



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 699 OF 2019**

**DR. JOAN WAIRIMU WANYUTU.....CLAIMANT**

**-VERSUS-**

**SOCIAL SERVICE LEAGUE, MP SHAH HOSPITAL.....RESPONDENT**

**RULING**

**Introduction**

1. The application before me is the claimant's Notice of Motion dated 17.10.19. It is brought under Rule 16 of the ELRC (Procedure) Rules 2010 and it seeks the following orders:-

**a. THAT** this matter be certified as urgent and the same be heard ex-parte in the first instance.

**b. THAT** the Respondent be restrained from terminating the Claimant's employment on 23rd Octobr, 2019 and or interfering in any way with the Claimant's employment and or terms of employment pending the inter partes hearing and determination of this application or as this Honourable court shall order..

**c. THAT** after the inter partes hearing, the Respondent be restrained from terminating the Claimant's employment and or interfering in any way with the Claimant's employment and or terms of employment pending the hearing and determination of this suit or as this Honourable court shall order.

**d. In the alternative** pending the hearing and determination of this application and the suit filed herein, the Respondent be ordered to reinstate the Claimant's to employment on the same terms and in the same status as she was prior to her termination or as this Honourable court shall order..

**e. THAT** this Honourable Court do give such directions or orders regarding the hearing of this matter, as it shall deem fit.

**f. THAT** the costs of this Application be provide for.

2. The application is premised on the grounds set out on the body of the motion and the Supporting Affidavit sworn by the claimant on 17.10.2019. In brief, the applicant contends that she was subjected to an unfair disciplinary process, which culminated in being served with a 30 days separation notice effective 23.10.2019. She has filed suit challenging the unfair termination and seeking reinstatement to her job without loss of benefits and damages for unfair termination. She therefore seeks an injunction to restrain the respondent from terminating her employment and in the alternative, she prays for reinstatement pending trial of the suit.

3. The respondent has opposed the application by filing a Replying Affidavit sworn on 31.10.2019 by her HR Officer Mr. Willie Nduaci. In brief, he contends that the claimant gave wrong medication to a patient, which was a valid reason for summarily dismissal from service. As a result, he was served with a show cause letter and thereafter invited to a disciplinary hearing in the company of a colleague of his choice.

4. After the hearing on 22.9.2019, her defence was found to be unsatisfactory and she was served with a notice of termination of one month. He contended that the termination was lawful and fair and prayed for the interim order to be set aside.

5. In her submissions, the applicant contended that the termination contradicted section 45(2) of the Employment Act because it did not pass the legal test of substantive and procedural fairness. She maintained that under the CBA, the offence committed did not warrant termination but a warning letter. That the said offence was the first one after the earlier warning lapsed automatically after the expiry of one year without commuting any offence.

## Respondent's Case

6. The respondent contended that termination of the claimant's services was lawful and fair because there was a valid reason and fair procedure was followed by according the claimant a hearing. She further submitted that the interim order was obtained through material non disclosure and urged for the same to be set aside.

7. In addition, she submitted that an order of reinstatement of an employee is a specific performance order with finality and it should not be granted before trial. She further contended that the order is prejudicial to her, and the claimant has not shown any special circumstances that can warrant the exercise of this courts discretion to order reinstatement before trial.

## Analysis and determination

8. The issues for determination are:-

- a. Whether the application meets the legal threshold for granting interlocutory injunction.
- b. Whether the claimant should be reinstated to his job pending trial and determination of the suit.

## Threshold for interlocutory injunction

9. The principles for grant of interlocutory injunction were set out in *Giela Vs Cassman Brown [1973]EA 358*. First, the applicant must prove a prima facie case with probability of success. Second, the applicant must show that she stands to suffer irreparable harm if the order is not granted. Third, if the court is in doubt, it shall decide the case on a balance of convenience.

10. In this case, the claimant contended that she was unfairly dismissed without any valid reason and without following a fair procedure. She contended that the termination was premature because she had not been served with 3 written warnings as required under the CBA.

11. The Respondent has however maintained that the termination was lawful and fair because the claimant performed her work negligently by giving wrong medicine to a patient and thereafter he was accorded a hearing before the termination. She further submitted that the order is prejudicial and equal to ordering specific performance. She also submitted that the claimant will not suffer any irreparable harm since she has a remedy under section 49 of the Employment Act.

12. After careful consideration of all the material presented to the court by the parties I find that the claimant has proved a prima facie case with probability of success. Prima facie case is one which on the basis of the evidence presented by affidavits, a reasonable court would find that the opposing party is obligated to make a rebuttal. That was the view of the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR* when Bosire JA held thus:-

**“What is a prima facie case? I would say that in Civil case, it is a case in which on the material presented to the court a tribunals 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.”**

13. In view of the foregoing, I would say that a prima facie case need not be successful after trial but one which calls for a trial or otherwise discloses a reasonable cause of action. Black's Law Dictionary, 10th edition defines a cause of action to mean:-

**“a group of operative facts giving rise to one or more bases of suing; a factual situation that entitles one person to obtain a remedy in court from another person.”**

14. The cause of action herein is that the termination of the claimant's employment was premature and unjustified. That sounds like an alleged breach of an express term of contract and it calls for the respondent to file a defence for a trial to be conducted.

15. The foregoing notwithstanding, the court finds that the claimant will not suffer any irreparable harm if the order of injunction is withheld because any damage that the claimant may suffer is quantifiable in monetary terms under section 49 of the Employment Act. Consequently, I find that the order of interlocutory injunction is not warranted and it is declined accordingly.

## Reinstatement

16. The order for reinstatement is equal to an order of specific performance by which the employer is compelled to continue employing an employee. The said order must ordinarily await trial. It follows therefore that reinstatement at interlocutory stage should be eschewed save under very special and vivid circumstances, each case being considered on its own merits.

17. In this case, the claimant has not demonstrated any such special circumstances that warrant the order for reinstatement pending trial. Consequently, I decline to grant the said order.

18. In the end, the application dated 17/10/2019 is dismissed for reasons stated above. Costs in the cause.

**Dated, Signed and Delivered in Open Court at Nairobi this 8th day of November, 2019**

**ONESMUS N. MAKAU**

**JUDGE**