



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.669 OF 2017

LILY ANDAYI AMAKOBE.....CLAIMANT

VERSUS

SHERIA CO-OPERATIVE SAVINGS &

CREDIT SOCIETY LIMITED.....RESPONDENT

RULING

The claimant filed application dated 13th September, 2017 through Notice of Motion brought under the provisions of Order 6 Rule 2(3) and Order 36(1) (b) and seeking for orders that;

1. Summary judgment be entered against the respondent in the following terms;

a. A declaration that the termination was illegal

b. The claimant be reinstated with immediate effect

c. Special damages of Kshs.5, 741,298/= be paid to the claimant immediately.

d. Interest on the above at court rates of 14%

e. Costs of the suit

The application is supported by the affidavit of Justy Lumumba Nyaberi, advocate for the claimant and on the grounds that since the respondent entered appearance on 15th May, 2017 they have failed to file a memorandum of Response to the claim and hence do not have any defence to the same. On 12th January, 2017 the respondent received a letter of demand and admitted liability vide letter dated 7th February, 2017.

The respondent filed Grounds of Opposition on 11th October, 2017. Such grounds are that the application by the claimant has no merit as the respondent filed and served its response and counter-claim upon the claimant and if the application is allowed as prayed there shall be great prejudice upon the respondent. The respondent has not admitted any claims and the letter dated 7th February, 2017 had a typing error.

Both parties filed written submissions.

The claimant submits that the termination of employment was in breach of procedural fairness and contrary to section 455(2) (c) of the Employment Act. The respondent by admitting to unlawful termination of employment has no reasons or ground to justify the same and the orders sought for reinstatement should issue. The defence filed after this is a mere afterthought and meant to prolong the cause without any justification.

The claimant relied on the cases of **Thomas Sila Nzivo versus Bamburi Cement Limited (2014) eKLR; Daniel Kiplagat Kipkeibut versus SMEP Deposit Taking Micro Finance Limited [2016] eKLR; Mary Chemweno Kiptui versus Kenya Pipeline Company Limited [2014] eKLR.**

The respondent submits that there is a defence and counter-claim filed and which has triable issues and the court should grant a chance for hearing for the respondent to argue its case of merit. Once a defence has been filed, the respondent does not admit the claim and letter sent to the claimant had a typing error. Due process was followed before the claimant was terminated from employment and the respondent has a

claim made against the claimant in the counter-claim and should be allowed to argue both the defence and the counter-claim. Reinstatement before the parties can be given a hearing should not issue as such is a final order and would deny the employer the right to be heard.

The respondent has relied on the cases of **Patel versus EA Cargo Handling Service [1974] EA; Chemwolo another versus Kubende [1986] eKLR; Civil Appeal in Dalmas B Ogoye versus KNTC Ltd [1996] eKLR; Mwala versus Kenya Bureau of Standards EA [2001] 1 EA.**

The application is based the provisions of the Civil Procedure Act, 2010 and the rules thereto. Such provisions and rules only apply to this court where the Employment and Labour Relations Court (Procedure) Rules, 2016 have not addressed the particular issue(s) a party wishes to have the court address.

Under Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016 this court has the jurisdiction to address applications and issue interlocutory orders in the nature sought by the claimant on the merits. By application of the Civil Procedure Act and the rules thereto, the claimant has omitted to address key elements for the grant of the orders sought in the Notice of Motion particularly with regard to Rule 17 Employment and Labour Relations Court (Procedure) Rules, 2016 on orders seeking reinstatement of the claimant.

Noting the above, the Memorandum of Claim was filed on 7th April, 2017 and the respondent entered appearance on 15th May, 2017 but did not file a defence until 25th September, 2017 when the claimant had already filed the application dated 13th September, 2017 seeking for summary judgement and orders of reinstatement. The respondent has also filed a counter-claim, to which the claimant filed a response on 6th December, 2017.

Rule 13 of the Employment and Labour Relations Court (Procedure) Rules, 2016 is clear with regard to fining of pleading and particularly a defence once a claimant has served the Memorandum of Claim. It provides that;

13. (1) If a party served with a statement of claim intends to respond, the party shall, within twenty one days from the date of service, enter appearance and file and serve a response to the suit.

The respondent filed defence on 25th September, 2017 as noted above.

In this regard, where a defence was not filed in 21 days pursuant to Rule 13(1), sub-rule (4) and (5) provides that;

(4) The pleadings in a suit shall close fourteen days after the service of a reply under paragraph (3) or, where a reply is not filed, fourteen days after service of a response to pleadings under paragraph (1).

(5) The Court may, on application by a party to any proceedings, extend or reduce the time within which a responding party may respond to a pleading.

To file any pleadings after time thus requires the court upon application to extend time. To file without leave or without application for time extension is contrary to the court rules, good order and orderly business of the court. Such should not be encouraged.

The respondent has moved without leave and filed the defence and counter-claim. There is a reply thereto by the claimant. The defence thus having a counter-claim, such is a new suit which should not be compromised on the simple reason that the defence is filed out of time. However, for the court to ignore the defence on its merits would not meet the ends of justice. Orders of reinstatement must be addressed carefully and keenly by the court while putting into account the provisions of section 12(3) of the Employment and Labour Relations Court Act, 2011 together with the provisions of section 49(4) of the Employment Act, 2007 and read with Rule 17(10) of the Employment and Labour Relations Court (Procedure) Rules, 2016. The rationale is that orders of reinstatement are for specific performance and requires the court to address the reasons for termination of employment and put into account the provisions and principles set out under section 49(4)(a) to (m) of the Employment Act, 2007. To thus order for reinstatement at the interlocutory stage would deny the court great material leading to such a remedy.

Noting the above, and putting into account the defence is filed out of time and without leave, such defence is hereby allowed. As parties have now exchanged their pleadings, the suit should proceed on its merits.

Accordingly, application dated 13th September, 2017 is hereby declined. The respondent shall meet the costs due to the claimant.

Read in open court at Nairobi this 20th day of April, 2018.

M. MBARU

JUDGE

In the presence of:

Court Assistant:.....

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