REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT KERICHO

CAUSE NO.53 OF 2019

KIBET SITIENEI.....CLAIMANT

VERSUS

KENYA AGRICUTURAL &

LIVESTOCK REASEARCH ORGANISATION.....RESPONDENT

RULING

Ogado Advocate for the claimant

And

Ochieng Advocate for the respondent.

[The main file from ELRC Kericho was not placed with the court. both parties present in court, a skeleton file was opened and the parties provided the pleadings for reconstruction. The file at ELRC Nakuru shall be place together with the main file at ELRC Kericho]

The claimant by application and Notice of Motion dated 19th September, 2019 and seeking for orders that;

1. Spent.

2. An interim order suspending the respondent's letter dated 11th September, 2019 terminating the claimant/applicant employment pending the hearing and determination of the application.

3. Pending the hearing and determination of the application this court be pleased to issue an order restraining the respondent or its agent from compelling the claimant from handing over his office and/or evicting the claimant/applicant from the respondent's staff hour (TRI-Kericho) pending the hearing and determination of this application.

4. Pending hearing and determination of the claim filed herewith, this court be pleased to issue an order restraining the respondent or its agents from effecting the purported termination letter of 11th September, 2019 and restore the claimant/applicant's full salary.

5. This court be pleased to issue an interim declaration order that the claimant/applicant is still an employee of the respondent pending the hearing and determination of the claim filed herewith.

6. This court be pleased to grant any other or further orders as it may deem fit and expedient.

The application is supported by the affidavit of the claimant and on the grounds that he was employed on 6th January, 2009 by the Tea Research Foundation of Kenya and located at Kericho as an assistant research officer. The claimant was offered on transfer of service with the respondent on 18th May, 2018 as Research Scientist and which appointment he accepted. The claimant became subject to the respondent's code of conduct and regulations.

The claimant also avers that he is a highly accredited scientist in environmental issues and in charge of important funded projects with the respondent. He was in charge of a project known as *POLY4 inclusive Blends at Incremental K Rates on Tea Production in Agro ecological Zones East and West of Kenya Rights Valley i*n collaboration with *[particulars withheld]*Africa of South Africa.

On 6th September, 2019 the claimant through an internal memo to the Director, Tea Research Institute, Kericho requested for

accommodation and meals for a visiting research collaborator from *[particulars withheld]* Africa who was to visit trial sites between 8th to 10th September, 2019. There was however no response by the director and the claimant proceeded to the site.

The claimant also avers that the collaborator was represented by Mrs CG an agronomist and who was also attending a seminar in Nairobi.

In the course of his employment the claimant received Mrs C on 8th September, 2019 and took her to the respondent's guest house as requested. The next morning the claimant went to pick the guest but was informed that she had left for Nairobi and efforts to get an explanation or reasons for the sudden change were not given.

By a letter dated 11th September, 2019 the claimant was informed that his employment had been terminated allegedly for gross misconduct contrary to the provisions of the human resource manual of the respondent and section 44(g) of the Employment Act, 2007. The claimant also learnt that his project had been suspended until further notice and without being given any reasons.

The termination of employment was done without the claimant being issued with notice, a hearing or the respondent following due process and rules of natural justice under the human resource manual and the Employment Act. Such action is also contrary to the constitution. the termination of employment was with immediate effect and the respondent has now been applying undue pressure on the claimant to surrender the institutes house and handover his office despite the fact that the letter terminating employment gives him 6 weeks to appeal against the decision to terminate his employment.

Unless the orders sought are sued he will suffer irreparable loss and damage.

In reply the respondent filed the Replying Affidavit of Dr. Eliud Kireger the Director General of the respondent and who avers that the respondent is a state corporation established under the Kenya Agricultural and Livestock Research Act, 2013. As a state corporation the respondent is an equal opportunity employer and has a code of conduct and ethics (the Code) for its employees and which guides the employment relationship between the respondent and its employees in addition to the individual employment contracts.

Upon employment, each employee is required to familiarise himself with the code of conduct and ethics. The code has provisions for disciplinary offences, forms of punishment and an appeal process. Clause 11 of the Code set out three types of offences – minor offence, major offences and gross misconduct. Clause 11.12 provides for he forms of punishment for each type of offence; clause 11.5 provides for his organs with power to mete out any form of punishment. Under clause 11.9.1 (h) the Code provides for an appeal process within a period of 6 months from the time a decision is made by the respondent.

By letter dated 18th May, 2018 the claimant was retained by the respondent as Research Assistant I and under the supervision of the Director General. Under the Code at clause 11.11.1 (iii) the claimant was required not to engage in sexual harassment as such would comprise gross misconduct.

Dr Kireger also avers that on 8th September, 2019 while on duty the claimant sexually harassed and or assaulted Mrs CG and who has a detailed statement and complaint to the respondent.

Dr Kireger also avers that The claimant being directed under the Director General on matters of discipline and having committed gross misconduct by sexually harassing Mrs C he took disciplinary action against the claimant vide letter dated 11th September, 2019. The claimant was informed of his right of appeal within 6 months if aggrieved. The claimant has since vacated his office and all his duties taken over by other members of staff.

The claimant has moved the court without exhausting the internal appeal process, he did not pay accommodation for Mrs C as alleged as she was fully funded under the project and the claimant is not in charge of the *POLY4 project* as such are projects of the respondent and he has since been replaced. The disciplinary process undertaken for the claimant was in accordance with the policy in place and there exists an appeal process which he has not applied.

The claimant committed sexual harassment act which fell within the Code as gross misconduct and subject to summary dismissal the application seeking mandatory orders should not issue.

Both parties made detailed oral submissions in court with reference to case law.

An issue was raised by the respondent that the claimant has moved the court before exhaustion of internal remedies partially the process of appeal. That put into account, the claimant defended his action on the grounds that he is threatened with eviction from the company house allocated to him following the termination of his employment.

The respondent has attached the KALRO Human Resource Management Policy & Procedures Manual and clause 11.23 on lodging appeals or review of any adverse decision taken against an employee and these should be done within 42 calendar days and one (1) year respectively. Meaning an appeal should be made within 42 calendar day and a review be made within one year from the date the diction was conveyed. In this case on the 11th September, 2019.

The claimant has moved this court on good basis and noting the threat faced. This court retains a constitutional mandate over all embayment and labour disputes within the Republic. A party desirous of moving the court on good basis cannot be locked out. By moving the court, the claimant sought to protect his rights arising from his employment with the respondent.

By filing suit the claimant right to challenge the decision taken by the respondent does not abate. He is within the statutory time to assert his rights and arising out of his employment with the respondent. the context given by the respondent in the case of **Augustine Mutembei Maranggu versus The Inspector General of Police & others Petition No.126 of 2016** and in the case of **Corporal Thomas Othoo versus National Police Service Commission Petition No.61 of 2015** though claiming for conservatory orders, the court had gone into the merits of the petitions and issued final orders in judgement.

However, where an appeal process is allowed internally to an employee, by moving the court instead of exhausting such remedy, the employee is locking himself out of such forum. By now going for the appeal process upon filing suit herein, such would impair its objectivity.

It is common cause that by letter dated 11th September, 2019 the claimant was summarily dismissed from his employment by the respondent on the grounds that;

> **…** *It has been reported that on 8th September, 2019 at the Tea Research Institute (TRI) Kericho, you engaged in gross misconduct towards Ms. CG, who works as an Agronomist from [particulars withheld],*
>
> *Africa, a company collaborating with [particulars withheld] Institute on a project entitled …*
>
> *As a result of your conduct, [particulars withheld]has indicted that your behaviour has put its staff in a totally hostile environment and as such, the research partner indents to immediately cancel all current work with KALRO. …*
>
> *Your conduct in this matter amounts to sexual harassment categorised under gross misconduct as stipulated in section 10.27.2(b) and 11.21.1 of the KALRO Human Resource and Procedures Manual, 2017 and section 44(4)(g) of the Employment Act, 2007 punishable by dismissal without warning. However it is noted that you have committed similar offences before and you were warned verbally.*
>
> **…** *you are accorded six (6) weeks from the date of this letter to submit an appeal, if any, against the decision. …*

In this regard, with cessation of employment, the claimant is seeking that the letter dismissing him from his employment be suspended on the grounds that he was not issued with notice and was not given a hearing; that the respondent be restrained from evicting the claimant from the company house on the grounds that the claimant was not accorded natural justice in the handing of his case and shall suffer loss and damage; the claimant is also seeking to have the respondent pay his salary as the stoppage of the same will render him destitute and lead to reputational damage as he is a renowned scientist and was running a project that requires his skill and was due to travel abroad over his expertise; and that the court should declare the claimant as an employee of the respondent.

The principles governing the issuance of conservatory orders can be discerned in the case of **Board of Management of Uhuru Secondary School versus City County Director of Education & 2 Others [2015] eKLR**. In summary, the principles are that the Applicant ought to demonstrate an arguable *prima facie* case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. Further, the Court should decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of a specific right or freedom in the Bill of Rights, and whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory. Lastly, that the Court should consider the public interest and relevant material facts in exercising its discretion whether to grant or deny a conservatory order. See also **County Assembly of Machakos versus Governor, Machakos County & 4 others [2018] eKLR.**

The claim herein relates to the summary dismissal of the claimant for alleged gross misconduct. the letter he seeks to be suspended and dated 11th September, 2019 if suspended as requested shall in effect reinstate him back to his employment.

The claimant is also seeking to have his housing with the respondent secured and which if allowed shall have him retain a benefit relating to his employment now terminated through summary dismissal.

The claimant is also seeking to have his salary paid and that his employment be secured.

Effectively, the claimant is seeking reinstatement back to his position with the attendant benefits.

An order of reinstatement is a measure of last resort. This court has previously held that such remedy ought to issue sparingly. That is because orders of specific performance of an employment contract is a final order and should not issue in the interim. To grant specific performance in an employment matter without the establishment of the facts would go contrary to the provisions of ***sections 49 (3)*** and ***(4)*** of the Employment Act, 2007. The case of **Kenya Airways Limited versus Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR** that reinstatement should not be given except in *'very special circumstances'* and upon hearing the parties on the merits.

This position is further given emphasis under Rule 17(10) of the Employment and Labour Relations Court (Procedure) Rules, 2016 and which requires that;

> ***(10) Notwithstanding anything contained in this Rule, the Court shall not grant an ex parte order that reinstates into employment an employee whose services have been terminated.***

The rationale in my humble view is as held in the **Kenya Airways Limited versus Aviation & Allied Workers Union Kenya & 3 Others**

[2014] eKLR that;

> *The remedy of reinstatement is discretionary. However the Industrial Court is required to be guided by factors stipulated in section 49 (4) of the EA which includes the practicability of reinstatement or re-engagement and the common law principle that specific performance in a contract for employment should not be ordered except in very exceptional circumstances. The court should also balance the interest of the employee with the interest of the employer..... The EA has enacted the common law principle that the remedy of reinstatement should not be given except in "very exceptional circumstances.*

Reason is that once employment has been terminated, upon filing suit, and before the court can direct for specific performance, it must be established whether there were valid, fair and genuine reasons and where none exists, the remedy of reinstatement can be addressed as under section 49(4) of the Employment Act, 2007. On the other hand and employer who has filed a defence must be given a fair chance to urge its defence as to whether termination of employment was justified and due process followed as to allow for reinstatement as an interim measure would then place the employer into hardship once it is established the decision taken to terminate employment was for a justifiable cause.

Intimately, upon hearing both parties on the merits The Court retains the remedial powers of reinstatement, re-engagement and compensation in event the claim succeeds. The Claimant may be reinstated with back wages, and without the loss of privileges and seniority, at the end of the full hearing.

I agree with findings in **Alfred Nyungu Kimungui versus Bomas of Kenya [2013]eKLR** that;

> **…** *[with or without an interim reinstatement] The employee suffers nothing which is irremediable. The employer would be forced into an employment relationship during the trial period. The employee would continue drawing salaries, and restricting severely, the right of the employer to recruit an employee whom the employer can enjoy the cornerstone values of mutual trust and confidence with. In this case, the employee is still in the house availed by the employer freely, under section 31 of the Employment Act 2007. The rights and obligations of the employer and employee, ended with termination. There is no reason why the Claimant is still resident in his former employer's house, or why the Court should order that he goes on residing there. As stated above, employment protection is a shield, not a sword by which an employee should deprive the employer of its property rights.*

On this basis, the orders sought in the application dated 9th September, 2019 shall not issue in the interim. Noting the urgency of the matters presented, the main claim shall be heard on priority basis and at Kericho. Costs in the cause.

The file herein shall be moved to its registry, ELRC Kericho.

Delivered at Nakuru this 24th day of October, 2019.

M. MBAR?

JUDGE

In the presence of: .....

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