



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE 401 OF 2019**

**(Before Hon. Justice Hellen S. Wasilwa on 19<sup>th</sup> December, 2019)**

**BARASA KEVIN ODANGA.....CLAIMANT**

**VERSUS**

**CIC LIFE ASSURANCE LIMITED.....RESPONDENT**

**RULING**

1. The Application pending for determination before me is the Notice of Motion Application dated 21<sup>st</sup> June, 2019 filed under Articles 22, 23, 27, 28, 41, 50 and 159 (2) (a) of the Constitution of Kenya, 2010; Sections 45, 49 and 50 of the Employment Act, 2007; Section 12 of the Employment and Labour Relations Court Act; Rules 17 and 28 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and all enabling provisions of the law.

2. The Application seeks the following Orders **THAT**:-

1. *This Honourable Court be pleased to certify this Application as urgent and dispense with service in the first instance.*
2. *This Honourable Court be pleased to grant an ex-parte interim injunction restraining the Respondent either by itself, servant and/or agents from headhunting, advertising, carrying out interviews, recruiting and employing a Head of Sales - Corporate division pending hearing and determination of this Application.*
3. *This Honourable Court be pleased to Order the Respondent to reinstate the Applicant as the Head of Sales – Corporate pending hearing and determination of the Claim.*
4. *This Honourable Court be pleased to grant an injunctive order restraining the Respondent either by itself, servant and/or agents from headhunting, advertising and recruiting a Head of Sales – Corporate pending hearing and determination of the main Claim herein.*
5. *Costs of this Application be provided for.*

3. This Application is premised on the grounds **THAT**:-

- a) *The Applicant was working as the Head of Sales – Corporate for the Respondent from 18<sup>th</sup> August, 2016 until 28<sup>th</sup> November, 2018 when the Respondent contrary to its HR Policy and Human Resource Manual and without prior notification or consultation issued the Claimant with a letter informing him that he had been sent on 30 days compulsory leave for allegedly securing some credit life and credit life schemes within the Respondent company.*
- b) *The Applicant contended that the above concerns were not raised with him through his immediate supervisor in accordance with the Respondent's Human Resource Policy and Procedure Manual.*
- c) *On 20<sup>th</sup> December, 2018 the Respondent's Acting Managing Director served the Applicant with yet another letter extending his compulsory leave for a further 30 days and the same was now expected to end on 28<sup>th</sup> January, 2019.*
- d) *On 16<sup>th</sup> January, 2019 the Applicant averred that he was served with a Notice to Show Cause which also further extended his compulsory leave by a further 2 weeks to 11<sup>th</sup> February, 2019.*

*e) The Applicant further avers that the Show Cause Letter above intimated that the Respondent had undertaken investigations which revealed that he had allegedly circumvented the Company's laid down procedures by engaging Bandari Sacco without following the proper channels, a fact that is vehemently denied by the Applicant.*

*f) He further contends that the company does not have any express provision restricting client engagement. He further insists that he therefore cannot be called upon to answer to allegations of contravening company procedures yet there are no specific procedures which the Respondent is referring to.*

*g) The Applicant maintained that his engagement with Bandari Sacco was therefore within the scope of his duties and was done at the direction of the Applicant's immediate supervisor, the then Managing Director who instructed him to assist in securing the business.*

*h) The Applicant did in fact respond to the Notice to Show Cause vide his letter dated 23<sup>rd</sup> January, 2019 despite being denied access to his office, his computer and work emails thus denying him access to information and documents that he could use to adequately respond to the allegations levelled against him.*

*i) Subsequently the Applicant was invited for a hearing before the Respondent's disciplinary committee on 1<sup>st</sup> February, 2019, which he duly attended.*

*j) On 11<sup>th</sup> February, 2019 the Applicant averred that he was issued with a letter from the Respondent herein terminating his employment in complete disregard of his evidence tendered during the disciplinary hearing. The Applicant contended that his termination was contrary to his Contract of employment, the Company's Human Resource Policy Manual, the Employment Act and fair labour practices as enshrined in Article 41 of the Constitution of Kenya, 2010*

*k) The Applicant further contends that his termination was unfair and contrary to the provisions of Section 45 (4) (b) of the Employment Act, 2007.*

*l) It is on this basis that the Applicant urged this Honourable Court to grant him the prayers sought in his Application as he stands to suffer prejudice and loss as he is the weaker party should the Respondent be allowed to proceed and fill his position at the Company.*

4. The Application is supported by the Affidavit of **BARASA KEVIN ODANGA**, the Claimant herein sworn on 21<sup>st</sup> June, 2019, in which he reiterates the averments made in the Notice of Motion Application.

5. The Respondent in opposition to the instant Application filed a Replying Affidavit deposed by **MUYESU LUVAI**, the Group Chief Internal Auditor, on 8<sup>th</sup> July, 2019, in which he avers that he received on 3<sup>rd</sup> July, 2018 from the Respondent's Group Chief Executive Officer to conduct investigations into a report regarding the renewal of Bandari Sacco Limited.

6. He further contended that upon conclusion of the investigations it was established that the Claimant circumvented the Respondent's procedures by engaging Bandari Sacco. He further averred that from the report the Claimant was issued with a Notice to Show Cause why disciplinary actions should not be taken against him.

7. The Respondent also confirmed that the Claimant was thereafter invited for a disciplinary hearing which was held on 1<sup>st</sup> February, 2019 for the purpose of according him an opportunity to respond to the allegations levelled against him.

8. He further confirmed that the Claimant's services were later terminated on 11<sup>th</sup> February, 2019 and that he (the Claimant) was informed of his right to Appeal the decision in 14 days in the event he was not satisfied with the decision. The Respondent confirmed that no Appeal was received from the Claimant herein.

9. He averred that subsequently the Respondent Company went through realignment within its Corporate and Micro Insurance Functions and assigned the role of Head of Sales – Corporate and Micro to one Rosa Mistica Nyomombi. This communication was done vide the Respondent's letter dated 15<sup>th</sup> March, 2019.

10. It is further averred that from the above, the Claimant's position as Head of Sales – Corporate was merged with Micro Department and the role assigned to Rosa Mistica Nyomombi with effect from 15<sup>th</sup> March, 2019.

11. The Respondent stated that the prayer for reinstatement pending hearing and determination of the Claim cannot be granted at this point as it is a final remedy and cannot be granted at interlocutory stage.

12. It is further contended that the Applicant has not established a prima facie case with a probability of success to warrant the grant of the orders sought in the instant Application. In conclusion, the Respondent urged this Court to dismiss the Application with Costs.

13. Parties thereafter agreed to canvass the Application by way of written Submissions.

#### **Submissions by the Parties**

14. It is the Claimant/Applicant's submission that it has met the threshold for granting an interlocutory injunction as set out in the case of

**Giella Vs Cassman Brown & Company Limited (1973) EA 358** and restated in the Court of Appeal decision in the case of **Nguruman Limited Vs Jan Bonde Nielsen & 2 Others (2014) eKLR**.

15. The Claimant/Applicant further submitted that he has established a prima facie case for grant of the reliefs sought in his Application as highlighted in case of **Mrao Limited Vs First American Bank of Kenya Limited & 2 Others (2003) eKLR**.

16. He contends that the Respondent has clearly shown gross violation of his rights as protected under the Constitution of Kenya, 2010 in the manner in which it unfairly and illegally terminated his employment. To fortify this argument the Claimant/Applicant cited and relied on the Authority of **Rebecca Ann Maina & 2 Others Vs Jomo Kenyatta University of Agriculture and Technology (2014) eKLR**.

17. The Claimant/Applicant further submitted that the Respondent failed to follow laid down procedures in its investigations and the disciplinary hearing of the Claimant herein and therefore his termination was therefore unfair and unlawful.

18. It is further contended that the Respondent herein has failed to demonstrate or justify the reason for the Claimant/Applicant's termination in its Replying Affidavit as required under the provisions of Section 47(5) of the Employment Act, 2007 and that that should be reason enough for this Honourable Court to grant the Orders sought in the instant Application.

19. The Claimant/Applicant further submitted that the process of reconstruction as alleged by the Respondent was not done in accordance with the provisions of Section 40 of the Employment Act, 2007.

20. The Applicant contends that he is entitled to the remedy of reinstatement at this stage and urged this Court to be guided by the Authorities of **Agnes Ongadi Vs Kenya Electricity Transmission Company Limited (2016) eKLR** and **Stephen Mbugua Chege Vs Nairobi City Water & Sewerage Company (2017) eKLR**.

21. He further submitted that reinstatement is practical in his case and that he satisfies the test as set out in case of **Kenya Airways Limited Vs Aviation and Allied Workers Union Kenya & 3 Others (2014) eKLR**.

22. In conclusion, the Applicant submitted that having demonstrated that it is fair & just that his Application be allowed in terms of the reliefs sought. He therefore urged this Honourable Court to allow his Application as prayed.

#### **Respondent's Submissions**

23. The Respondent on the other hand submitted that the order for reinstatement as sought by the Applicant is moot and incapable of being granted as the position has already been filled on 15<sup>th</sup> March, 2019.

24. The Respondent further submitted that this relief can none the less be issued only after the substantive hearing of the main Claim and not at the interlocutory stage. To buttress this argument the Respondent relied on the Authority of **Kenya Tea Growers Association & Another Vs Kenya Plantation and Agricultural Workers Union (2018) eKLR**.

25. The Respondent further argued that it is premature for this Honourable Court to grant an Order of reinstatement prior to hearing this matter on merit. The Respondent relied on the case of **Alfred Nyungu Kimungii Vs Bomas of Kenya (2013) eKLR** where it was held:-

*“...ordinarily reinstatement of an employee is a substantive remedy, not a temporary relief. The law does not contemplate that reinstatement issues (sic) as a provisional measure. It is a remedy that should normally be granted upon the full hearing of the employer, and employee.”*

26. It is further contended that should the court proceed to grant the order of reinstatement it will defeat the purpose of the suit as there will be nothing to litigate over. To fortify its argument the Respondent cited and relied on the Authority of **Richard Muimo Parsitau Vs Kajiado County Government & 2 Others (2014) eKLR**.

27. The Respondent further submitted that the Claimant/Applicant has failed to meet the threshold for grant of interim orders as set out in the case of **Giella Vs Cassman Brown (1973) EA 358**. It is further the Respondent's contention that the Claimant was lawfully and procedurally terminated from its employment.

28. The Respondent further contends that the Applicant has not suffered any irreparable injury the Application with costs.

29. In conclusion, the Respondent submitted that the Applicant has failed to set out his case for grant of injunctive orders as well as orders for reinstatement as pleaded in the instant Application. It therefore urged this Honourable Court to dismiss the instant Application with costs to the Respondent. For emphasis the Respondent cited and relied on the case of **Dhanjal Investments Limited Vs Kenindia Assurance Company Limited (2016) eKLR**.

30. I have considered averments of both Parties. I note that the order of reinstatement by the Applicant being sought at this time is a final order which is also being sought in the main Claimant and can only be considered in the main claim after hearing the claim on merit.

31. I decline to grant the said order and direct that the Claimant proceeds with the main claim.

32. Costs in the cause.

Dated and delivered in open Court this **19<sup>th</sup> day of December, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of**

Ogembo holding brief Kamotho for Claimant – Present

Ochieng holding brief Opaka for Respondent – Present