



Edwin Onyono & Sherwim Njoroge v Judicial Service Commission (Cause 1252 of 2018) [2019] KEELRC 2478 (KLR) (22 January 2019) (Ruling)

Edwin Onyono & another v Judicial Service Commission [2019] eKLR

Neutral citation: [2019] KEELRC 2478 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1252 OF 2018
HS WASILWA, J
JANUARY 22, 2019

BETWEEN

EDWIN ONYONO 1ST APPLICANT

SHERWIM NJOROGE 2ND APPLICANT

AND

JUDICIAL SERVICE COMMISSION RESPONDENT

RULING

1. The Application before this Court is the one dated and filed in Court on 26th July, 2018 through a Notice of Motion filed under Section 17 of the *Employment and Labour Relations Court Act* of 2014, Section 41, 43 and 45 of the *Employment Act*, Article 41 and 47 of the *Constitution* of Kenya and all enabling provisions of the law.
2. The Application seeks the following Orders:-
 1. That the Application herein be certified as urgent and service be dispensed with in the 1st instance.
 2. That pending the hearing and determination of this Application the Respondent be and is hereby restrained from altering, amending, withdrawing, varying, terminating or in other way interfering with the accepted contract of employment as contained in the letter of offer dated 22nd June, 2018.
 3. That pending the hearing and determination of this Claim the Respondent be and is hereby restrained from altering, amending, withdrawing, varying, terminating or in other way interfering with the accepted Contract of employment as contained in the letter of offer dated 22nd June, 2018.



4. That the costs of this Application be provided for.
3. It is grounded on the following grounds:-
 - a) That the Applicants herein have been employees of the Respondent since May 2014.
 - b) That initially they were employed as legal researchers on a 2 year contract which expired in May 2016 when they were offered new contracts commencing July 2016 which changed their designation to Law Clerks and reduced their salary from a consolidated monthly salary of Kshs. 179,000/- to a consolidated monthly salary of Kshs. 133,750/-.
 - c) On the 11th of May, 2018 the Respondent notified the Applicants that their contracts as Law Clerks were expiring on the 30th June, 2018 and would not be renewed.
 - d) That on the 22nd day of June, 2018 the Respondent offered the Applicants new contracts for the position of Law Clerks for a period of one year commencing 1st July, 2018 at a consolidated monthly salary of Kshs. 190,000/- and the Applicants signified their acceptance of the offer by appending their respective signatures, returned their acceptance to the Respondent and accordingly commenced work on 1st of July, 2018.
 - e) That on the 16th of July, 2018, the Applicants were summoned to the Deputy Registrar's (Court of Appeal) office and without any explanations they were issued with different contracts for the position of Legal Researchers with a reduced consolidated monthly salary of Kshs. 133,750/= whilst purporting to withdraw the existing contract for the position of Law Clerks as contained in the offer letter dated 22nd June, 2018.
 - f) The Respondent has now given the applicants an ultimatum to sign the subsequent contracts as Legal Researchers within 30 days from the date of the said letter failure of which the offer shall lapse.
 - g) The existing contract does not have any provisions for withdrawal once accepted and the Respondent has not laid any basis or legal justification for the purported withdrawal of the existing contract and substitution thereof with another contract.
 - h) This has introduced a sudden uncertainty in the employment status and contractual position of the applicants especially in the intervening 30 days period and beyond by the purported withdrawal and substitution of an existing contract, a situation that is unknown at law and is the basis of the Applicants' Application and suit filed herewith.
 - i) That the Applicants are now apprehensive that the intended action by the Respondent will violate their constitutional rights to fair labour practices and contradicts the provisions of the Employment Act and they seek assistance of the Court to stop the same.
 - j) The Claimants are apprehensive that unless this Honourable Court intervenes and grants the prayers sought the Applicants' employment status and applicable terms remain uncertain to the detriment of the Applicants who are otherwise still contracted by and working for the Respondent.
 - k) That the Application herein is made in the interest of Justice.
 4. The Application is supported by the Affidavit of Edwin Onyono and Sherwin Njoroge sworn on 26th July, 2018 in which they reiterate the averments made in the Notice of Motion Application.



5. The Respondent opposed this Application vide a Replying Affidavit filed in Court on 30th July 2018 deponed by Winfrida Mokaya, the Registrar of the Respondent, in which she avers that there is no position of Law Clerk in the Court of Appeal and that all other officers serving in superior Courts are serving as Legal Researchers. She further avers that the Claimants/Applicants both serve in the Court of Appeal and the correct position is that of a Legal Researcher.
6. The Respondent avers that upon realisation of the error, the management took steps to rectify the same culminating in the issuance of the letter dated 9th July, 2018 so as to place the officers correctly based on the structure approved by the commission.
7. In disposing of the instant Application, the parties agreed to file written submissions.

Claimants/Applicants' Submissions

8. The Claimants/Applicants' in their submissions urged the Court to allow the instant Application as they have meet the conditions for a party to be granted injunctive orders as set out in the land mark authority of *Giella Versus Cassman Brown & Co. Limited (1973)EA 358*.
9. On the issue of establishing a prima facie case the Claimants/Applicants' have submitted that indeed they have established the same and relied on the authority of *Mrao Ltd Versus First American Bank Limited & 2 Others* for emphasis.
10. It is further the Applicants' submission that the Respondent's action of unilaterally purporting to withdraw the offer of appointment duly accepted by the Applicants' dated 22nd June, 2018 and replacing the same with the one dated 9th July, 2018 long after the Applicants commenced serving under the former offer is unjustified.
11. The Applicants' further submitted that the Respondent's actions constitute a breach of their constitutional, employment and contractual rights. Further that the offer letter provided for termination under clause 5 which stated:

“Termination of service during the contract period will be by either party giving one (1) month Notice or payment equivalent salary in lieu of Notice.”
12. It is submitted that the Respondent is therefore bound by the above and that termination was to be effected as such.
13. For emphasis, the Claimants/Applicants' relied on the case of *Esther Mbinya Musau Versus National Bank of Kenya Limited (2015)* eKLR where the Court observed that an employment contract is founded on special circumstances that are regulated by statute and anchored under the provisions of Article 41 of the *Constitution* unlike the ordinary contracts regulated under the law of contracts. As such, where an employee cites the violation of their rights, such rights must be assessed under the applicable law as well as under the constitution.
14. The Applicants averred that the purported withdrawal was done without any explanation being given to the Claimants/Applicants' in total disregard to Section 10 (5) of the *Employment Act*.
15. The Applicants' further submitted that there is no major difference between a Law Clerks and Legal Researchers as alluded to by the Respondent which would result in difference in remuneration. Further



that the difference in remuneration goes against the doctrine of equal pay for equal work or equal pay for work of equal value as enshrined in Section 5 (5) of the [Employment Act](#) which provides:-

“An employer shall pay his employees equal remuneration for work of equal value.”

16. It is the Claimants/Applicants’ submission that they have been subjected to unfair labour practices contrary to Article 41 of the [Constitution](#) of Kenya. For emphasis, they relied on the Authority of Elizabeth Washeke & 62 Others Versus Airtel Networks Limited & Another.
17. The Claimants further submitted that they had legitimate and reasonable expectation that the Contract they were currently working under would be fulfilled by the Respondent.

Respondent’s Submissions.

18. It is submitted by the Respondent that the Claimants/Applicants’ have not met the threshold to be granted the interlocutory reliefs they seek as set out in the case of Court of Appeal in C.A No. 51 of 1972 Giella Versus Cassman Brown & Co. Ltd (1975) EA 358 at page 360 as follows:-
 - a) The Applicant must show a prima facie case with a probability of success.
 - b) Applicant must prove that he will suffer irreparable injury unless interlocutory injunction is granted.
 - c) If the Court is in doubt, it will decide the Application on a balance of probability.
19. For emphasis the Respondent relied on the following authorities:

[Esther Mbinya Musau Versus National Bank of Kenya Limited](#) (2015) eKLR and [Rejab Barasa & 4 Others Versus Kenya Meat Commission \(2016\)](#) eKLR.
20. It is the Respondent’s submission that the Applicants herein served in the position of Legal Researcher prior to the signing of the new offer of appointment and not Law Clerks therefore its actions do not amount to unfair labour practice as alleged by the Claimants/Applicants’.
21. It is further submitted that the Respondent’s intention was to renew the Applicants’ contract for a further one year. However, it erroneously gave the Applicants an offer to position of Law Clerks which was non-existent at the time.
22. It is submitted that upon the realizing the error, the Respondent took steps to rectify the same by issuing the further offer letter dated 9th July, 2018 making reference to the earlier offer and informing the Applicants of the correct terms and conditions of service. For emphasis the Respondent relied on the case of [Nebart Munyi Versus Nicholas Muriithi Zakaria \(2015\)](#) eKLR where the Court observed that:-

“It is presumed that at the time of making a contract the parties are like-minded and that their bargain is motivated by commonality of purpose. However, if a mistake arises in the cause of the contract, the Court shall determine whether the mistake goes to the root of the agreement or whether it was a mistake of both parties.”
23. The Respondent further submitted that it was not in any way varying, withdrawing or repudiating its contract with the Applicants but was rather correcting an error on paper.
24. The Respondent averred that the Applicants’ claim of legitimate expectation has no basis as the Applicants were erroneously given the wrong letters of offer dated 22nd June, 2018 which letters were



corrected by the issuance of the offer letters dated 9th July, 2018 (Sixteen days later). For emphasis the Respondent relied on the cases of Communication Commission of Kenya & 5 Others Versus Royal Media Services & 5 Others and Sethi Auto Service Station & Another Versus Delhi Development Authority & Others (2009) 1SCC 180.

25. The Respondent submitted that the instant Application be dismissed with costs to the Respondent for lack of merit.
26. I have examined the averments of both parties. In determining whether the Applicants have a justifiable case, I must establish that they have met the threshold to be granted the interlocutory reliefs sought as set out in the Court of Appeal CA No. 51/1972 Giella vs Cassman Brown and Company Limited (1975) E.A 358 – (supra).
27. The Applicants have demonstrated that they had a contract of employment offered to them on 22.6.2018 starting on 1.7.2018. They signed the contract accepting it with all its terms. This was a fresh contract not a renewal of the contract that was due to expire on 30th June 2018.
28. The Respondents on their part contend that there was an error on the contract signed and that is why they sought to withdraw it and asked the Applicants to sign a fresh contract. There is no evidence that the Respondents considered Section 10(5) of *Employment Act* in changing the terms of the contract.
29. Section 10(5) of *Employment Act* 2007 states as follows:-

“Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing”.
30. The Respondents have also not demonstrated that they stand to suffer irreparably if the orders sought are granted as the Applicants will still be serving them.
31. It is my finding that the Applicants have established that they have a prima facie case. I therefore find the Application merited. I therefore find for the Applicants in terms of prayer 3.
32. Costs in the cause.

DATED AND DELIVERED IN OPEN COURT THIS 22ND DAY OF JANUARY, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of

Miss Okello for Respondent – Present

No appearance for Applicants

