



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT NAIROBI

CAUSE NO 481 OF 2017

BEATRICE WAMBUI NJENGA.....CLAIMANT

VERSUS

EXPORT PROCESSING ZONES AUTHORITY.....RESPONDENT

RULING

1. By a motion dated 29th June 2018 the claimant sought orders among others that her dismissal and recruitment of her replacement be stayed pending the determination of the application.
2. The application was based on grounds inter alia that she was interdicted for insubordination of Board members of the respondent. She filed a claim for unpaid salary and on 13th March, 2017 was suspended until the claim was determined. On 13th April, 2018 the Court delivered a ruling in which the court found that no disciplinary hearing had taken place and that the interdiction period had expired without any decision being made against the claimant. On 26th April, 2018 the respondent terminated the claimant's services based on the impugned disciplinary proceedings despite the pendency of her claim herein.
3. The respondent on its part opposed the application and filed a replying affidavit through one Thomas Mongare in which he stated among others that the court in its ruling was very clear that there was no court order stopping the disciplinary process hence the claimant could not claim to have reasonable expectation that the process would be stayed pending the hearing and determination of the claim.
4. Mr Mongare further stated that the respondent held a disciplinary meeting on 13th February, 2017 where the claimant was present and was also represented by a member of staff who was also a member of the claimant's union. The claimant was given an opportunity to defend herself before the disciplinary committee. Mr Gachoka in his submissions before the court stated that the claimant's suspension was to last until the determination of this claim. The claim has not been determined hence the claimant was under reasonable expectation that her services would be retained until the claim is determined.
5. According to counsel, the respondent did not keep their promise and terminated the claimant on 26th April, 2018 notwithstanding the pendency of the claim. The claimant had appealed to the Board and no determination has been received. Counsel further submitted that the respondent had embarked on recruitment process to replace the claimant in violation of her right to fair labour practice.
6. Mr Wanjohi on the other hand submitted that the court gave the respondent the liberty to embark on the disciplinary process. The Board therefore proceeded from where the proceedings had reached and a decision to dismiss was made. The claimant appealed against the dismissal hence by the present application the claimant wants to delay the process. According to counsel, the claimant can be compensated by way of damages.
7. The motion dated 10th March, 2017 concerned payment of the claimant's salary which she said was withheld by the respondent. The application sought no orders concerning interdiction of any recruitment process pending the determination of the suit. On 28th March, 2017 the court issued directions that if the only issue the claimant sought the court to decide on was payment of salary for the period the claimant was on suspension the submission be filed thereon by the parties and ruling be made on the same. This was done by the parties and the court gave its ruling on 13th April, 2018.
8. From the affidavit in support and opposition of the application dated 29th June, 2018 (instant application) it emerges that the respondent took the claimant through a disciplinary process on 13th February, 2017 but dismissed the claimant on 26th April, 2018. In spite of the fact that the claim herein had been filed the claimant never moved the court to question the validity or justification of the disciplinary process. In fact the claimant was comfortable when as she alleges, was told the respondent would hold its decision pending the outcome of the suit yet she never took any step to seek a formal injunction of the disciplinary process.

9. As observed earlier, the application dated 10th March 2017 concerned payment of the claimant's dues withheld for the period she was on interdiction. The court made a finding that the claimant's services not having been terminated and further that since the interdiction period had expired without any decision being made concerning the claimant, her full salary be released to her.

10. The issue of stay of dismissal pending suit was not before the court then and is being introduced for the first time in the present application. The court is therefore of the view that the application has been brought late in the day when the claimant had every opportunity to bring the same earlier. No good or sufficient reason has been given for the omission. In the circumstances, the application is found without merit and is hereby dismissed with costs.

11. It is so ordered.

Dated at Nairobi this 28th day of September, 2018

Abuodha Jorum Nelson

Judge

Delivered this 28th day of September, 2018

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.