



**REPUBLIC OF KENYA**

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

**CAUSE NO. 898 OF 2018**

**KENYA SHIPPING CLEARING FREIGHT**

**LOGISTICS AND WAREHOUSE WORKERS UNION.....CLAIMANT**

**-VERSUS-**

**MAY FREIGHT LTD.....RESPONDENT**

**RULING**

1. The Application before me is the claimant's Notice of Motion dated 7.6.2018 which seeks the following orders:

- a) That the application be certified urgent and be heard ex-parte in the first instance.
- b) That there be temporary injunction restraining the Respondent from filing the position of Mark Opaye Wangusi (grievant) as a supervisor until after hearing and determination of this suit.
- c) That the Honourable Court be pleased to order and direct the summary dismissal letter dated 25/5/2018 be set aside and reinstate the grievant, Mark Opaye Wangusi unconditionally until the hearing and determination of the suit.

2. The application is based on grounds that:

- a. The show cause letter dated 15.5.2018 admits that the allegations made against Mr. Mark Opaye Wangusi were not true. The words "if found to be true" show that the show cause letter was premature because the person had no information about what transpired.
- b. The Union in its letter dated 23.5.2018 cautioned the Respondent on its show cause letter but the Respondent ignored her and dismissed the grievant.
- c. The Respondent failed to follow the procedure in the Collective Bargaining Agreement, which binds Mr. Mark Opaye Wangusi by suspending him first to pave way for investigation.
- d. The Respondent in its hearing letter dated 17.5.2018 failed to mention the shop steward but stated a representative of his choice thus the Respondent ignored the CBA.

3. The application is supported by the affidavit of James O. Tongi the Applicant's Secretary General sworn on 7.6. 2018. He deposed that the Respondent had a motive behind the allegations as it failed to disclose the said allegations in the summary dismissal letter dated 25.5.2018. He further deposed that the grievant in question did not commit any offence to warrant the summary dismissal.

4. The respondent opposed the application, by filing the Replying Affidavit sworn by Vitalis Osodo, its Group Human Resource Manager, on 16.6.2018. The Affiant confirmed that the grievant was employed as a porter in February 2002 and promoted to the position of Export Supervisor on 20.2.2015 and that there was a valid Collective Bargaining Agreement (CBA) between the Applicant and itself.

5. He deposed that on 12.5.2018, the respondent's Security Manager was informed of some missing items being 1 strapping roll and 5 kilograms of metal chips after which he conducted investigations which revealed that the grievant requested items worth Kshs. 3,525 on 12.5.2018 which did not reach the intended recipient; that the said revelation meant that the grievant could no longer be trusted with any responsibility or company property; that before any disciplinary action was taken, the grievant was issued with a show cause letter to respond to the allegations and thereafter he was invited to a disciplinary hearing on 22.5.2018 when he attended with his representative; and that after the disciplinary hearing the grievant was found guilty of gross misconduct as charged and a summary dismissal letter was issued to him.

6. As regards the claimant's contention that the grievant ought to have been suspended pending investigations, the affiant averred that there is no express provision under the Employment Act requiring an employer to put an employee on suspension upon allegations of gross misconduct.

7. The affiant further deposed that the prayers sought in the Notice of Motion cannot be granted in the interlocutory stage that reinstatement should be granted upon the full hearing of the parties, and after due regard to the relevant guidelines for reinstatement set out under Section 49 of the Employment Act, and also that under the common law principle that there should be no order of specific performance in a contract of service.

8. In conclusion, he averred that the dismissal of the grievant was in accordance with the Collective Bargaining Agreement and the Employment Act. He urged the court to dismiss the application.

9. The Application canvassed by written submissions.

#### **Applicant's submissions**

10. The Applicant submitted that Clause 32 (a) and Clause 13 (a) of the CBA set the procedure to be followed before a decision is made and contended that the respondent ought to have suspended the grievant to pave the way for investigations before issuing a show cause letter. It contended that the show cause letter did not indicate that any investigations report was prepared. She maintained that no theft was done or reported to the police and as such that the dismissal was grounded on a mere imagination.

11. With respect to the orders sought, the applicant submitted that section 43 of the Employment Act provides that an employer should prove the reason for termination. She argued that the documents filed in court and the facts given prove that the grievant committed no offence and therefore urged the Court to grant the orders 2 and 3 of the application.

#### **Respondent's submissions**

12. The Respondent submitted that the Applicant has not satisfied the test for an injunctive relief and relied on the case of **John Njeru v Intex Construction Ltd [2017] eKLR** where court held that the court must be satisfied whether there is a prima facie case, and whether other remedies can adequately address the alleged wrongful acts of the respondent, and the balance of convenience. It further relied on the case of **Giella v Cassman Brown Co. Ltd (1973) E.A 358** where set out the threshold for grant of interlocutory injunction.

13. It submitted that the Applicant has not demonstrated a prima facie case with a probability of success and maintained that the grievant's employment was terminated in accordance with the CBA and the Employment Act. It further submitted that the Applicant has not shown any right of the grievant employee that may be infringed if the position of supervisor is filled. For emphasis, it relied on the case of **Mrao Ltd v First American Bank Ltd & 2 Others [2003] eKLR** where the Court defined a prima facie case.

14. In addition, the respondent submitted that the Applicant has also not demonstrated that the grievant will suffer irreparable damage, which cannot be sufficiently compensated by damages in the event the Court finds that this dismissal was unlawful after trial. It argued that an award of damages will be sufficient compensation should the court find that the termination was unlawful. It further argued that the grievant is able to secure alternative job elsewhere and therefore he should not hold it at ransom by requiring that the position he left behind remains vacant.

15. Finally, on the prayer for injunction, the respondent urged the Court to find that the balance of convenience tilts in its favour because it will suffer great harm if the injunctive relief is granted since the roles previously performed by the grievant will not be performed until the suit is heard and determined.

16. As regards the reinstatement order, the respondent submitted that section 49 (3) of the Employment Act makes the provision of the remedy for reinstatement but it contended that the order cannot be granted at interlocutory stage. For emphasis, it relied on **Gladys Boss Shollei v Judicial Service commission [2013] eKLR** where the court held that reinstatement is a substantive remedy and not a temporary relief.

17. It argued that granting the order for reinstatement at this stage would be premature and prejudicial to it as the Court is not well seized of all the facts of case. It therefore urged the court not to grant the order until it has heard both parties at the trial. It relied on the case of **Evans Kaiga Inyangala & 2 Others v County Government of Vihiga & 2 Others [2014] eKLR** where the Court held that it is difficult to order reinstatement at an interlocutory stage as the Court is not seized of all facts pertaining to the termination.

18. The respondent further relied on the case of **Kenya Airways Limited v Aviation Workers Union Kenya & 3 Others [2014] eKLR** where the Court of Appeal held that the factors to be taken into account when considering reinstatement are the ones set out under section 49(4) of the Employment Act including wishes and expectation of the employee; common law principle that there should be no order of specific performance in a contract of service except in very exceptional circumstances; the practicability of the reinstatement; any compensation paid by the employer; and chances of the employee securing alternative employment. It contended that reinstatement is not practicable because the trust between it and the grievant has irretrievably broken down and the court cannot force the parties mend the broken relationship.

19. In conclusion, it submitted that the injunctive relief sought by the Claimant does not meet the injunctive relief test set out in **Giella v Cassman Brown (supra)** and that reinstatement is a summative remedy to be granted after hearing a full case of the parties.

#### **Issues for determination and analysis**

20. After careful consideration of the Application, affidavits and submissions by both parties, it is common knowledge that the grievant was dismissed from employment by the respondent on 25.5.2018. The main issues are:

- (a) Whether the court should grant the interlocutory injunction sought by the applicant.
- (b) Whether the court should grant the reinstatement order sought by the applicant.

### **Interlocutory injunction**

21. In Kenya threshold for granting interlocutory injunction has not changed since the celebrated decision in **Giella v Cassman brown [1973] EA 358** where the following principles were set out:

- a) That the applicant must establish a prima facie case with probability of success.
- b) That the applicant must demonstrate that he stands to suffer irreparable harm if the order is withheld.
- c) If the court is in doubt, it should determine the application on a balance of convenience.

### **Prima facie case**

22. Prima facie case was defined by the Court of Appeal in **Mrao Limited v First American limited & 2 others [2003] e KLR** as follows: -

***“...in civil cases is a case in which on the material presented to the court a tribunal properly directed itself will conclude that there exists a right which apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”***

23. Guided by the foregoing binding precedent, the applicant herein must prove that grievant's legal rights under the Constitution, legislation, employer's HR Policies and Procedures Manual, Collective Bargaining Agreement or the contract of service have been or are about to be infringed if the respondent recruits another person to fill the position of Supervisor which was previously held by the grievant before the impugned dismissal on 25.5.2018. In this case, the Applicant's case is that the grievant's dismissal was wrongful because the Respondent did not comply with provisions of the CBA and the Employment Act. In the main suit, the claimant seeks reinstatement of the grievant to his job as the Supervisor and hence the prayer to restrain the respondent from recruiting another Supervisor. However, the Respondent is of the view that the dismissal was lawfully done in compliance with the CBA and the Employment Act and as such the claimant has not established that the grievant is likely to be reinstated after the trial.

24. I have carefully considered the material presented to the court by the claimant in support of the application but I am not satisfied that the applicant has established a prima facie case with probability of success. It has not proved on a balance of probability that the grievant has a good chance of being reinstated to his former job as Supervisor after the trial because the dismissal did not meet the test of substantive and procedural fairness set out under section 45 (2) of the Employment Act. In particular, the applicant did not demonstrate that the gross misconduct allegedly committed by the grievant was not true and that he was denied an opportunity to defend himself before the dismissal.

25. On the contrary, the applicant attached to its Supporting Affidavit several relevant documents including copy of the show cause letter given to the grievant, setting out the misconduct charged and the particulars thereof, and further inviting him to respond; copy of the written response by the grievant admitting that he requisitioned for the items material to this case and gave them out to a third party; copy of letter suspending him from work and also inviting him to a disciplinary hearing; copy of Minutes for the disciplinary hearing showing that the grievant and his union representative were heard; and finally, copy of the dismissal letter citing the reason as gross misconduct contrary to section 44(4)(g) of the Employment Act, setting out the dues payable and giving him the right of appeal.

26. In my considered view the foregoing documents, manifests that a fair procedure was followed as required under Section 41 of the Employment Act, 2007 which provides that; -

***“(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.***

***(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”***

27. In addition, the said documents confirm that the respondent's allegations that the grievant handled its property on 12.5.2018 in a dishonest manner that led it suspect him of theft and thereby lost trust in him as a Supervisor. The foregoing constitutes a valid and fair reason upon which summary dismissal is justified under section 44(4)(g) of the Employment Act.

28. Having found that the applicant has failed to show that the impugned dismissal was vitiated by substantive and procedural unfairness, the grounds upon which a case for reinstatement can succeed, I proceed to hold that the Applicant has not established a prima facie case with probability of success. The purpose of interlocutory injunction is to preserve the substratum of a suit pending trial so that the court does not proceed in vain. However, the case being preserved should not just be arguable but it must demonstratively have high chances of success,

and that irreparable harm will be occasioned if the injunction order is withheld.

### **Irreparable harm or injury**

29. Irreparable harm or injury was defined in the **Halsbury's Laws of England, 3<sup>rd</sup> Edition Volume 21 page 252 paragraph 739** as follows:

***"... injury which is substantial and could never be adequately remedied or atoned for by damages..."***

30. In this case the applicant has not demonstrated by affidavit that if the after the trial the court finds that the impugned dismissal was unlawful, damages would not adequately compensate the grievant under section 49(1) of the Employment Act or that it will not be possible for him to secure alternative employment in the respondent or elsewhere.

### **Balance of convenience**

31. As regards the balance of probability, I would say that it is not a relevant herein because I am not in any doubt. In the end, I agree with the respondent that the applicant has not met the legal threshold for grant of interlocutory injunction as elucidated in the principles set out in **Giella v Cassman Brown case**.

### **Reinstatement pending trial.**

32. The jurisdiction to order reinstatement of an employee is donated by Section 49 (3) (a) of the Employment Act and section 12 (3) (vii) of the Employment and Labour Relations Court Act the Court. The emerging jurisprudence from this court and the Court of Appeal is that, before the court can order reinstatement, it must be guided by the provisions of section 49(4) of the Employment Act. In the case of **Kenya Airways Limited v Aviation Workers Union Kenya & 3 Others [2014] eKLR** where the Court of Appeal held that the relevant factors to be taken into account when considering reinstatement are provided under section 49(4) of the Employment Act and they include: -

***"...the wishes and expectation of the employee; common law principle that there should be no order of specific performance in a contract of service except in very exceptional circumstances; the practicability of the reinstatement; any compensation paid by the employer; and chances of the employee securing alternative employment."***

33. The said factors, in my view can only be properly brought out by evidence during the hearing of the main suit and not at the interlocutory stage. I gather support from **Kenya Tea Growers Association & another v Kenya Plantation & Agricultural Workers Union [2018] eKLR** the Court of Appeal held:

***"...In our view, the circumstances in the present case militated against granting the order for reinstatement particularly at an interlocutory stage..."***

***We agree entirely with the statement by Rika, J in Alfred Nyungu Kimungii vs Bomas of Kenya [2013] eKLR that "Ordinarily, reinstatement of an employee is a substantive remedy, not a temporary relief. The law does not contemplate that reinstatement issues (sic) as a provisional measure. It is a remedy that should normally be granted upon the full hearing of the employer, and the employee."***

34. On the other hand it is trite law that reinstatement of an employee is tantamount to ordering specific performance in a contract of service at whatever stage of the suit as such in line with **section 49(4) of the Employment Act** and the holding in the **Kenya Airways case, supra**, the employee must demonstrate exceptional circumstances. In this instance, however, the Applicant has not demonstrated any exceptional circumstances to justify his reinstatement but only contended that the grievant did not commit the wrong doing and that the Respondent did not follow the procedure set out under the CBA and the Employment Act before dismissing the grievant.

35. With due respect to the applicant, the foregoing contention constitutes the main issues for determination after hearing of the main suit not at this stage. I therefore decline to order reinstatement at this interlocutory stage because I am not properly seized of the material evidence to enable me make an informed decision on the said relief.

36. In conclusion, since reinstatement is a summative remedy to be determined after a full hearing of the suit, and the applicant has not met the legal threshold for granting interlocutory injunction, I proceed to dismiss the application for lack merit. Costs of the application shall be in the cause.

**Dated and delivered at Nairobi this 1<sup>st</sup> Day of October, 2020.**

**ONESMUS N MAKAU**

**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 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the**

parties having waived compliance with Rule28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE