered between him and the Respondent on 22/5/2019 in which he was employed as the Chief Chemical Engineer.***
- 2. The Applicant agree to a gross monthly salary of Kshs. 642,277/- plus other fringe benefits including a company car and driver, fully paid house, medical facility, annual leave, sick leave and overtime worked.***
- 3. On or around April 2020, the Respondent arbitrarily and unlawfully scaled down his salary from Kshs. 642,277/- to Kshs. 449,593/- against his will and has adamantly refused to pay the shortfall of his detriment.***
- 4. The Respondent refused to pay his hospital bill of Kshs. 1,551,017.40. That since he fell sick the Respondent has engaged in a most unfortunate behaviour towards him where it has arbitrarily withdrawn his fringe benefits including company car and driver, housing benefit, denied him sick leave, annual leave, medical cover and earned overtime all in violation of his basic constitutional rights which is untenable under the law.***
- 5. The Respondent has unlawfully terminated his employment without giving the requisite notice and has asked him to make arrangements to return to his home place in Kolkata- India together with his family.***
- 6. The Respondent forcibly told him to self-quarantine himself for 14 days even though he has never been a Covid-19 patient and later told him they has booked his flight home despite him still seeing the doctor.***

7. The decision to arbitrarily terminate his employment unfair and unlawful and has grossly violated his fundamental rights as an employer as provided under the circumstances is unfair and unlawful and has grossly violated his fundamental rights as an employee as provided for under section 45 of the Employment Act.

8. The Respondent is breach of Article 41 and 47 (5) of the Constitution and ILO Convention 158 on termination of employment, 1983.

3. The Application is supported by the affidavit of Mridul Chakraborty, the applicant herein, sworn on 8/9/2020 in which he reiterates the averments on the face of the application.

4. In response to the application, the Respondent filed a Replying Affidavit sworn by Shailesh Rajani, its Managing Director, on 11/9/2020. He deposes that though the Applicant was provided with a car he cannot drive as he does not possess a Kenyan driver's licence and that the car is only available on need basis or for official purposes.

5. The affiant deposes that though the Applicant has a work permit that is to run from 2019 to 2021 and was employed by the Respondent with effect from 14/7/2019. He arrived in the Country while unwell and did not disclose this fact to the Respondent. He further deposes that the Applicant proceeded to take leave on 18/7/2019.

6. He avers that the Applicant has not been discriminated against and was provided with the necessary medical facilities to enable him recover and it also did rent an apartment for him.

7. He admits that upon prior consultation with the Claimant, his salary was scaled down from Kshs. 642,277 to Kshs. 449,593 vide the letter dated 15/4/2020. He avers that the same was due to the prevailing economic situation in the country caused by the Covid-19 pandemic.

8. He deposes that it was never the intention of the Respondent to reduce the Applicant's salary and that this was necessary for the Company to stay afloat. He contends that the letter dated 15/4/2020 promised to review the salary upward in June 2020 in case the economy was to stabilise.

9. He denies that the Applicant was discriminated upon given that most of the 48 permanent employees received pay cuts. He avers that though the Applicant fell ill and was admitted to Aga Khan Hospital, the Respondent has no responsibility to cater for further medical expenses that the Applicant incurred.

10. He avers that the Applicant was sent on paid leave in the month of August until 13/8/2020 and thereafter on unpaid leave with effect from 1/9/2020 until further notice vide the letter dated 28/7/2020 and that the company was not entitled to offer him any extra benefits but offered to facilitate his travel back to India but he refused to travel.

11. He avers that the Applicant received Kshs.22,000 to enable him take the mandatory Covid-19 test before leaving the County but he never took the test and is yet to account for this amount.

12. He avers that the Applicant is not entitled to any reliefs sought as his contract was not terminated but rather he was sent on paid leave and thereafter unpaid leave. He contends that the Applicant is being repatriated out of the country as the Respondent has no such powers but is being alive to the current economic situation.

13. He avers that the Applicant has been paid all his dues to the month of August when he was on paid leave. He avers that the application is incompetent and the same should be dismissed with costs.

14. The Application was canvassed by way of written submissions.

Applicant's submissions

15. The Applicant submitted that since the Respondent has sent him on an indefinite unpaid leave until the situation improves, it has terminated his housing, medical and company car benefits and purchased tickets for him and his relatives. It was his submission that he will be responsible for his upkeep during his continued stay and that the air tickets will be cancelled should he not travel by 1/9/2020.

16. He submitted that the logical conclusion is that he has been wrongfully dismissed without payment of his terminal dues.

Respondent's submissions

17. The Respondent submitted that no case has been set out to warrant the injunctive orders and that the principles set out in **Giella v Cassman Brown** have not been satisfied. It maintained that the Applicant's employment has not been terminated and that the Applicant's actions seek to mitigate further loss.

18. It submitted that the Court cannot grant a prayer stopping his termination when there is no proof of termination or intention to terminate him. It submitted that the order for benefits cannot be granted as the Applicant is on unpaid leave. It submitted the order seeking to restrain his forcible repatriation does not have any legal mandate. It submitted that in accordance with section 10 of the Employment Act, the Applicant was consulted prior to the alteration of his employment terms as evidence in the letter dated 28/7/2020.

19. It submitted that the Court in **Moses Kamau & 6 Others v Signature Holdings (E.A) Ltd [2020] eKLR** held that the Covid-19

pandemic makes the Court's task perilous and its effect is that an employer may be forced to declare redundancies. It maintained that the Applicant is still its employee and that it has invested heavily in him including obtaining a 2 year work permit at the costs of Kshs. 400,000.

20. It submitted that there is a need to balance employer's and employee's rights since the Respondent requires to service its loans. It relied on the case of **Kenya Aviation Workers Union v Kenya Airways PLC & 2 Others [2020] eKLR** where the Court held that there was a need to balance the industry in these hard times. It urged the Court to dismiss the application with costs.

21. I have examined the averments of the Parties herein. It is event that the Applicant is an employee of the Respondent. It is also true that due to the circumstances prevailing due to Covid-19, many Industries have suffered a lot of economic downturn and that could be the situation the Respondent may be finding themselves in.

22. The question then is whether the Respondent if indeed they have some economic problem should repatriate the Applicant back to India?. The Respondent avers that they have not terminated the Applicant. Even if that is the position, repatriation to India cannot be a solution.

23. If indeed the Respondent are being sincere, the prudent thing to do is to declare in writing that they have not terminated him but will allow him to stay in the Country without a salary to be payable once the situation improves.

24. The letter written to the Applicant was terse with no option given to the Applicant but to leave without being informed about his future with the company. This indeed is akin to being terminated in which case the Claimant should be paid all his terminal/redundancy dues before he leaves the country.

25. In the circumstances, I find the application has merit and I allow it and confirm prayers No. 3 and 5.

26. Costs of this application to be in the cause.

Dated and delivered in Chambers via zoom this 6th day of October, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Okeyo holding brief Njenga for Respondent – Present

Nduati for Claimant – Present