



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 237 OF 2020

(Before Hon. Justice Hellen S. Wasilwa on 1st October, 2020)

THADDEUS OLUOCH OSEKO.....CLAIMANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

RULING

1. Pending for determination before this Court is the Respondent's Notice of Motion Application filed in Court on 14th February, 2020. The same is filed under certificate of urgency and is brought under Order 10 Rule 11, Order 51 Rules 1 and 13 (2) of the Civil Procedure Rules, 2010, Section 1A, 1B, 3, 3A and 63 (e) of the Civil Procedure Act and all enabling provisions of the law including the Judicature Act seeking orders that:-

- 1. The application herein be certified as urgent and service thereof dispensed with in the first instance (Spent).***
- 2. The Respondent's their employees or Agents be and are hereby restrained from evicting or in any manner interfering with the Applicants' quiet and peaceful occupation of his house pending the inter partes hearing of this application.***
- 3. The Respondents, their employees or Agents be and are hereby restrained from evicting or in any manner interfering with the Applicants' quiet and peaceful occupation of his house No- LCA 13 Lang'ata Estate pending the hearing and final determination of the case.***
- 4. The Officer Commanding Station Lang'ata Police Station to ensure smooth compliance with the order.***
- 5. The costs of the application be provided for.***

2. The Application is premised on the grounds that:-

- i. The Applicant as a senior staff of the Respondent Company was allocated a house No- LCA 13 at Lang'ata estate of Nairobi County.***
- ii. The Applicant who lives with disability resides on the suit premises with his family.***
- iii. The Applicant who was terminated and was not satisfied with his termination lodged an Appeal, which may take long to determine.***
- iv. The Applicant has also filed suit in Court challenging his termination in which the Applicant has sought inter alia a prayer for reinstatement.***
- v. The Applicant has been threatened with eviction from the suit premises.***
- vi. It is only fair and just that the Respondents be restrained from interfering with the Applicant's quiet and peaceful occupation of the house at Lang'ata pending hearing and final determination of the case.***

3. The Application is further supported by the Affidavit of **THADDEUS OLUOCH OSEKO**, the Claimant/Applicant herein sworn on 16th May, 2020, in which he reiterates the averments made on the face of the Application.

4. In response to the Application, the Respondent filed a Replying Affidavit deposed to by CHRISTOPHER NGUMUTA on 10th July, 2020 in which he avers that the Claimant's employment with the Respondent was terminated on 15th February, 2019 on the grounds of gross misconduct.

5. The Affiant further averred that in terminating his employment, the Respondent followed due process according to the Claimant a fair chance to present his case.

6. He further contended that following his termination, the Claimant was issued with notice to vacate the premises in the year 2019, which notice he failed to obey and/or ignored. It is the Respondent's contention that the Claimant was allocated a premises by virtue of his employment with the Respondent and the provisions of Section 31 of the Employment Act.

7. He posits that this right to housing was lost once the Claimant lost his employment with the Respondent. He further maintains that the Claimant remains indebted to it in the sum of Kshs. 522,000/- as rent arrears for the period between February 2019 to July 2020.

8. He further argued that it would be pre-judicial to it should this Court allow the instant Application as no employer-employee relationship exists between the Respondent and the Claimant herein.

9. He urged this Honourable Court in the circumstances to dismiss the Application in its entirety with costs to the Respondent.

10. In his brief rejoinder the Claimant filed a further affidavit in which he contends that the Respondent's assertion that he was accorded a fair hearing prior to his termination was not true as the officers who attended the same had pre-determined minds on terminating his employment.

11. The Claimant maintained that he was not given a fair opportunity to defend himself prior to the issuance of the dismissal letter and was therefore not satisfied with the procedure followed by the Respondent in his termination and as a result lodged an appeal with the Respondent on 1st March, 2019.

12. He posits that his Appeal remains pending before the Respondent. He further remains apprehensive that if the Orders sought in his Application are not allowed he stands eviction before his appeal is heard and determined.

13. The Claimant maintains that the continued failure by the Respondent to finalize his appeal is unfair and that its persistent calls for his eviction by the Respondent before determination of his appeal clearly demonstrate ill motive and witch hunt on the part of the Respondent.

14. He further maintains that the continued pendency of his appeal is in gross violation to his right under the doctrine of legitimate expectation. He therefore urged this Honourable Court to allow his Application in terms of the reliefs sought therein.

15. Parties thereafter agreed to dispose of the Application by way of written submissions.

Submissions by the Parties

16. The Claimant/Applicant submitted that he has met the threshold for the grant of the orders sought in his Application as set out in the cases of **Giella Vs Cassman Brown** and **E.A Industries Vs Trufoods (1972) EA 420**.

17. He further maintained that he has established a prima facie case with probabilities of success as he was summarily dismissed without cause and that the failure by the Respondent to hear and determine his Appeal is inexcusable.

18. He further contends that his termination was in effect a sham, unfair, un-procedural, wrongful and unjust. To buttress this argument the Claimant cited and relied on the case of **Raymond Robert Ngetich Vs Kenya Utalii College (2016) eKLR** where the Court granted an injunction to the Applicant therein on the grounds that the balance of convenience tilted in his favour as his appeal remains undetermined.

19. He further submitted that he stands to suffer irreparable harm if the Orders sought in his Application are not granted for the reason that he is disabled and was aged 54 years at the time of his termination and will be forced to look for alternative accommodation for his family, which may not be compensated by an award of damages.

20. In conclusion, the Claimant urged this Honourable Court to exercise its discretion and allow his Application in terms of the reliefs sought therein.

Respondent's Submissions

21. The Respondent on the other hand submitted the Applicant has failed to meet the threshold for the grant of the Orders sought in his Application and therefore urged this Court to accordingly dismiss the Application as prayed with costs to the Respondent.

22. It is further the Respondent's position that the contention by the Applicant that his Appeal remains pending before it is not true as the Respondent clearly responded vide its letter dated 9th April, 2019 and informed the Claimant that no new evidence was adduced by him to

warrant the review of the decision of termination issued on 15th February, 2019.

23. It is therefore contended that the assertion of a pending Appeal are therefore misconceived and intended on painting the Respondent in bad light. It further maintained that the Applicant has illegally continued to occupy its premises since 2019 even after his termination accruing over Kshs. 500,000/- in unpaid rent arrears.

24. The Respondent contends that the Claimant's housing was by dint of the provisions of Section 31 of the Employment Act, 2007 and that such a right is not absolute and only exists where there is a valid employment relationship. To buttress this argument the Respondent cited and relied on the case of **Fadhil Juma Kisua & Another Vs Kenya Ports Authority (2016) eKLR** on the right to housing under Section 31 of the Employment Act, 2007. For further emphasis, the Respondent cited the Court of Appeal decision in the case of **Eric V.J Makhokha & 4 Others Vs Lawrence Sagini & 2 Others (1994) eKLR**.

25. The Respondent further submitted that the Claimant is not entitled to the Orders sought as he did not seek for the same at the main suit by dint of the provisions of Section 17 (5) and (6) of the Employment and Labour Relations Court Rules, 2016. For emphasis, the Respondent cited and relied on the case of **Fadhil Juma Kisua & Another Vs Kenya Ports Authority (2016) eKLR**.

26. In conclusion, the Respondent urged this Honourable Court to dismiss the instant Application in its entirety with costs to the Respondent.

27. I have considered the averments of the Parties herein and the submissions filed. I notice that the Claimant/Applicant was allocated house No. LCA-13 by virtue of his employment. This employment was terminated by the Respondent on 15/2/2019. This implies that there is no longer an employer – employee relationship between the Applicant and the Respondent, which would warrant compelling the Respondent to house the Applicant.

28. The Applicant has averred that he has filed an appeal and also this suit for which he has a good case and so should not be evicted.

29. In my view, the fact of a pending appeal is not a panacea to remaining in Respondent's house after dismissal. If indeed the Court finds the Applicant's dismissal to have been without merit, then the Applicant can be compensated in monetary terms.

30. In the circumstances, I find the application by the Applicant without merit and I dismiss it accordingly.

31. In order to avoid a miscarriage of justice the Applicant is given 1 months' notice with effect from the date of this ruling to vacate the Respondent's premises.

32. Costs in the cause.

Dated and delivered in Chambers via zoom this 1st day of October, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mbaye holding brief Emily Nyongesa for Applicant – Present

Nyaringita for Respondent – Present