



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 181 OF 2019**

**STEPHEN KARUMBI NGUGI.....CLAIMANT**

**VERSUS**

**CIM CREDIT KENYA LIMITED.....RESPONDENT**

**RULING**

1. Stephen Karumbi Ngugi (Claimant) instituted legal proceedings against CIM Credit Kenya Ltd (Respondent) on 22 March 2019 alleging unfair termination of employment through constructive dismissal, and breach of contract.

2. When served with the *Notice of Summons* and *Memorandum of Claim*, the Respondent not only filed a *Reply to Memorandum of Claim and Counterclaim* but a *Notice of Preliminary Objection* in the following terms

a) THAT the Claimant lacks the locus standi to file and maintain this suit contrary to section 45(3) of the Employment Act, 2012

b) THAT the Honourable Court lacks jurisdiction to hear and determine this matter and the suit offends the mandatory provisions of law cited hereinbefore and we pray that the suit herein be dismissed with costs.

3. Pursuant to the Court's directive, the Respondent filed and served submissions and authorities in support of the Preliminary Objection on 19 July 2019 while the Claimant filed his submissions and authorities on 4 September 2019.

4. The parties highlighted the submissions on 2 October 2019.

**Brief facts and undisputed points**

5. It is not disputed that the Claimant was employed by the Respondent as Finance Director with effect from 7 May 2018 on a 2 year fixed term contract. The contract had a 3 month probation period which could be extended.

6. During probation, either party could terminate the contract by giving 7 days' notice but after probation, a 3 months' notice was required.

7. On 20 September 2018, the Claimant gave the Respondent a 7 days' notice of termination through resignation

8. The Claimant, however, realised that the probation period of 3 months had lapsed and therefore, on 25 September 2018, he wrote to the Respondent to correct the error and indicate that the notice was for 3 months effective 20 September 2018 and terminating on 20 December 2018.

9. The Respondent's Managing Director replied on 26 September 2018 notifying the Claimant that his resignation notice had been accepted but subject to other contractual provisions.

10. The Claimant responded to the Managing Director's letter on 27 September 2018 lamenting that though he had intended to serve the 3 months' notice, the Respondent had deactivated his access to office and resources, thus rendering him unable perform his duties.

11. The Claimant also noted that the Respondent had already issued him with a certificate of service. This was before the lapse of the notice period.

12. On 28 September 2018, the Claimant informed the Respondent that he considered his employment terminated on account of the

Respondent's actions/conduct.

13. The Claimant thereafter filed the present action.

### **Respondent's arguments**

14. The fulcrum of the Respondent's objections was founded upon the provisions of section 45(3) of the Employment Act, 2007 which is in the following terms

An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.

15. The Respondent submitted firstly, that although Lenaola J (as he then was) had in *Samuel Momanyi v Attorney General & Ar* (2012) eKLR declared section 45(3) of the Employment Act, 2007 as inconsistent with certain provisions of the Constitution, this Court was not bound or should not feel bound by the decision in the *Momanyi* case because it was a decision by a Court at the same judicial hierarchy with this Court, albeit with different jurisdiction.

16. In advancing the argument, Ms. Oseko for the Respondent found umbrage in a dictum by Githinji JA in *Nation Media Group Ltd v Onesmus Kilonzo* (2017) eKLR where the Judge observed that

Both Radido Stephen and Rika JJ and, I hope other judges of ELRC, correctly appreciate that the High Court's decision in *Momanyi's* case is not binding on them. The High Court and ELRC are superior courts and each is autonomous and exercising different and distinct jurisdiction (see Supreme Court decision in *Republic v Karisa Chengo and two others* – Petition No. 5 of 2015).

Furthermore, the ELRC has jurisdiction to interpret and apply the Constitution relating to questions of labour rights and Bill of Rights in general, directly arising in employment and labour disputes within its jurisdictional competence (*Prof. Daniel M. Mugendi v Kenyatta University & three others* (2013) eKLR; *Judicial Service Commission v Gladys Boss Shollei & Another* (2014) eKLR).

17. In the aforesaid decision, Githinji JA was of the view that there was no compelling reason why Judges of this Court should continue applying a decision of the High Court if they found it incorrect in law.

18. In the same vein, the Respondent contended that this Court should follow the steps of Mativo J in *David Ramogi & 4 Ors v Cabinet Secretary, Ministry of Energy & Petroleum & 7 Ors* (2017) eKLR and find that it was not bound by the declaration of unconstitutionality by Lenaola J in the *Momanyi* case.

19. Secondly, the Respondent urged that because the Claimant had served for only 4 months (less than 13 months), this Court should adopt the position taken by Rika J (*Samuel G. Momanyi v SDV Transami Kenya Ltd* (2013) eKLR), and hold that section 45(3) of the Employment Act, 2007 was constitutional, with the ultimate finding that the instant Cause could not stand for lack of jurisdiction.

### **Claimant's contentions**

20. In opposing the Preliminary Objection, the Claimant asserted that the cause of action before Court was anchored on allegations of violations of constitutional rights as well as breaches of contract, and therefore went beyond unfair termination of an employment dispute, and consequently the Court had jurisdiction.

21. The Claimant also contended that the preliminary objection did not meet the threshold of a true preliminary objection in terms of the principle set out in the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696.

22. Further, the Claimant urged that section 45(3) of the Employment Act, 2007 had been held to be inconsistent with the Constitution in the *Momanyi* case, and because no appeal had been preferred against the declaration, the said provision no longer forms part of the laws of Kenya.

23. To anchor the argument, the Claimant cited the holding by Makau J in *Onesmus Musyoki Kilonzo v Nation Media Group Ltd* (2014) eKLR (formed the subject of Appeal and the decision of Githinji JA referred to in paragraph 17 above) and my own decision in *Mercy Njoki Karingithi v Emerald Hotels Resorts & Lodges Ltd* (2014) eKLR.

### **Evaluation**

24. It is correct and sound as a general legal principle that a judge of concurrent jurisdiction or Court is not bound by the decision of a Court of co-ordinate or concurrent Court.

25. However, in the view of this Court, the real question arising in the present circumstances is whether the general legal principle is sound in constitutional theory and litigation, and more so where a competent Court of coordinate jurisdiction has made a declaration of inconsistency or invalidity of a statutory provision with Constitutional norms.

26. To the Court, the answer posed to the question in the preceding paragraph was the question of the moment.

27. It is unfortunate that the parties did not, despite an oral entreaty by the Court, address the question in any depth or through appropriate

research.

28. This Court is of the firm belief that the legal principle adverted to by Githinji JA and Mativo J is sound in litigation where a Court is called upon to interpret and/or apply Constitutional norms and statutory provisions in *ordinary* litigation.

29. However, in the respectful view of this Court, it would not augur well for *certainty in the law* and *public policy* for parties to re-litigate at the same judicial hierarchy legal questions in respect of statutory provisions which have been declared inconsistent or found invalid with the Supreme law.

30. *Legal certainty* especially where constitutional norms are concerned serves to assure the citizens that they can organise their affairs in a manner that is in tandem with the law. It also assures of predictability of legal outcomes.

31. Equally, re-litigation at the same judicial level on decided constitutional norms in respect of inconsistency would not only lead to a diminishing of confidence in the judiciary but to legal anarchy. *Legally anarchy* of one Court making a declaration of inconsistency, and another Court *undeclaring* the declaration of inconsistency.

32. Further, it would be against public policy to have one competent Court declaring a provision of statute as inconsistent with the Constitution and years later have another Court at the same level *undeclaring* the declaration of unconstitutionality.

33. Certainty in law would frown upon such a course or process.

34. As this Court held in the *Mercy Karingithi* case, it would still have concluded that section 45(3) of the Employment Act, 2007 is not inconsistent with the Constitution contrary to the declaration by Lenaola J, but because of the foregoing reasons, it concludes that it has no jurisdiction to make an order which would *undeclare* a declaration of inconsistency with the Constitution, made by a competent Court of equal status in 2012.

35. The invitation made by the Respondent, in this case, should be taken to the higher echelons of the judicial pyramid. The Court hopes that this Ruling will serve as an opportunity to have the Court of Appeal to address its mind to the constitutionality of section 45(3) of the Employment Act, 2007. Until that time, the section remains inconsistent with the Constitution.

36. The Court finds no merit in the preliminary objection and orders it dismissed with no order on costs.

**Delivered, dated and signed in Nairobi on this 25<sup>th</sup> day of October 2019.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant                      Ms. Anyara instructed by Muma & Kanjama Advocates

For Respondent                    Ms. Oseko instructed by Oseko & Ouma Advocates

Court Assistant                    Lindsey