



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 47 OF 2019

(Before Hon. Justice Hellen S. Wasilwa on 27th June, 2019)

JULIET WAMIRI.....CLAIMANT

VERSUS

JAMES R. NJENGA, HON. STEWARD MADZAYO, ALICE KYALA, BENSON KAARIA,

ACHIYA ECHAKARA & HELLEN KOMBO, MS. RHODA AHONOBADHA AND GEN JEREMIA KIANGA

(Sued as Registered Trustees of AGRICULTURAL SOCIETY OF KENYA.....RESPONDENT

RULING

1. Before this Court is the Claimant/Applicant's Application dated 29th March 2019, wherein she seeks the following orders:-

1. Spent.

2. THAT pending the hearing and determination of this Application inter partes, this Honourable Court be pleased to stay the actions of the Respondent suspending the Claimant herein vide the letter dated 27th March 2019 and allow the Claimant to perform her duties in the normal manner as per her employment contract.

3. THAT this Honourable Court be pleased to find and order that Batram Muthoka being the Respondent's Chief Executive Officer is in contempt of the Orders issued by this Honourable Court issued on 29th January 2019 in this cause.

4. THAT the said Batram Muthoka be arrested and committed to civil jail for a term not exceeding 6 months.

5. THAT the costs of this application (sic).

2. The Application is based on the grounds that since the Court issued the interim injunction orders of 30th January 2019, the Chief Executive Officer of the Respondent engaged in continuous and calculated acts against the Applicant with the intent to make the working environment hostile so as to force her out of employment and thereafter terminate her services. This is contrary to the said orders restraining the Respondent or its servants from harassing or victimizing the Applicant regarding the transfer directive.

3. The Applicant avers that her emails were disabled by the Respondent and shortly thereafter she received a notice to show cause on the ground that she had unauthorized access to the Respondent's office email address and accessed confidential data in contravention of ICT policy.

4. Applicant requested for the particulars of the email address utilized and the nature of the confidential information but was issued with a half-hearted response. She was given 48 hours to respond and did so by denying the allegations and requested for a conducive work environment. She was suspended from duty and directed to hand over to the Chief Executive Officer.

5. It is the Applicant's position that the Respondent did not follow the suspension procedure as outlined in Clause 1.5.5 of the Human Resource Manual. Particularly, she has been subjected to the disciplinary penalty of warning, surcharge and suspension over a period of 2 weeks. The Application is supported by the Applicant's Affidavit and is based on the grounds on the face of the motion.

6. The Respondent has opposed the Application vide the Replying Affidavit of Batram M. Muthoka. The Respondent asserts that the orders issued on 30th January 2019 only bars it from transferring the Applicant, but did not suspend the operation of the terms and conditions of employment or curtail the Respondent's power to exercise its employer rights over its employees.

7. The Respondent avers that the Applicant was issued with a show cause letter for working half-day on 20th February 2019 and for absenteeism from work on 21st February 2019. She was issued with another show cause letter for knowingly printing the year planner with errors and omissions.

8. She was further issued with a show cause letter on the allegation of gaining unauthorized access of the official email address which led to her suspension. It is its position that the issues raised were disciplinary in nature and which were handled according to its HR Manual. The Respondent chooses to refrain from commenting on the merits and demerits of the disciplinary process as it may prejudice or pre-empt the outcome of the appeal process currently before the Respondent.

9. As regards the show cause letter dated 25th March 2019, upon receiving the Claimant's response regarding the same, the Respondent consulted the National Chairman on the Applicant's intended suspension, who concurred with the same. The Applicant was then suspended to pave way for further investigation.

10. The Respondent contends that the Applicant has not been unfairly targeted and that the Applicant had previously been issued with show cause letters dated 28th March 2018, 11th April 2018 and 29th May 2018.

11. The Respondent avers that the application is frivolous, vexatious, premature and an abuse of the Court process.

12. The Applicant filed a rejoinder to the Respondent's Replying Affidavit contending that although the Respondent had powers to issue show cause letters, the manner and frequency of its issuance constituted an abuse of discretion aimed at intimidating her to make her working environment intolerable.

13. She further contended that she was not in the office on 20th and 21st February 2019 because she was out on official duty, a fact she relayed to the Respondent. She avers that the 2019 ASK Year Planner, which had errors, was prepared and circulated by the Communications Department and not the Marketing and Sales Department. She further avers that those involved in the matter were never disciplined.

Submissions by the Parties

14. The Application was disposed of by way of written submissions. The Applicant filed her submissions on 10th May 2019, while the Respondent filed theirs on 20th May 2019.

15. The Applicant urges the Court to grant the orders sought and submits that the disciplinary process instituted against her was arbitrary, an act of victimization and aimed at curtailing her rights.

16. She further submits that the show cause letters in contention were issued against the backdrop of an express court order barring any form of victimization or harassment pending the hearing and determination of the Applicant's application challenging her transfer. She relies on the case of **Kenya Tea Growers Association vs. Francis Atwoli & 5 Others [2012] eKLR** where the Court cited with approval the decision of **Clarke & Others vs. Chadburn & Others [1985] 1ALL ER (PC) 211** where the Court observed that:-

“I need not cite authority for the proposition that it is of high importance that orders of the courts should be obeyed, willful disobedience to an order of the Court is punishable as a contempt of court, and I feel no doubt that such disobedience may properly be described as being illegal... even if the Defendant thought that the injunction was improperly obtained or too wide in its terms, that provides no excuse for disobeying it. The remedy is to vary or discharge it.”

17. In its submissions, the Respondent pointed out that it had not been served with the Applicant's submissions. Nevertheless, they submitted that the application is premature as the matter is incomplete since its internal disciplinary processes have not been exhausted.

18. They further submit that the Applicant cannot therefore seek a substantive determination that challenges the Respondent's disciplinary decision through an application which is not anchored in the main claim, without parties presenting their evidence and the evidence subjected to cross examination.

19. It is its position the determination of this question would amount to a summary trial. The Applicant has the opportunity of presenting her case at the appeal process as the Respondent has refrained from commenting on the merits and demerits of her case so has to give her a fair chance.

20. The Respondent submits that contempt proceedings ought to be about breach of express Court orders.

21. I have examined all the averments and submissions of both Parties. This Court issued exparte orders on 29/1/2019 barring the Respondents from transferring the Claimant/Applicant herein.

22. The Application was set down for inter partes hearing on 11.3.2019 and a ruling date set for 9.5.2019. Interim orders were extended.

23. It is assumed that the Applicant resumed her work based on the interim orders but was subjected to a series of actions, which she contends were aimed at harassing her having sued the Respondent.

24. She contends that on 12.3.2019 to 27th March 2019, she was served with a record 3 show cause letters in quick succession culminating in her suspension from employment by the Chief Executive Officer who is now being cited for contempt.

25. She contends that she had already preferred an appeal against the said penalties of warning and surcharge issued simultaneously by the Chief Executive Officer on the ground that they were done to poison the working environment and create an impression that she was incompetent and therefore unable to perform her duties and hence finally dismiss her.

26. She also avers that on 21st March 2019 to the date of her suspension, she was disabled from the Respondent's Systems and her email disabled.

27. In dealing with this application I will consider two issues:-

1. Whether the interim orders issued against transferring the Claimant should be upheld.

2. Whether the Respondent's Chief Executive Officer has committed acts of contempt.

28. On the 1st issue, the Claimant has by her averments indicated that she was transferred to Mombasa as a Regional Manager, a position which was subservient to her current position at the Headquarters as Marketing Manager.

29. The Respondent in answer to this intimated that the Marketing Manager was just like any other Manager and there was no demotion in the transfer. The Claimant indicated that the transfer was going to cost her 40,000/= loss of salary ad allowance and was thus a demotion.

30. In determining whether the transfer was a demotion or not, I noted that Claimant was appointed as Manager, Marketing and Publicity. Her duties were as per her attached job description which include development and implementation of market plans, prepare PR strategies and ensure their implementation, conduct market research and customer analysis with a view to improve customer service and enhance the Society Corporate Image.

31. These duties the Applicant has been performing at Respondent's Headquarters.

32. In the transfer letter, she was now going to be Mombasa ASK Branch Manager.

33. The duties were limited to doing the work of business planning and growth at branch level and ensuring carrying out of other duties at that level. She was expected to submit monthly reports to the Head office.

34. The import of the transfer is to relegate her to the branch level from the Headquarters, which meant reporting to the Headquarters and submitting monthly reports. The letter also indicated that she was not going to be entitled to 40,000/= car allowance which was only payable to staff residing in Nairobi in M2 and M3 ranks.

35. The change was indeed drastic not only making charges in terms of employment but also in remuneration payable. This offends provisions of Section 10(5) of Employment Act 2007 which state as follows:-

“(5) 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”.

36. On the face of it, the transfer cannot stand as indicated. I will therefore confirm the interim orders granted barring the Respondent from transferring the Applicant to Mombasa pending hearing and determination of this Clam.

37. On the 2nd issue, the manner in which the various disciplinary actions follow in succession on 12/3/2019, there was 1st show cause letter, on 12/3/2019, a warning letter was issued based on the show cause letter and the response therein. The Applicant appealed and the appeal is pending.

38. On 12/3/2019, another show cause letter she was also issued with a different letter asking her to explain why she caused the printing of the wrong year planner. She responded to this letter on same day indicating that it was Communication Department that shared the planner with the designer.

39. On 18/3/2019, she was issued with a letter indicating she was being surcharged Kshs.134,500/- for the wrong printing of the year planner. She also appealed this decision.

40. In the meantime, her email was having some difficulties and on 25/3/2019, she was issued with yet another show cause letter for gaining unauthorized access to the Society's confidential data. She denied this acquisition and sought more particulars on the accusations.

41. 2 days later, she was placed on suspension.

42. The Applicant contends that the speed and manner in which those letters were written to her were in a manner calculated to harass her and was meant to defeat the orders of this Court and was therefore in contempt thereof.

43. The manner and speed of the said letters are indeed suspect coming in quick succession. The Respondents aver that the orders of the Court barring transfer to Mombasa did not mean that the Applicant should continue to disregard her work and fail to be punished.

44. It is indeed true that a stoppage of transfer did not imply a stoppage of any disciplinary process against the Applicant if she is culpable in any way.

45. This Court had issued orders barring the Respondents from transferring the Applicant to Mombasa or in any way harassing or victimizing the claimant herein directly or indirectly relating to the transfer directive.

46. The harassment or victimization was stopped by Court in relation to the transfer subject. However, the action of the Respondent following hotly on the heels after the stoppage of the transfer could be viewed as being harassment calculated to defeat the Court's order. I say so because the Respondent never conclusively handled any of the complaints against the Applicant. There was a 1st notice to show cause on 12.3.2019 and has not been handled fully even after the response by the Applicant.

47. This is viewed from the fact that punishment including warnings surcharge etc was meted against the Applicant without any disciplinary hearing.

48. It is therefore my finding that the action of the Respondent smacks in the face of this Court and should not continue unless handled properly for whilst following the laid down processes and procedures. I find the action of the Claimant is clear and is blatant disregard to the law and procedure and should henceforth not be encouraged to continue.

49. The Applicant sought the alleged contemnor to be punished. I will not at this stage inflict any punishment on Respondent's Chief Executive Officer but I issue warning that the action meted against the Applicant against this Court's express orders should cease and will remain so pending the hearing and determination of this case.

50. Costs in the cause.

Dated and delivered in open Court this 27th day of June, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ochieng for Respondent – Present

Thuku holding brief Ogembo for Applicant – Present