



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 2 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

JAW.....CLAIMANT

VERSUS

THE BOARD OF TRUSTEES,

NATIONAL SOCIAL SECURITY FUND.....RESPONDENT

RULING

The Application before the Court is dated 2nd January 2019. The Claimant/Applicant seeks for Orders:

1. That a temporary injunction be issued restraining the Respondent from terminating the services of the Claimant pending the hearing and determination of this application.
2. That a temporary injunction be issued restraining the Respondent from terminating the services of the Claimant pending the hearing and determination of this suit.
3. That the Respondents be compelled to furnish the Claimant with the medical report
4. That the costs of this application be borne by the Respondent.

The Application is premised on the grounds that the Claimant has been issued with a termination notice which was effective from the 3rd of January, 2019, based on medical grounds. She avers that the decision to terminate her was based on her HIV status contrary to the HIV Prevention and Control Act.

That in the year 2014 while she was employed in the position of a Shorthand Typist II she was confirmed to have HIV and was accordingly registered by the National Council of Persons with Disability. That on July 2018, she was summoned by the Respondent to appear before the National Medical Board to determine her continued fitness to work.

She avers that the request for the medical examination was as a result of several requests from the Claimants HR Department to go to the hospital for continuous monitoring and consistent treatment. Subsequently she ended up revealing her status to the Respondent's HR Department since every time she would visit the hospital she would return the treatment records to them which records clearly indicated her HIV status.

The Applicant claims that two unknown persons who claimed to be from the National Medical Board visited her office and interviewed her, focus being on her HIV status and hearing disability. That a medical report was generated from the interview and what followed was notice dated 3rd December 2018, terminating her employment, requiring her to retire on medical grounds.

She is of the view that the decision to terminate her employment was made in bad faith, was arrived at irregularly because in the first place the so called medical board that examined her was improperly constituted and did not disclose to her the purpose of their interview. Further that the decision to terminate her was based on her disability and HIV status which in her opinion is discriminatory and in complete violation of her rights. She urges the Court to issue conservatory orders to stop the Respondent from further violating her constitutional rights.

The Respondent filed a Replying Affidavit sworn by one Regina Mua the Acting Section Head (Employee Relations) wherein she admits

that the Claimant was an employee of the Respondent who she contends continued to discharge her duties until sometime in 2016 when the immediate manager in the procurement department wrote a memo to the Human Resource regarding the performance of the Claimant which was below minimum and that she was always absent minded.

That the Respondent carried out the yearly performance appraisal during the year and the Claimant scored less than 0.90 out of 5. That the same exercise was repeated in 2017 and the Claimant scored 1.3 which was still below average and needed improvement.

The Respondent avers that on 30th March 2017, it wrote to the Director of Medical Services requesting for a medical opinion on the Claimant and whether she was in a position to carry on with her normal duties. It subsequently informed the Claimant that she was supposed to appear before the medical board on 19th July 2018 to determine her suitability for continued employment. The board reached a unanimous decision that the Claimant was not fit for further service.

On 3rd December 2018, the Respondent communicated the decision taken by management following the advice from the Medical board to terminate her services. The Respondent is of the view that it committed no offence by implementing the decision of the medical board and as such the application should be dismissed.

Submissions

On behalf of Claimant/Applicant it is submitted that section 31 of the HIV Aids and Control Act provides that no person shall be denied access to employment which he is qualified or transferred, denied promotion or have his employment terminated on grounds of his actual, perceived or suspected HIV status.

That the Respondent has contravened the law by terminating the Claimant in the manner that it did. The Claimant urges the court to allow the application.

The Respondent on the other hand submits that if the orders sought are granted the matter will have been concluded at interlocutory stage. That if the Court finds at conclusion of the case that the Claimant should be reinstated, then the respondent can effect the same at that stage.

Determination

The principles of injunctive orders are set out in the case of **Giella Vs Cassman Brown & Company Ltd (1973) EA 358**. The Plaintiff must show that he has a prima facie case with a probability of success and that he stands to suffer irreparable damage. If the court is however in doubt on the foregoing, it will decide the matter on the balance of convenience.

The Claimant/Applicant premises the application on the ground that the Respondent has issued a notice of termination effective, 3rd January 2019, but the Claimant obtained injunctive orders whereby the Court suspended the letter of retirement ref: SF/P/2435/48 dated 3rd December, 2018, pending the hearing and determination of the suit.

In the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR** the Court of Appeal endeavoured to define a Prima facie case as follows:

“So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter...”

... prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.”

The Claimant avers that she was terminated for an invalid reason which is her HIV status whereas she was a performer. The Respondent on the other hand avers that the Claimant's appraisal for two consecutive years was below average which prompted them to refer the matter to the Medical Board.

The memo from the Acting Procurement Officer referring the matter to Human Resource Department shows that the Claimant had been absent minded and had difficulties in supporting herself. The Respondent has attached medical evidence that informed the decision to refer the matter to the Medical Board. The Claimant did not attach contrary evidence declaring her fit to serve.

The court is however concerned that the respondent's policy on retirement on medical grounds has not been availed to court for the court to be in a position to assess compliance therewith. It is not confirmed whether before reference to the Medical Board the claimant was made aware of her performance lapses and the intention to refer her to a medical board. The court has not been informed whether the medical board found that the claimant could perform any either job or it limited itself to the claimant's job as Secretary. It has not been indicated whether before retiring her the claimant was given an opportunity to comment on the medical report and if she agreed or disagreed with it.

In the case of **Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR** it was held:

“The court should issue an injunction where the balance of convenience is in favour of the plaintiff and not where the balance is in favour of the opposite party. The meaning of balance of convenience in favour of the plaintiff is that if an injunction is not granted

and the suit is ultimately decided in favour of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.”

A case of termination of employment on medical grounds is not the same as that of termination on account of either incompetence or misconduct. It ought to be done in a humane manner. The respondent has not even filed a defence to assist the court in determining whether it has a valid defence to the claimant's averments of discrimination on her HIV/AIDS status.

This is a case which the court needs to investigate further before a decision can be arrived at on whether or not the claimant was not discriminated.

For this reason the application succeeds and the respondent is restrained from retiring the claimant on medical grounds pending the hearing and determination of this case.

In view of the nature of the case, the respondent is directed to comply with all pre-trial procedures by filing its defence and bundle of documents as well as witness statements within 14 days so that the case can be set down for hearing as soon as possible. A date for mention shall be taken at the time of delivering the ruling.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14TH DAY OF JUNE 2019

MAUREEN ONYANGO

JUDGE