



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION 22 OF 2017

NAOMI CONNIE LUSICHE.....PETITIONER

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....RESPONDENT

RULING

1. By a motion dated 16th March, 2017 the Petitioner sought a raft of orders including:

a. That the honourable court hereby grant leave waiving the discretionary requirement to pursue internal appeal proceedings under section 9(4) of the Fair Administrative Action Act and further grant leave to the Petitioner to seek judicial review orders under the said Act in the application and petition.

b. Pending the hearing and determination of the petition inter-partes, this Honourable court be pleased to stay the dismissal letter dated 9th March, 2017 terminating the petitioner as the head of Agency Banking and to further restrain the respondent by itself, its agents and servants from otherwise or whatsoever suspending, dismissing, purporting to send on compulsory leave or doing anything prejudicial to the applicant after the aforesaid stay by the court.

c. That pending the hearing and determination of the petition the respondent whether by itself, or its servants or agents, advocates or any other person acting for and or on their behalf be restrained by an order for injunction from charging interest rate on the Staff Housing Loan at 10.00% plus a margin of 4.00% or any other rate of interest save the allowed charges for staff accounts and the interest staff rage of 6% and further be restrained from issuing threats of listing the petitioner with the credit reference bureau and further repossessing, offering for sale, selling, transferring, disposing or in any other way alienating or encumbering her family home which is King'ong'o Block 21/1723 Eldoret Municipality.

2. The application was supported by the affidavit of the petitioner and further premised on grounds among others that:

a. That there has been continuous bias and a predetermined decision to terminate the petitioner's services to the respondent throughout in the internal capability process.

b. That the respondent failed and/or declined to accord the petitioner a fair capability process and the following provisions of the fair Administrative Actions Act were violated:

i. Section 4(1) which provides that; every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

ii. Section 4(3) (e) and Section 5 which provide that; the person affected by the decision has the right to notice of the right to legal representation, where applicable; the respondent disregarded the significance of the administrative decision that was being taken against the petitioner.

iii. Section 4 (3) (f) on the right to notice of the right to cross-examine or where applicable; the petitioner was denied the opportunity to cross-examine or where applicable; the petitioner was denied the opportunity to cross-examine the persons who gave adverse evidence against her.

iv. Section 4 (4) (d) provide that the administrator shall accord the person whom an administrative action is been taken the right to request for an adjournment of the proceedings, where necessary to ensure a fair hearing, the petitioner was

however denied the same.

c. That the respondent calculated that it would financially convenient to pay basic damages for wrongful dismissal by constructively terminating the petitioner and disguising it as termination for poor performance despite the grave harm of loss of career to the petitioner.

d. That the respondent has greatly endangered the petitioner's economic and social rights and her right to redeem her home on King'ong'o Block 21/1723 Eldoret Municipality by converting the Petitioners' staff loan from staff rate of 6% to customer rate of 10.00 plus margin of 4.00% and further violated the petitioner's legitimate expectation of repaying the loan at staff rate until payment in full.

3. The respondent opposed the application and filed a replying affidavit through one Vaslas Odhiambo who described himself as the respondent's employee relationship manager and further stated that:

a. That on 21st March 2012, the claimant applied for and was issued with a staff housing loan facility for Eldoret Municipality/Block 21(King'ong'o)/1723 amounting to Kshs 6,000,000 repayable in 204 consecutive monthly installments of Kshs 46,987.00

b. That one of the terms and conditions of the loan facility were that the Kshs 6,000,000 was issued subject to the generic terms and conditions for staff loans contained in the staff manual and that any changes to the staff manual would be applicable to the loan facility.

c. That the respondent's staff manual under clause 24 provides that upon exit from employment, loan accounts are to be placed in the customer section immediately on leaving employment and interest should be charged at the normal customer rate plus other fees.

d. That on 9th March 2017, the claimant's employment was terminated for failing to meet the agreed performance targets contrary to business expectations.

e. That since the claimant accepted the loan facility and has already benefitted from it, she is bound by all its terms including the condition that all loans for ex-employees would be charged at normal customer rates.

f. That in reaching the decision to terminate the claimant's employment, the respondent complied with its internal policies and the requirements of the Employment Act.

g. That there is prima facie evidence that the claimant was informed of the intention to terminate her employment for poor performance, given an opportunity to be heard and given written reasons for the termination of her employment.

h. That the respondent's decision to terminate the claimant's employment was not an administrative action as alleged but was done within the parties' private employment contract.

i. That the relationship between the claimant and the respondent was that of an employer and employee and in reaching the decision to terminate her services, the respondent was not exercising a public function.

j. That I am advised by my advocates on record, which advise I believe to be true that the provisions of the Fair Administrative Act do not apply to private employment contracts entered between employer and employee.

k. That consequently, the claimant lacks any legal basis to seek judicial review orders against the termination letter dated 9th March 2017.

4. In his submissions in support of the application, Mr Kanjama for the petitioner submitted that the petitioner as an employee of the respondent served for twenty six years and her tenure was distinguished through outstanding professional performance which resulted in steady promotions. According to counsel, the circumstances surrounding the petitioners termination were subject since on 8th March, 2017 a day before her termination, she was forced to attend an appeal hearing for the underperforming rating without the documents she had requested for from the respondent which documents could have assisted her in proving otherwise the allegations levelled against the petitioner.

5. On the issue of prima facie case, counsel submitted that the respondent's failed to accord the petitioner a fair hearing to defend herself against the accusations despite the serious consequence that she was at the risk of facing the outcome of the said proceedings. Further, the respondent failed to follow its own laid down procedure for problem solving at work as outlined in the Disciplinary Capability and Grievance Policy and Procedure Manual. According to counsel the said manual provides for five steps of the capability process which include capability hearing, decision and sanction communication i.e informing the employee of the decision and review process. Counsel submitted that the respondent did not follow this process.

6. Mr Kanjama further submitted that if the court were to decide in favour of the petitioner damages would not be adequate to compensate her for the loss she was faced to suffer since the applicant was at the risk of losing her only resource of livelihood as well as her matrimonial home on King'ong'o Block 21/1723 Eldoret Municipality. On the issue of reinstatement counsel submitted that the court had power to so order pending the hearing and determination of the petition for the reason that the process by which the petitioner was terminated was flawed and unlawful.
7. On the issue whether the Petitioner's Constitutional rights to fair administrative action have been denied, counsel submitted that section 2(ii) of the Fair Administrative Action Act define administrative action as any act or omission or decision of any person or body or authority that affects legal rights or interests of any person to whom such action relates. Mr Kanjama therefore submitted that the petitioner was firmly grounded to seek judicial review orders against her termination letter.
8. On the issue of reinstatement Ms Oyombe for the respondent relying on the case of **Jacinta Sekoh Ochieng Vs KPC Ltd [2017] eKLR** submitted that the court will not ordinarily issue an interlocutory order, whether it be called a stay of termination or outright reinstatement whose effect is to reverse the termination. According to counsel, the issue of whether the claimant is entitled to be reinstated can only be determined after the court has heard the case on merits and considered evidence produced by both parties.
9. On the issue of exemption from the respondent's internal appeal mechanism, counsel submitted that this meant that the petitioner willingly chose not to exhaust the internal disciplinary mechanism before coming to court hence not entitled to interim reinstatement pending the determination of the suit. On the issue of whether the petitioner is entitled to injunction against the application of commercial rates of her loan, Ms Oyombe submitted that the claimant did deny that she was the respondent's employee and thus received a loan facility by virtue of her employment. The claimant further did not deny that the staff manual applied to her. Consequently, counsel submitted that the petitioner as an employee was bound by the terms of the loan facility as indicted in the staff manual.
10. On the issue whether the petitioner was denied her constitutional right to fair administrative action, Ms Oyombe relying on the case of **Loice Mutai Vs KRA [2017] eKLR** submitted that the decision to terminate the petitioner from employment did not fall within the context of administrative action as envisaged under article 47 of the Constitution and Fair Administrative Action Act, this was because the employment relationship was governed by article 41 of the Constitution and various labour laws including Employment Act. Further, the employment relationship was governed by a private contract thus any actions done under the contract of employment did not amount to administrative action under article 47 of the Constitution.
11. The first question that requires to be decided in this application is whether the principles and provisions of the Fair Administrative Action Act (FAA-Act) are applicable to private contracts including employment contracts. The FAA Act states that it's an Act of Parliament to give effect to article 47 of the Constitution and connected purposes. Article 47 is resident in chapter four of the Constitution which deals with the Bill of Rights. Under article 19(2) the Bill of Rights are stated to be purposed for recognizing and protecting human rights and fundamental freedoms and to preserve the dignity of individuals and communities and to promote social justice and realization of the potential of all human right.
12. Further article 20(1) provides that the bill of rights applies to all and binds all state organs and all persons. Article 41 deals with Labour Relations and provides that every person has the right to fair labour practices. Labour Relations are therefore a component of Bill of Rights. Article 47 deals with fair administrative action which include the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Under the FAA-Act, Section 2 defines administrative action to include any act, omission or decision of any person, body that affects legal rights or interests of any person to whom such action relates.
13. From the foregoing, it cannot be gainsaid that the FAA-Act applies to private contracts including contracts of employment. In fact almost all unfair termination claims usually revolve around fairness of procedure for termination and the right to be heard before the termination is carried out. Further, part VI of the Employment Act on termination and dismissal, especially sections 41,42,44,45,46 and 47 are all about fairness of the reason and process of termination of Employment.
14. The second issue is whether this court can waive an internal administrative process and entertain the Petitioner's complaints in the context of the FAA-Act. The petitioner seeks an order of the court for the waiver in order to apply for Judicial Review orders under the FAA-Act. Under section 9(2) of the FAA-Act the High Court (read courts of equal status) shall not review an administrative action or decision under the Act unless the mechanisms including internal mechanism for appeal or review and all remedies available under any other written law are first exhausted. The wording of this section are couched in mandatory terms and appears to give no room for exercise of judicial discretion over the provisions of this section. This order therefore is incapable of being granted. The court would instead order that the petition stands stayed pending the filing, hearing and determination of an appeal against the petitioners' dismissal which should be done within 60 days of this order.
15. On the question of the rate of interest to be paid on the loans advanced during the currency of employment, the court is persuaded and will rely on the decision of Mbaru J in the case of **Boniface Lum Amunga Biko Vs NBK [2017]** and hold that the interest rate remains at staff rates pending the hearing and determination of the Petition herein. On the issue of reinstatement, pending the determination of the petition, the court concurs with the counsel for the respondent that this is an order in a proper case to be made if merited after full trial. It may however be made at interlocutory stage where it has been demonstrated that there are exceptional and compelling circumstances or where the dismissal or termination is done despite the existence of a court order interdicting the same.
16. This matter shall be mentioned on the 15th day of November, 2018 for further directions on hearing and disposal.
17. It is so ordered.

Dated at Nairobi this 21st day of September, 2018

Abuodha J. N.

Judge

Delivered at Nairobi this 21st day of September, 2018

Abuodha J. N.

Judge

In the presence of:-

.....for the Claimant

.....for the Respondent.