



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. E614 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

DR. ALLAN PAMBA.....CLAIMANT

VERSUS

THE KENYA HOSPITAL ASSOCIATION for and on behalf of

THE NAIROBI HOSPITAL.....RESPONDENT

RULING

The application before me for determination is dated 5th October 2020 and filed by the Claimant/Applicant under certificate of urgency on the same date. The prayers sought in the application are the following –

1. That this Application herein be certified urgent and be heard ex-parte in the first instance in respect of prayer 2 herein below.
2. That the Court be pleased to grant the Applicant a temporary order by way of injunction directed against the Respondent Hospital restraining it from implementing the unlawful termination of the Applicant's services from its employment pending the hearing and determination of this Application and thereafter the suit.
3. That the Court be pleased to grant the Applicant an order restraining the Respondent from enforcing its letter of 2nd October, 2020 purporting to terminate the Applicant's contract that is still in force up to the 8th of March 2023 without valid reasons for so doing.
4. That the costs of this Application be provided for.

The grounds upon which the application is premised are that –

- a) That the Applicant's Contract of employment is still in force until the 8th of March, 2023 yet the Respondents have purported to terminate the same without any reason.
- b) That the Applicant's probation contract ended on the 8th of September, 2020 yet the Respondent Hospital has purported to terminate the contract in total violation of the Applicant's Constitutional right envisaged under Articles 47 and 50 of the Constitution of Kenya 2010.
- c) That it is in interests of justice that an injunctive Order be issued to halt irreparable loss, injustice and damage to the Applicant through unlawful termination

The application is further supported by the affidavit of the Applicant sworn on 5th October 2020 in which he deposes that he applied for the position of Chief Executive Officer of the Nairobi Hospital on 18th February 2020, was successful in the interview and was offered the job on 4th March 2020. That he was on probation from 6th March to 8th September 2020. That on 10th September 2020 the Respondent's Chairman to the Board of Directors handed him a letter extending his probation which lapsed on 8th September 2020. That from the date of recruitment there had not been any discussions or meeting with the Board on his performance or evaluation thereof.

The Applicant further deposes that he is aware that the Board of Directors was summoned to a meeting on 2nd October 2020 which he attended but was requested to step out despite the agenda not showing that he was the subject of discussion.

That in the letter of termination dated 2nd October 2020, the reason for termination is failure to execute the probation period extension. That if his performance was unsatisfactory he should have been informed earlier and given an opportunity to discuss the same before such punitive action taken against him.

It is the Applicant's averment that the termination of his contract was actuated by malice as the reason cited for the same is neither valid nor proven.

The Respondent filed both grounds of opposition and a replying affidavit. In the grounds of opposition, it sets out the following grounds –

1. *The Application is too late in the day and has been overtaken by events.*
2. *There is no prima facie case with any probability of success.*
3. *The alleged breaches by the Claimant if at all proved (a fact which is highly doubtful) can be adequately compensated by award of damages which the Claimant has pleaded and prayed for.*
4. *The balance of convenience dictates that an award of injunction (if at all tenable) would be against the balance of convenience in the circumstances.*
5. *Such other and further grounds as may be adduced at the hearing thereof.*

In the replying affidavit sworn by MAXWELL MWANGI MAINA, the Respondent's Acting Company Secretary on 13th October 2020, the Respondent states that the contract signed by the claimant provided for a probationary period of 6 months, subject to extension of a further 3 months in the event of unsatisfactory performance. That the contract further provided for supervision of the claimant by its Chairman who was also mandated to carry out appraisal and to review the claimant's performance at the end of the second, fourth and sixth months respectively.

That the Chairman duly invited the Claimant for appraisal meetings with the final appraisal being carried out on 9th and 10th September 2020. That since the claimant's overall performance was unsatisfactory, his probationary contract was extended by 3 months to 12th December 2020. The claimant was also required to sign a Performance Enhancement Plan (PEP) by 30th September 2020.

That on 29th September 2020, the claimant communicated his refusal to sign the PEP. That the Respondent's Board met on 2nd October 2020 and decided to formally terminate the claimant's contract.

The respondent denies any malice in the termination of the contract and states the contract was terminated in accordance with the law.

The affiant deposes that the reliefs sought by the claimant in the application are incapable of being granted on grounds that –

- (a) *The substantive reliefs of the application have both been overtaken by events in that an injunction cannot issue to restrain that which has already occurred;*
- (b) *There is absolutely no prima facie case with any probability of success;*
- (c) *The Claimant cannot suffer any justiciable irreparable damage and since at paragraph 7 of the Statement of Claim the Claimant has quantified his perceived loss and verified that position by his own affidavit his perceived loss are compensable by damages.*

The affiant further deposes that the balance of convenience favours the Respondent because of the following reason –

- i. The Respondent is a health services provider. The Court is invited to take judicial notice of the current health problems in Kenya and the world, the COVID-19 pandemic, and appreciate that just as all other hospitals in Kenya, it is necessary and critical that the Respondent with all its outlet hospitals need to be functioning optimally under a Chief Executive Office in whom the Respondent's Board has confidence in.
- ii. The position in question is one of the Chief Executive Officer, the senior most executive position in the management of the Respondent. It shall grossly and egregiously prejudice management and service delivery of very essential services to Kenyans, if the Claimant were to be imposed on the management of the Respondent.

According to the affiant the application should be dismissed in the interest of justice and in the public interest.

The application was heard on 4th November 2020.

Senior Counsel Paul Muite appearing for the Claimant jointly with Ms. Guserwa and Mr. Kangwana Jr submitted that the termination of the claimant's contract was wrongful. That being at the apex of his career, the termination impacts on the claimant's prospects which would be permanently damaged.

He submitted that damages would not be an adequate remedy in the circumstances. That it would be convenient of the court to grant orders

of status quo with fast tracking of the suit so that the matter can be decided on the merits.

Counsel submitted that the Respondent has commenced the process of recruiting a successor for the position even before the court has an opportunity to hear the parties. That it is necessary to preserve the subject matter of the case while parties move to the substantive suit.

Mr. Obura, appearing for the Respondent with Mr. Otiende Amolo, Mr. Bwire and Mr. Ezekiel Munya, submitted that the application is not justiciable as the Applicant is asking the court to grant an injunction restraining implementation of a letter of termination. That in the Memorandum of Claim, the claimant seeks orders of injunction against the Board of Directors from interfering with the claimant's terms of employment. That the prayers in the claim and those in the application are at variance.

That even if the prayers were not at variance, the claimant has acknowledged in the claim that his services have been terminated. That this is repeated in the supplementary affidavit. Mr. Obura submitted that the court cannot issue an injunction against that which has already happened. That what the court would be doing is reinstating the claimant back to employment at interlocutory stage, yet an order for reinstatement should only be granted after full hearing.

Mr. Obura referred the court to the decision in the case of **Benedict Omolo v JSC, Gladys Shollei v JSC, Francis Njuguna v Construction Authority and Alfred Kimungui v Bomas of Kenya**. He submitted that reinstatement is a mandatory order to be granted only after taking evidence of the parties.

Mr. Obura further submitted that the application does not satisfy the principles in **Giella v Cassman Brown** being that the applicant must establish a prima facie case, irreparable harm and balance of convenience, to be applied sequentially as was held in the case of **Yellow Force Inns Ltd v Nduati and Co. Ltd**.

Mr. Obura submitted that in his affidavit sworn on 5th October 2020 the claimant states that his probationary contract ended on 8th and he was given an extension on 10th September 2020. That in the supplementary affidavit, the claimant deposes that the extension was on 15th September 2020.

That in his letter dated 29th September 2020 the claimant acknowledges the fact that there is an extension of the probationary contract and calls upon the Board to review the decision of the Chairman. That having accepted that there was an extension of his probationary contract, he cannot come to court to state that there was no extension or that he is still an employee. That these are issues to be cleared at the hearing.

Mr. Obura submitted that though the claimant might have an arguable case, this must be distinguished from a prima facie case as was emphasised in **Mrao Ltd v First American Bank**.

On whether the Applicant has proved irreparable damage, Mr. Obura observed that in his own pleadings, the Applicant has sought and tabulated special damages. That he cannot therefore at the same time plead irreparable damage. For emphasis, Mr. Obura further relied on the decision of Abuodha J. in **Katunge v National Aids Control Council (2019) eKLR**.

Mr. Obura submitted that the claimant cannot seek to bar recruitment of his replacement as he did not seek such orders in his application.

On the final principle for grant of interlocutory injunction, Mr. Obura submitted that the world is in the middle of a pandemic. That the Respondent being a leading private hospital, a Chief Executive Officer who does not have the confidence of the Board cannot be imposed on it during a crisis.

Mr. Bwire appearing with Mr. Obura added that parties are bound by their pleadings citing the case of **Odd Jobs v Mubea**. He submitted that the question of injuncting a recruitment process not having been pleaded is not a subject for adjudication.

In a rejoinder, Senior Counsel Paul Muite submitted that the facts as pleaded by the Claimant in his application are that he was on probation for 6 months and the Respondent attempted to extend the probation period yet there is no suggestion that the Applicant was found to be wanting in performance. He submitted that at paragraph 2 and 3 of the application, the Claimant is asking for suspension of the letter terminating his employment so that the effect of the orders put on hold the recruitment process. He reiterated that wrongful termination of a person at the apex of his career will not be capable of being remedied by damages. He submitted that it is not the entire Board supporting the termination. He urged the court to order status quo.

Determination

I have considered the application and the grounds and affidavits in support and opposition thereof. I have further considered the submissions of the parties as well as the authorities cited.

The issues for determination are whether the claimant has satisfied the threshold for grant of the orders sought in his application and whether the orders should be granted.

The case of **Giella v Cassman Brown** is the locus classicus for grant of interlocutory injunctive orders. The principles set out in the case are that for an Applicant to qualify for grant of interlocutory injunctive orders, the Applicant must demonstrate a prima facie case and irreparable harm. When in doubt the court should decide on a balance of convenience.

Besides the principles set out herein above, in employment cases, the court also has to consider the fact that reinstatement is not an automatic remedy as Section 49(4) of the Employment Act sets out factors to be considered by a court before reaching a conclusion to reinstate, re-

engage, pay compensation or grant none of these remedies.

Sub section 49(4)(c), (d) and (e) of the Employment Act specifically require the court to consider the following factors –

(c) the practicability of recommending reinstatement or re-engagement;

(d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;

(e) the employee's length of service with the employer;

The remedies of reinstatement and re-engagement are also only available upon a finding that the termination was unfair.

In the instant case the Applicant was still on probation, the same having been extended by letter dated 10th September 2020. The letter of termination of the probationary contract is dated 2nd October 2020. The grounds for termination of the contract are as stated therein. The propriety of the termination is not the subject of this interlocutory application as that remains to be determined upon examination of the evidence to be adduced at the hearing. What is for determination in the instant application is only whether the court should injunct the termination letter.

A termination letter takes effect upon the issuance thereof and once it takes effect, the employment relationship comes to an end. The only way to reverse the letter of termination is by way of an order of reinstatement or re-engagement. This is the rationale of Section 49(3) of the Employment Act as read with Section 50 which provides –

(3) Where in the opinion of a labour officer an employee's summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to—

(a) reinstate the employee and treat the employee in all respects as if the employee's employment had not been terminated; or

(b) re-engage the employee in work comparable to that in which the employee was employed prior to his dismissal, or other reasonably suitable work, at the same wage.

50. Courts to be guided

In determining a complaint or suit under this Act involving wrongful dismissal or unfair termination of the employment of an employee, the Industrial Court shall be guided by the provisions of Section 49.

In the instant case, there is no doubt that the claimant has established a prima facie case based on the facts of the case. The claimant has questioned his assessment for purposes of confirmation. In his letter dated 29th September 2020, he raises pertinent issues that call for examination by the court. The grounds for termination of the probationary contract are also questionable having been premised on the letter dated 29th September 2020.

On the issue of irreparable harm, I agree with submissions of Counsel for the Claimant that being at the apex of his career, the termination may well cause irreparable harm. This is because it impacts on future employability of the claimant. Nairobi Hospital being a premium hospital not only in the country but in the region, such an opportunity or a similar opportunity many never present itself for the claimant. Damages although an alternative remedy provided by law, cannot remedy such a loss.

Having made the above findings, I must now consider the balance of convenience.

As already observed, Nairobi Hospital which the claimant headed is a premium hospital. A lot is going on, especially now with the COVID-19 pandemic which has stretched health facilities worldwide to the limit. This calls for coordinated management which requires that the Chief Executive Officer to work closely with the Board. Even in ordinary circumstances without a pandemic like COVID-19, the position of a Chief Executive Officer is so focal to the success of an organisation that a situation where there is conflict between the Chief Executive Officer and the Board would hurt performance of any organisation.

From the correspondence exchanged between the Claimant and the Chairman of the Board, including the pleadings filed in court, it is obvious that the relationship between the two is already strained. According to his job description, the claimant reported, to the Chairman of the Board who was also to carry out his performance review as per Performance Review clause in the letter of appointment.

I do not think it would be logical in the circumstances, to force the Claimant and the Chairman to work together. The balance of convenience would thus militate against granting orders of injunction.

In addition to the foregoing, as already observed, an injunctive order would have the consequence of reinstating the claimant, which according to Section 49(3) of the Employment Act may only be done upon making a finding of unfair termination and considering the factors under Section 49(4).

For the foregoing reasons, I decline to grant the orders sought in the claimant's application with the result that the application fails. The

same is dismissed with costs to abide the outcome of the main suit.

It is ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF NOVEMBER 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