



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 119 OF 2018

OLIVIA MILYCENT ATIENO.....CLAIMANT

VERSUS

MOMBASA AVIATION TRAINING INSTITUTE....RESPONDENT

RULING

1. On 9th March 2018, the Claimant filed a Memorandum of Claim together with supporting documents, seeking compensation for unlawful termination of employment and payment of final dues. On 11th July 2018, the Claimant filed an amended Statement of Claim together with an amended list of documents.

2. The Respondent filed a Reply to the amended claim 17th August 2018 to which the Claimant responded on 22nd August 2018.

3. On 2nd October 2018, the Claimant filed a supplementary list of documents and on 29th January 2019, she filed a further supplementary list of documents.

4. On 23rd May 2019, the Respondent moved the Court by way of Notice of Motion seeking orders directing that the following documents be submitted to the Directorate of Criminal Investigations, Forensic Document Examiner's Office for purposes of investigation into their authenticity:

a) Letter dated 1st June 2007 (page 2, Claimant's list of documents);

b) Undated letter titled "Confirmation and Appointment Letter" (page 3, Claimant's list of documents);

c) Letter dated 11th January 2017 (Respondent's alleged receiving stamp appearing thereon; pages 9 and 10, Claimant's list of documents).

5. The Respondent further seeks stay of proceedings pending the outcome of the requested investigation.

6. The Respondent's application is supported by an affidavit sworn by its Mombasa Campus Principal, Joshua Onyango and is based on the following grounds:

a) That vide her amended Statement of Claim, the Claimant sued the Respondent seeking inter alia:

i) Kshs. 498,942;

ii) An order compelling the Respondent to issue a Certificate of Service to the Claimant;

iii) Interest at court rates;

iv) Costs of the claim;

v) Any other order and/or relief that the Court may deem just and fit to grant.

b) That annexed to the said amended Statement of Claim was an amended list of documents which documents included the following:

- i) Document No 2, page 2 – Confirmation and Appointment Letter dated 1st June 2007;
 - ii) Document No 3, page 3 – Undated Confirmation and Appointment Letter;
 - iii) Document No 8, pages 9 & 10 – (Demand) Letter from *Kituo Cha Sheria* dated 11th January 2017.
- c) That the foregoing documents were also extensively referred to in the Claimant’s written statement (paragraphs 4 and 12).
- d) That vide the Respondent’s Reply to the Claimant’s amended Statement of Claim and the Respondent’s witness statement lodged on 17th August 2018 and 13th March 2019, respectively, it was stated *inter alia* that:

“*The Claimant’s ad hoc engagement with the Respondent was purely as a Relief Lecturer, on Part-Time basis...*”

and

“*All documentation in respect of the Claimant’s Confirmation and Appointment has been falsified for obvious reasons on the face thereof...*”

- e) That the Respondent is acutely aware that:

i) The documents listed as No 2 and 3 in the Claimant’s list of documents are falsified as:

- Both letter heads are falsified;
 - The Respondent’s witness, Joshua Onyango, was only appointed as Principal, Mombasa Campus on 1st April 2008 and could not have authored letter dated 1st June 2007 as Principal;
 - It is impossible that Peter Manyuru, the ostensible author of letter titled ‘Confirmation and Appointment Letter’ and the Respondent’s witness, Joshua Onyango could both have served as Principal, Mombasa Campus, at the same time, as depicted by both documents;
- It is impossible and illogical that the same individual would receive two different Confirmation and Appointment letters.
- ii) The receiving stamp allegedly endorsed on the demand letter from *Kituo Cha Sheria* dated 11th January 2017 does not belong to the Respondent, and is falsified.

f) That the entirety of the Claimant’s claim is based on falsehoods and criminal falsification, the only recourse being referral to the Directorate of Criminal Investigations for verification and attendant consequential action.

7. The Claimant filed Grounds of Opposition on 27th May 2019 stating that:

- a) This Court lacks jurisdiction to grant the orders sought;
- b) The Respondent’s application is an abuse of the court process, misconceived and made in bad faith;
- c) The allegations of falsification of documents are not supported by any criminal complaint to the appropriate authorities;
- d) The Claimant is not the maker of any of the subject documents and there is nothing that bars the Respondent from summoning the makers to court to confirm or deny their authenticity;
- e) This Court, as a neutral and unbiased arbiter cannot aid one party to the proceedings to carry out investigations against another party as it will lose its constitutionally mandated independence and impartiality;
- f) The Claimant’s constitutional right to a fair trial will be contravened should the prayers sought be granted;
- g) The Respondent’s application is irrelevant since the Respondent’s Reply at paragraph 4(iii) admits the contents of paragraph 4 of the Claimant’s amended Statement of Claim and confirms that the Claimant was employed by the Respondent in 2007, a fact which is supported by the subject documents. The said paragraph 4(iii) of the Respondent’s Reply states that:

“*The Claimant’s first engagement with the Respondent in 2007 was on Contract basis, which Contract ended in Year 2010, and the Claimant’s subsequent engagement with the Respondent was on ad hoc basis.*”

8. On the face of it, the Respondent’s application seeks submission of certain documents filed by the Claimant to forensic examination for

purposes of determining their authenticity. However, both in the grounds of the application and the affidavit in support thereof, the Respondent proceeds to discredit the said documents by way of circumstantial evidence. There is nothing to suggest forgery either of the body or signature of any of the documents.

9. The Employment and Labour Relations Court is not a criminal court. It follows therefore that a document filed in this Court may only be submitted to forensic examination for purposes of confirming or dispelling allegations of forgery. In such a case, the document in question will be examined against the genuine handwriting or signature of the alleged maker. This is not what the Respondent is asking for; what the Respondent wants is for the Court to order a general investigation into employment documents submitted by the Claimant.

10. It would appear that the Respondent wants the Court to assist it in the discovery process. As held in **Rafiki Microfinance Bank Ltd v Zenith Pharmaceutical Ltd [2016] eKLR** the purpose of discovery is to level the litigation field and expedite the determination of disputes. This cannot be achieved by ordering a general investigation such as envisaged in the Respondent's application. If indeed the documents in issue did not emanate from the Respondent, this is a matter to be canvassed and determined in full trial.

11. That said, the Court finds and holds that the Respondent's application dated 23rd May 2019 is without merit and proceeds to dismiss it with costs to the Claimant.

12. It is so ordered.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 25TH DAY OF JULY 2019

LINNET NDOLO

JUDGE

Appearance:

Miss Katisya for the Claimant

Mr. Ngonze for the Respondent