



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 369 OF 2019

DR. PETER OGECHA.....CLAIMANT/APPLICANT

VERSUS

KENYATTA UNIVERSITY.....RESPONDENT

RULING

INTRODUCTION

1. The Applicant, a lecturer in the Department of Security and Correctional Science Studies at Kenyatta University, was summoned to the Director of Criminal Investigations(DCI) to record statements in connection to malicious emails sent to all users, Vice Chancellor (VC), management, lecturers, staff and students of the Respondent, on diverse dates in April 2018. Thereafter, he was charged with publishing inflammatory reports to the public which charges were withdrawn as there was no evidence to sustain them. The Applicant was then subjected to disciplinary proceedings to answer to the same allegations, and which culminated in his dismissal. Despite timeously lodging an appeal, the same remains unheard.

2. The Applicant being aggrieved by the dismissal, filed the cause herein and the instant application seeking the following orders:

a. THAT the Honourable Court certifies this application as urgent and the same be placed before the duty Judge and be heard *ex parte* and service upon the respondent be dispensed with in the first instance.

b. THAT this Honourable Court be pleased to issue an order reinstating the Claimant/Applicant back to his position as a lecturer in the department of security and correctional science studies at the Kenyatta University **pending hearing and determination of this Application.**

c. THAT this Honourable Court be pleased to issue an order restraining the Respondents, their agents, staffs, officials and or agents from interfering, restraining and frustrating the Applicant in continuing with his duties upon reinstatement **pending the hearing and determination of this Application.**

d. THAT this Honourable Court declares the trial of 6th March 2019 along with dismissal letter issued to the Applicant by the Respondent dated 15th March 2019 unfair and against administrative justice, discriminatory and therefore unlawful and illegal.

e. THAT the Respondents be condemned to pay the costs of this Application.

3. The grounds of the motion are that the Applicant was dismissed without being accorded a fair hearing and that his termination was fueled by the Respondent's malice in an attempt to find him culpable for the false accusations levelled against him. The Applicant further avers that it is just and equitable to award the orders sought as he stands to suffer irreparable damage that cannot be compensated by way of damages.

4. The Application is supported by the Applicant's Affidavit sworn on 10.06.2019 wherein he avers that the dismissal was brought about by politics of senior officials who did not want him in the institution due to the likelihood that he would be appointed to lead the faculty.

5. The Applicant also avers that the investigation findings revealed that he was not connected to the email but he was still charged so that his employment could be terminated. He was later suspended to pave way for investigation. However, the Respondent took close to 5 months before the Applicant was given a fair hearing.

6. The Applicant maintains that he was not accorded a fair hearing as he was not given copies of the evidence against him, the board was not

properly constituted and the charges were not properly communicated.

7. The Respondent has opposed the Application vide the Grounds of Opposition filed on 1.07.2019 and the Replying Affidavit of Professor Joseph Ngeranwa filed on 11th July 2019.

8. The Respondent's avers that the Application pre-empts the outcome of the trial before the Respondent's case is heard and the prayers sought cannot be granted at the interlocutory stage because the suit will be rendered academic and nugatory. Further, the Claimant has not demonstrated any exceptional circumstances or that he has suffered irreparable harm to warrant the issuance of the orders.

9. The Claimant has come to this Court with unclean hands by committing perjury in his Affidavit of 10.06.2019 hence not worthy of the orders sought.

10. The Respondent avers that the Application is unmerited, based on a misapprehension of the law and has no foundation in the Memorandum of Claim. She further avers that the it is in the public interest for this Court not to issue the orders sought.

11. It is the Respondent's case that the allegations in the emails were unfounded and malicious and had quite wide coverage, which emails, caused panic and tarnished the Respondent's reputation. As a result, the students were concerned that their academic qualifications would be devalued. As such, it was her right to lodge a formal complaint with the DCI, to investigate and discipline those who were found culpable.

12. The Respondent is of the view that the Applicant's assertion that he continued to earn a salary during the subsistence of the investigations proves that the Respondent is a fair employer. The Respondent maintains that the investigations were independent and observes that the Applicant has not disclosed the officials who pressurized the DCI.

13. The Respondent contends that the Applicant's averment that he was exonerated are dishonest since the Prosecution dropped the charges against the Applicant under unclear circumstances with the recommendation that the issues ought to be raised through a civil process. Further, the Applicant can be charged afresh as the case was withdrawn under section 87 (a) of the Criminal Procedure Code.

14. The Respondent maintains that the disciplinary proceedings against the Applicant were instituted long before the criminal case was withdrawn. It is her position that the proceedings were commenced because there were reasonable grounds to take disciplinary action against the Applicant. It is her case that the Applicant was given a fair hearing and contends that the Applicant never requested to be issued with copies of the evidence relied on. Further, she maintains that the members of the committee had no vested interest in the outcome and that the same was never raised at the hearing. It is the Respondent's position that the Applicant's appeal was to be heard on 25th August 2019 and the delay was due to the fact that the vice chancellor who hears the appeals is not the Respondent's full-time employee, a fact that stalled other appeals.

15. The Respondent is of the view that the court should not interfere in its internal matters as the disciplinary process is ongoing.

16. The Application was argued in open court on 12.07.2019, where both parties made their submissions.

Applicant's submissions

17. Mr. Kangethe, learned counsel for the Applicant submitted that the applicant is a Lecturer at the respondent university and also a member of UASU. He contended that the claimant was subjected to unfair treatment contrary to the CBA between the Respondent and his union, UASU and the reason for the said treatment is in connection with an alleged offending email circulated in July 2018, which never was. That, in his view, the CBA ought to have taken precedence over all laws but the CBA was not even adhered to. He contended that clause 26 (c) of the CBA provides for a progressive disciplinary process which requires the Respondent to issue a union member like Applicant with a written warning first before issuing him with a suspension letter.

18. It was also counsel's submissions that clause 26 (g) of the CBA was breached because the Applicant was sent on suspension without a medical cover. That after the hearing he was dismissed from service and appealed which appeal, according to clause 26 (b) (viii), the the counsel submitted that it ought to have been heard within 45 days. However, the same had not been heard as at the time of filing this cause. He urged this Court to allow the Application.

19. On the other hand, Mr. Thuo, counsel for the Respondent submitted that the prayers sought by the Applicant could not be granted at an interlocutory stage. In his view, granting prayer 4 would determine the suit before the trial and that orders 2 and 3 for reinstatement should await full trial. To buttress this position, he relied on the cases of *Wells Fargo Limited vs. Cyrus Kioko & 48 Others [2015] eKLR* and *Kenya Tea Growers Association & Another vs. Kenya Plantation and Agricultural Workers Union [2018] eKLR*, where the Court of Appeal held that reinstatement should await full trial.

20. Counsel further submitted that the orders sought are not founded on the prayers in the main suit hence they are sought in a vacuum. In addition, he observed that order 2 & 3 for reinstatement are already spent because they were sought pending the hearing and determination of the application. He further contended that reinstatement could not be granted because the applicant has not met the legal threshold set out in section 49 (4) of the Employment Act 2007. That it is not practicable to reinstate the Applicant because according to him people were playing politics against him and also he has already poisoned the work environment by circulating the said offending emails. In the counsel's opinion, the circumstances presented by the Applicant were not exceptional to warrant the issuance of the orders. He urged this Court not to issue the orders sought.

21. In the Applicant's rejoinder, his counsel submitted that no explanation was given as to the Respondent's failure to comply with the

provisions of the CBA. He maintained that reinstatement was practicable as there was a *prima facie* case for the issuance of the same. Counsel maintained that the criminal case was withdrawn due to lack of evidence.

Analysis

22. After considering the pleadings filed by the parties, the evidence adduced in court and the submissions by the parties' counsel, I find that it is not in dispute that the Respondent terminated the Applicant's employment. Therefore, the issue for determination before this Court is whether the Applicant has established a case to warrant the granting of the orders sought.

Reinstatement

23. As correctly observed by the respondent's counsel, order 2 of the application seeks reinstatement pending the hearing and determination of the same application. It follows therefore that by rendering this ruling, the said order is overtaken by events. I should therefore not waste much energy in considering the merits of the submissions made towards the request for the reinstatement because granting the order as prayed will still be of no consequence.

24. Be that as it may, it trite that except on very special circumstances being shown by evidence, an order for reinstatement should as a matter of course await full trial so that court can have a basis to know, at least, its practicability as envisaged under section 49 of the Employment Act.

Injunction

25. In this case the injunction sought is predicated upon granting of the reinstatement order. In view of the finding above, that the order of reinstatement is overtaken by events and is of no consequences by virtue of this ruling, I further find that the application for injunction has no ground to stand on. In addition, the injunction order as sought is itself overtaken by events and is also of no consequence because, it is intended to be in force pending the hearing and determination of this application. I will therefore also not waste any effort in determining whether the applicant has met the legal threshold for granting interlocutory injunction.

26. The legal threshold for granting interlocutory injunction was set out in *Giella vs. Cassman Brown [1973] EA 358*:

"... First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award for damages. Thirdly, if the Court is in doubt, it will decide an application on a balance of convenience."

Declaration of Unfair Process and Unlawful Dismissal

27. The prayer for a declaration that the trial and the dismissal letter issued to the Applicant was unfair, discriminatory and against administrative justice and therefore unlawful and illegal is declined because it requires testing through trial. It is obvious that the declaratory order sought by the Applicant is final in nature and if granted would render the suit herein nugatory. This would also amount to condemning the Respondent unheard contrary to Article 50 of the Constitution. It is also clear that the said order is not even sought in the main suit.

Disposition

28. In light of the finding herein above, I return that the Application has no merit and it is dismissed with costs because the application is equal to distinct suit from the Memorandum of Claim herein.

Dated, Signed and Delivered in Open Court at Nairobi this 27th day of September, 2019

ONESMUS N. MAKAU

JUDGE