



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 1804 OF 2017

Before Hon. Lady Justice Hellen S. Wasilwa on 5th February 2018

SARAH NDUTA THENYA.....1ST CLAIMANT

HELLEN NJERI KANGIRI.....2ND CLAIMANT

PAMELA NDWIGA.....3RD CLAIMANT

VERONICA WANJIKU WAMBUGU.....4TH CLAIMANT

ANGELA SHARU IRUSA.....5TH CLAIMANT

VERSUS

EDELVALE TRUST JAMAA HOME &

MISSION HOSPITAL.....RESPONDENT

RULING

1. Before this Court is a Notice of Motion application dated 7th September 2017 brought under Rule 17(3), (4), (5) and (6) of the Employment and Labour Relations Court Procedure Rules, Section 12(3) of the Employment and Labour Relations Court Act, Section 1A, 1B, 31 and 63(e) of the Civil Procedure Act together with all other enabling provisions of the law.

2. The Respondents/Applicants are seeking orders:

- 1. That the application be certified as urgent and be heard ex-parte in the first instance.*
- 2. That the application be heard during the pendency of the annual vacation by the Honourable Vacation Duty Judge.*
- 3. That pending the hearing interpartes and determination of this application, this Honourable Court be pleased to restrain the Respondent and/or its agents by way of temporary injunction from terminating the employment of the 1st, 2nd and 3rd Applicants.*
- 4. That pending the hearing and determination of the main suit this Honourable Court be pleased to restrain the Respondent and/or their agents from terminating the employment of the 1st, 2nd and 3rd Applicants.*
- 5. That pending hearing and determination of this suit this Honourable Court be pleased to restrain the respondent by way of temporary injunction from threatening the 1st, 2nd and 3rd Applicants on the intended termination.*
- 6. That pending hearing and determination of this suit, this Honourable Court be pleased to restrain the Respondent by itself, its servants or agents by way of temporary injunction from intimidating, harassing or interfering in any manner whatsoever with the 1st, 2nd and 3rd Applicants' employment.*
- 7. That pending the hearing and determination of this suit this Honourable Court be please to lift 1st, 2nd and 3rd Applicants' suspension.*

8. That pending hearing and determination of this suit this Honourable Court be pleased to order the Respondent to release salary for the 1st, 2nd and 3rd Applicants and continue paying their monthly salary.

9. That the costs of this application be provided for.

3. The Application is supported by the supporting affidavit sworn by one Sarah Nduta Thenya and also supported on the following grounds that:-

a. The Respondent is a hospital providing medical services.

b. The Respondent employed the 1st Applicant as a permanent employee on the 1st day of January 2011 as a Kenya Registered Community Health Nurse (KRCHN).

c. The Respondent employed 2nd Respondent as a permanent employee on the 1st day of January 2011 as a Kenya Registered Community Health Nurse (KRCHN).

d. The Respondent employed the 3rd Applicant on a contractual basis on the 1st day of July 2010 as a nurse and confirmed her as a permanent employee on the 1st day January 2013 as a Kenya Registered Community Health Nurse (KRCHN).

e. The Respondent employed 4th Applicant as a contract employee on the 1st day January 2002 as a nurse and later confirmed her as a Kenya Enrolled Community Health Nurse (KECHN) on the 1st day of January 2005.

f. The Respondent employed the 5th Applicant on a contractual basis as a Kenya Registered Community Health Nurse (KRCHN) on the 1st of October 2011 and later confirmed her as a permanent employee in 2014.

g. The Respondent maliciously suspended the Applicants on the 18th day of July 2010 for fourteen (14) days in order to pave way for investigations on insubordination allegations.

h. The Applicants responded to the allegations raised by the Respondent as required through letters dated on or around the 25th and 26th days of July 2017.

i. That further the Applicants attended a disciplinary meeting convened by the Respondent where the Applicants defended themselves from all the allegations raised by the Respondent.

j. That through a letter dated the 2nd day of August 2017, the Respondent terminated the employment of the 4th and 5th Applicant citing that the said Applicants conducted themselves rudely to the Respondent's disciplinary panel.

k. That through the Respondent's letter dated the 10th day of August 2017, the 1st, 2nd and 3rd Applicants were suspended for a further fourteen (14) days awaiting the Respondent's decision.

l. That the 1st, 2nd and 3rd Applicants' further suspension was effected after serving a twenty three (23) days suspension, nine (9) days more than the days stated in the first suspension.

m. A further fourteen (14) days suspension would take the 1st, 2nd and 3rd Applicants suspension to 37 days.

n. That by the time of filing this Application, nineteen (19) days have elapsed since the second suspension took effect taking the suspension period to forty-three (43) days and yet the Respondent has not communicated its decision to the 1st, 2nd and 3rd Applicants.

o. The 1st, 2nd and 3rd Applicants continue to serve an extended leave which contravene the employment laws and the Respondent's policy.

p. The 1st, 2nd and 3rd Applicants are apprehensive that malicious actions of the Respondent puts them at eminent danger of being unlawfully terminated from their employment as the unlawful extension of their suspension is in bad faith and portrays the intention of the Respondent.

q. Unless this Honorable Court intervenes to stop the intended termination, the 1st, 2nd and Applicants will suffer damages, irreparable loss, and suffering.

r. No prejudice will be occasioned on the Respondent.

s. It is in the interest of Justice to allow this Application.

t. Such other grounds and reasons as the Court may allow to be raised and or argued during the hearing hereof.

4. The Respondent has filed a response via a replying affidavit dated 18th October 2017 where they aver that in July of 2017 or thereabouts, the Respondents' management realized that most patients were no longer eager to be admitted for a second time in the hospital.
5. They aver that upon conducting investigations with respect to low admission rate, they learnt that the patients complained about some of the staff who included the Claimants herein of failing to give proper care and proper handling of them.
6. They aver that some of the staff members complained that some of the Claimants were coercing them to leave the nursing council and registering them in a welfare yet to be formed for their own objective.
7. They aver that all the Claimants were investigated and from the material gathered it was clear that the Claimants herein had contravened the Rules and Regulations as contained in the letter of appointment for permanent employment, certificate of the acknowledgment and acceptance and the terms and conditions of employment of Edelvale Trust as revised from time to time. Copies of the rules and regulations as contained in the letter of appointment for permanent Employment are contained in the Claimants' annexures HNK-1 to HNK-7(Annexed hereto and marked "VN1" are terms and conditions of employment of September, 1999 and Certificate of Acceptance of Acknowledgement and acceptance and the terms and conditions of employment of Edelvale).
8. They aver that the Respondent on the 18th July 2017 decided to exercise its rights of suspension as provided for in Clause fifteen (15) of the standard letter of appointment for permanent employment as there existed grounds to show that the Claimants had acted in contravention of the Code of Ethics and Hospitals' Code of Conduct which they are familiar with.
9. They aver that in the Claimants' respective suspension letters they were each requested to report to their supervisors with a written reply to charges made against them.
10. They aver that on the 2nd of August 2017, all the Claimants were given a chance to defend themselves orally and also rely on their respective written responses as can be seen in the minutes of the Disciplinary Committees proceedings. (Annexed hereto and marked "VN2" is a copy of the minutes).
11. They aver that the Disciplinary proceedings were held and all the Applicants were found culpable.
12. They aver that all the Claimants herein had previous records of contravening the rules and regulations as contained in their letters of appointment. The same was echoed in the letters of dismissal. Examples as hereunder as indicated against the 2nd, 4th and 5th Claimants.
13. The Respondents contend that the 1st to 3rd Claimants only served one more suspension after the suspension of 18th July 2017 aforesaid. The second was recommended by the committee after the disciplinary proceedings of 2nd August 2017 and independent of the first suspension.
14. They also contend that according to Clause 15 of the Terms and Conditions of Employment of September 1999, titled, "Dispute-Grievance Procedures" the Claimants had a right to appeal to the Evadale Trust for a final decision before the action to terminate their services was implemented which right they failed to exercise.
15. They therefore aver that since the Claimants are the ones who failed to follow the internal dispute resolution mechanisms put in place by the Respondent, it is clear that their claim herein is premature and lacks any foundation.
16. The Respondents aver that by the time this honorable court issued orders on the 8th of September 2017, all the Claimants had already been lawfully terminated from employment by the Respondent. (Annexed hereto and marked "VN10" are copies of the termination letters for all the claimants herein).
17. They aver that all the claimants herein were given a chance to be heard before being terminated from employment. The reasons for termination of the Claimants from employment were also communicated to them.
18. They contend that the 1st to 3rd Claimants herein failed to commence the Clearance process which prevented them from being issued with the Certificate of Service (Annexed hereto and marked "VN11" are the copies of the certificates of service of the 4th and 5th Claimants)
19. The parties filed their respective submissions. The Applicants have submitted that the orders sought be granted as the Applicants are entitled to fair labour practices, fair remuneration and reasonable working conditions as provided under Article 41 of the Constitution.
20. They submit that the Respondents acts of intimidation and threats to the 1st to 3rd Applicants amount to unfair labour practices. They also submit that the 1st to 3rd Applicants have been on indefinite suspension because they never received any notification of the Respondent's decision after the disciplinary hearing on 2nd August 2017.
21. They aver that the Respondents Terms and Conditions of Employment September 1999 (VN-1) at Clause 14 provides for suspension until such time that the facts of the case are known. This, the Claimants submits is an unfair labour practice as suspension should be for a definite period as held in **Donald C. Avude vs Kenya Forest Service (2015) eKLR**.
22. They also submit that though the Respondents aver that the Claimants were terminated on 2nd August 2017, the letters were never received by the 1st to 3rd Applicants.

23. The Applicants submits that these letters of termination were produced with the sole purpose of rendering as spent the reliefs sought by the Applicants. They submit that these letters were made after the Court orders of 8th September 2017 injuncting the Respondents from terminating the employment of the 1st to 3rd Respondents.

24. The Respondents want the Court to grant them orders sought.

25. The Respondents on their part have submitted that the Applicants have not established a prima facie case with a probability of success. They have submitted that the principles in **Giella vs Cassman Brown** have not been established. They cited **Idris Aden Mukhtar & 2 Others vs County Government of Garissa and Another** (2015) eKLR where this Court cited the principles of Giella case as follows:-

“On an application for an injunction the Court must be satisfied that there is a serious question to be tried. The material available to Court at the hearing of the application must disclose that the Claimant has real proposals for succeeding in his claim for a permanent injunction at the trial. The former requirement that the Claimant should establish a strong prima facie case for a permanent injunction before the Court would grant an interim injunction has been removed”.

26. The Respondents submit that the Applicants have submitted conflicting evidence in Court in respect to the suspension the subject matter of the application. They urge the Court not to allow the application.

27. I have considered all the submissions of parties and evidence in Court. The main issue to determine before Court is whether the Applicants have established a prima facie case with a probability of success.

28. In determining this, I note the recent development in the law as cited in the **Aden Mukhtar** case above which points to the fact that what the Court should consider is whether there are triable issues in the main case. Coupled with the principle in **Giella vs Casman Brown**, the principle that the application will be decided on a balance of convenience.

29. In this respect, I note that on 7th September 2017, the Applicants approached Court exparte and got orders to bar the Respondents from terminating their services. The Respondents on their part insist that the Applicants were already terminated before this date. The Respondent exhibited Appendix VM 10 dated 24th August 1027 which are letters of termination of employment to the Applicants.

30. These letters were posted to Box 17153-00510 which is the Respondent’s own address. There is no certificate of posting to the Applicant’s addresses and no evidence of receipt of these letters by the Applicants as was indicated in the suspension letters that the decision of the disciplinary committee would be communicated through their registered addresses.

31. It is my finding therefore that the Applicants have never been notified of their termination and the orders of 7th September 2017 are still in force.

32. In this case then in deciding this matter on a balance of probabilities, the balance tilts in favour of injuncting the Respondent against terminating the services of the Applicants than letting the Applicants to be terminated and later for Court to find out that they should not have been terminated in the 1st place. In respect of submissions filed by the Respondents, they relate to a situation where termination has already taken effect as in the cases cited.

33. Having found that the Applicants have not yet been terminated yet, I find for them and confirm the exparte orders. All withheld salaries be released to the 1st to 3rd Applicants accordingly. The Respondents should henceforth continue to pay the Claimants salaries when they fall due until this claim is heard and determined.

34. Costs in the cause.

Read in open Court this 5th day of February, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Odhiambo holding brief for Job Nyasimi for Applicants – Present

Respondents – Absent