



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 161 OF 2018

JOHN ROBERT WALKER.....CLAIMANT

VS

VALAR FRONTIERS (KENYA) LIMITED.....RESPONDENT

AND

DIRECTOR OF IMMIGRATION SERVICES.....INTENDED INTERESTED PARTY

RULING

1. This ruling relates to two applications brought by the Claimant. The first one is dated 22nd March 2018 and seeks the following orders:

- a) A prohibitive order restraining the Respondent from terminating the Claimant's employment contract upon expiry of the termination notice;
- b) A mandatory order directing the Respondent to reinstate the Claimant back to employment in the position he held as at 25th February 2018 without loss of salary and other benefits.
- c) A mandatory order directing the Respondent to immediately release the Claimant's performance bonus of USD 16,000 awarded in October 2017.

2. The second application which is dated 19th April 2018, seeks joinder of the Director of Immigration Services in these proceedings and an order suspending the decision to cancel the Claimant's Entry Permit No. 066582 as contained in letter dated 12th April 2018.

3. The Claimant's applications are premised on the following grounds:

- a) The Claimant was forced by the Respondent's representatives to resign from employment on 25th February 2018;
- b) The said resignation under duress and/or undue influence was unlawful and unfair and amounts to constructive termination of the Claimant's employment which termination the Claimant is aggrieved with and wishes to challenge before the Court;
- c) The Claimant was awarded a performance bonus of USD 16,000 in October 2017 which has not been paid;
- d) On 26th February 2018, the Respondent's Chief Executive Officer, Gabriel Oser wrote to the Director of Immigration Services asking him to cancel the Claimant's Entry Permit;
- e) Being aware that the Court had issued orders suspending the termination of the Claimant's employment, the Respondent had a duty to write to the Director of Immigration Services to halt the cancellation

process;

f) The Respondent, through its Advocates on record, has advised that the Claimant's Entry Permit has been cancelled by the Director of Immigration Services and that the injunctive orders have been frustrated by operation of law;

g) All the Respondent's actions are calculated to ensure that the Claimant is unable to pursue his claim before the Court thus effectively defeating the Claimant's efforts to seek justice;

h) The orders issued herein together with the main suit will be rendered nugatory and the Claimant will be unable to pursue his legal rights through this case if he is forced to leave the jurisdiction of the Court;

i) The Claimant has a case with a very high probability of success and will suffer injustice if the orders sought are not granted;

j) The Claimant has a young child currently studying at [particulars withheld] Academy at Mombasa who will suffer irreparably if he is forced out of the School mid term;

k) No prejudice will be suffered by the Respondent if the orders sought are granted;

l) It is in the interest of justice that the orders sought are granted.

4. The Respondent's response is contained in two replying affidavits sworn by its Chief Executive Officer, Gabriel Oser on 3rd April 2018 and 28th April 2018. He depones that the Claimant was recruited to provide Security Management Services to the Respondent's client, Base Titanium Limited.

5. Oser further depones that in the first year, the Claimant's service was substantially without much complaint and he was therefore identified to be awarded a performance bonus of USD 16,000 for the period 20th October 2016 to 19th October 2017. He adds that the award of bonus though covering the period ending 20th October 2017, was to be distributed at the end of the calendar year.

6. However immediately after the announcement of the bonus award, the Respondent became the subject of audit inspection by the Kenya Revenue Authority and payment of any bonus had to be suspended until completion of the audit exercise. This was communicated to all employees.

7. It is also deponed that in the month of November 2017 subsequent to the declaration of bonus payments the Respondent started receiving complaints from its client that the Claimant's services were deteriorating and that there was lack of concentration on delivery of services. It was *inter alia* alleged that the Claimant was spending much time seeking alternative employment using the client's internet facilities as opposed to addressing his assignment. The complaints against the Claimant persisted into February 2018.

8. The Respondent's Chief Executive Officer, Gabriel Oser and Operations Director, James Dutkowski met the Claimant on 25th February 2018 to informally discuss with him the concerns raised by the client. The Claimant is said to have intimated that he was aware of the complaints and was planning to leave the Respondent's employment. Oser and Dutkowski stated that the Respondent would have no objection to the Claimant's wish in this regard.

9. The Claimant therefore wrote a resignation letter dated 25th February 2018 which was accepted by the Respondent on the same day. Oser denies the Claimant's averment that he was coerced into resigning by threat of dismissal. He takes the view that the Claimant's resignation was voluntary.

10. It is further deponed that following the Claimant's resignation, the Respondent had assigned a suitable replacement to provide services to the client. The Respondent had gone further to advise the Immigration Department to cancel the Claimant's work permit. The Respondent had no intention of accepting the Claimant back.

11. In his further affidavit filed in 19th April 2018, the Claimant denies allegations of poor performance made against him by the Respondent. He also reiterates that the Respondent has no justification to withhold his performance

bonus on the basis of an audit inspection by the Kenya Revenue Authority.

12. In response to the Claimant's second application seeking to enjoin the Director of Immigration Services as an Interested Party in these proceedings, plus an order suspending the cancellation of the Claimant's Entry Permit No. 100582, Oser states that the Court cannot suspend that which has already been effected. He adds that proceedings on suspension of an Entry Permit cannot be sustained under the present cause.

13. According to the Respondent, the cancellation of the Claimant's work permit frustrated the injunctive orders issued by the Court on 23rd March 2018, meaning that there are no injunctive orders in place.

14. The first application went before the Duty Judge in the Employment and Labour Relations Court at Nairobi, **Wasilwa J** on 23rd March 2018. The Duty Judge certified the matter urgent and issued an order prohibiting the Respondent from terminating the Claimant's employment contract, upon expiry of the termination notice on 25th March 2018.

15. The second application went before another Duty Judge, **Ongaya J** on 20th April 2018 who granted orders suspending the decision by the Director of Immigration Services, cancelling the Claimant's Entry Permit No. 066582 as contained in letter dated 12th April 2018.

16. The prayers sought in the Claimant's twin applications are a mixture of prohibitive and mandatory injunctions. The conditions under which injunctive orders generally may be granted are set out in the tested case of **Giella v Cassman Brown [1973] EA 358** as follows:

- a) That the applicant has demonstrated a *prima facie* case with a probability of success;
- b) That the applicant has shown that they will suffer irreparable injury not adequately compensable by an award of damages if the orders sought are not granted;
- c) If the court is in doubt it will decide the application based on the balance of convenience.

17. As a rule, mandatory injunctions will only issue in exceptional circumstances (see **Nation Media Group & 2 others v John Harun Mwau [2014] eKLR**).

18. The dispute herein was triggered by the Claimant's letter dated 25th February 2018 stating as follows:

“Subject: Resignation Letter

Dear Mr. Oser,

Based on my Employment Agreement I am activating clause 14.1 Termination by giving 30 days' notice. I am tendering my resignation for personal reasons effective today, February 25, 2018.

Yours faithfully,

(Signed)

Johnny Walker”

19. By its letter of even date, the Respondent accepted the Claimant's resignation and tabulated his terminal dues. The following day on 26th February 2018, the Respondent wrote to the Director of immigration Services requesting for cancellation of the Claimant's Entry Permit No. 066582 on the ground that his services were no longer required. By his letter dated 12th April 2018, the Director of Immigration Services notified the Respondent that the Claimant's Entry Permit had been cancelled.

20. It would however appear that the Claimant changed his mind over his resignation because on the same day, he wrote to the Respondent repudiating his letter of 25th February 2018 in its entirety. In the subsequent letter, the Claimant accused the Respondent of constructive dismissal.

21. The question before the Court is whether in the circumstances of the case, the Claimant has made a case for grant of the injunctive orders sought. By the time the applications were prosecuted *inter partes*, much water had passed under the bridge; notably, the Claimant's Entry Permit had been cancelled and the Respondent had hired his replacement.

22. It seems to me therefore that cumulatively, the Court is being asked to reinstate the Claimant at the interlocutory stage. There is firm jurisprudence from this Court that reinstatement is a substantive remedy to be granted after full hearing of the claim before the Court (see *Alfred Nyungu Kimungui v Bomas of Kenya [2013] eKLR* and *Loice Mutai v Kenya Revenue Authority [2017] eKLR*). Looking at the pleadings filed by the parties in this case there is a sharp divergence on many issues of fact touching on the circumstances leading to the Claimant's departure from the Respondent's employment.

23. In this regard, while the Claimant makes a claim for constructive dismissal, the Respondent presents a case of voluntary resignation. In my view, these are matters of fact which cannot be determined at the interlocutory stage. On this ground, the Court finds that no *prima facie* case has been established and condition number one in *Giella v Cassman Brown* (supra) has therefore not been satisfied.

24. On the question of irreparable harm, the Claimant himself seems aware that he can actually be compensated by an award of damages which he claims in the alternative. That would in my view, deal with the second condition in *Giella v Cassman Brown* (supra)

25. In his oral submissions before Court, Counsel for the Respondent, Mr. Obura took issue with the manner in which the Claimant had come to court in the second application. Counsel pointed out that under the Government Proceedings Act, no injunctive orders can issue against the Government other than by way of Judicial Review. In response, Mr. Mulaku holding brief for Mr. Asewe for the Claimant submitted that these were matters of technicality which should not be used to defat an otherwise legitimate claim.

26. This in my view, is a peripheral issue which the Court does not need to dwell on in light of the foregoing findings. The only thing I will say therefore is that the gate through which a party accesses the seat of justice is no longer a matter of substance. If a party can prove their case, the Court will not lock them out merely because they have not come through the beaten path.

27. Similarly, these applications do not turn on the question whether the Director of Immigration Services should be enjoined as an interested party or as a respondent. I say so because, the only role played by the Directorate of Immigration in a case such as the present one, is to facilitate performance of the employment contract. The Director is not a party to such a contract and any complaint against him, would in my view invite separate considerations by the Court.

28. Having said that and in light of my determination that the Claimant's applications have failed the first and second tests in *Giella v Cassman Brown* (supra), the balance of convenience must tilt in favour of the Respondent.

29. In the end, the Claimant's applications dated 22nd March 2018 and 19th April 2018 fail and are dismissed. The interim orders granted on 23rd March 2018 and 20th April 2018 are vacated.

30. The costs of both applications will be in the cause.

31. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 17TH DAY OF MAY 2018

LINNET NDOLO

JUDGE

Appearance:

Mr. Asewe for the Claimant

Mr. Obura for the Respondent