



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 991 OF 2018

JOYCE NASUMAYE.....CLAIMANT

-VERSUS-

DHL EXEL SUPPLY CHAIN (K) LTD.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday 19th December, 2019)

RULING

The claimant filed the suit together with an application on 20.06.2018 and through Okatch & Partners Advocates. The application was for some interim orders and was listed before Radido J on 04.07.2018 and by consent of the parties it was ordered:

- 1) That an order be and is hereby issued compelling the respondent from declaring the applicant redundant or in any other way interfering with her employment pending hearing and determination of this application.
- 2) That an order be and is hereby issued directing the respondent not to victimize, threaten or in any way interfere with the applicant's employment pending the hearing and determination of this application.
- 3) That an order be and is hereby issued restraining the respondent from suspending or in any other way interfering with the applicant's health insurance pending the hearing and determination of this application.
- 4) That the respondent to file their replying affidavit before end of 5th July, 2018.
- 5) That application be heard on 16th July, 2018.

On 16.07.2018 parties agreed to try an out of Court settlement and the interim orders were extended. The matter came up on 06.03.2019 and the claimant had filed another application dated 17.08.2018 alleging contempt of the earlier consent orders. On 06.03.2019 the parties recorded a further consent order thus:

- 1) By consent both applications are dispensed with costs in the cause.
- 2) Interim orders extended till hearing and determination of the main suit on priority basis.
- 3) Amended claim be filed and served by 13.03.2019 and amended response may be filed and served by 20.03.2019.
- 4) Parties to file and serve all witness statements and documents by 20.03.2019.
- 5) Mention on 20.03.2019 9.00am for directions on hearing and fixing hearing date.

On 20.03.2019 the parties had not filed all pleadings and the Court made directions by fixing timelines for compliance and further directed parties to fix a hearing date at the registry. The parties appear not to have successfully fixed a hearing date at the registry.

The respondent in the suit has filed on 14.11.2019 an application by a notice of motion through Eunice Akello Advocate of Sharpley Barret & Company Advocates. The application is under section 1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya and Order 40, Rules 6, 7 and Order 51 and Order 19 rule 3(1) of the Civil Procedure Rules 2010, section 49(1) (c) of the Employment Act, Act No. 11 of 2007 and all other enabling provisions of the Law. The applicant prays for orders:

- a) (Spent).

- b) The Honourable Court be pleased to discharge, vary and set aside the orders made on 05.07.2018 restraining the respondent from declaring the claimant redundant or interfering with her employment pending the hearing and determination of the main suit.
- c) A declaration be made by the Honourable Court that orders granted on 05.07.2018 have since lapsed and the claimant is unlawfully enjoying from the lapsed orders.
- d) The cost of this application be in the cause.

The application is based on the annexed supporting affidavit of Eunice Akello Advocate and upon the following grounds:

- a) The interim orders are in place but the claimant has failed to prosecute the main suit expeditiously within 12 months from the date of grant of the interim orders.
- b) The respondent is unfairly paying the claimant.
- c) The position held by the claimant in the respondent's establishment is none existent.
- d) There is no basis for the claimant to continue earning from the respondent.
- e) If the claimant's suit is successful the Court may at maximum order payment of 12 months' gross salaries as per section 49(1) (c) of the Employment Act, 2007.
- f) The applicant will comply with such conditions as the Court may order for discharging the prevailing interim orders.
- g) It is in the interest of justice that the prayers in the application are granted.

The claimant opposed the application by filing her replying affidavit on 25.11.2019. The grounds of opposition are as follows:

- a) The application is based on Order 19 rule 3(1) of the Civil Procedure Rules 2010 under which an injunction by the Court should lapse after 12 months. However, in the present case the interim orders are by consent of the parties and ought to remain in place until hearing and determination of the case.
- b) The applicant has not established a threshold for reviewing and setting aside the consent order on record which is a contract between the parties. No vitiating factors such as fraud, misrepresentation, mistake, undue influence, duress, incapacity, illegality and frustration have been established to justify the setting aside of the consent orders.
- c) The consent order was on 06.03.2019 and even if Order 19 rule 3(1) of the Civil Procedure Rules 2010 was to apply, the 12 months have not yet lapsed as they are due to lapse on 06.03.2020.
- d) The claimant's advocates have taken all due steps to set down the suit for hearing but unsuccessfully so. The applicant is not guilty of failing to set the suit down for hearing or prosecuting the suit.

The Court has considered the parties' respective positions on the application. It is clear that on 16.07.2018 interim orders were extended till hearing and determination of the main suit on priority basis. The record shows that parties complied with the Court's directions towards the hearing on priority basis but for reasons not attributable to the parties, the hearing of the main suit has not taken place. In particular on 26.04.2019 the claimant fixed the suit for hearing on 05.06.2019 but there is no explanation on record why the hearing failed to take place. However the record shows that on 28.05.2019 by consent of the parties before the Deputy Registrar the suit was by consent of the parties fixed for hearing on 28.10.2019. On 28.10.2019 the suit was instead listed before the Deputy Registrar and parties were directed that they would be notified when diary re-opens to fix a date. It is after that Court appearance before the Deputy Registrar that the present application was filed. The Court returns that in view of the steps taken for the suit to be heard, the claimant is not guilty of failing to prosecute the suit.

It is clear that by the orders granted on 16.07.2018 the interim orders which had been granted on 05.07.2018 by consent of the parties were extended till hearing and determination of the main suit on priority basis. The Court finds that as urged for the claimant the interim orders have not therefore lapsed so that the prayer in that regard will fail.

It is not disputed that the interim orders were by consent of the parties and as urged for the claimant, no vitiating factor to justify the setting aside has been established.

Nevertheless, the Court finds that it may be taking too long for the suit to be heard on priority basis as directed by the Court and as was understood by the parties when the orders of 16.07.2018 were made. To balance justice for the parties and the pleadings having closed, the Court will fix the earliest convenient date for hearing of the main suit herein before any judge of the Court. While making that finding, within the terms of the consent order, the claimant is expected to be at work and assigned duties accordingly. In that consideration, the respondent should be able to mitigate its circumstances.

In conclusion the application dated 13.11.2019 and filed on 14.11.2019 is hereby dismissed with orders:

- 1) The parties to immediately fix a convenient hearing date on priority basis.

2) Costs of the application in the cause.

Signed, dated and delivered in court at Nairobi this Thursday, 19th December, 2019.

BYRAM ONGAYA

JUDGE