



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 240 OF 2018

(Before Hon. Justice Mathews N. Nduma)

NASHON ASEKA.....CLAIMANT

VERSUS

MUMIAS SUGAR COMPANY LIMITED.....RESPONDENT

RULING

1. A Notice of Motion Application was filed on 28th Jun, 2018 seeking the following orders:-

- i. A temporary injunction do issue directed at the Respondent, it's Board of Directors, employees, workers, agents and/or whomsoever jointly and severally restraining them from terminating the services of the Claimant/Applicant pending the hearing and determination of this application.
- ii. A conservatory order does issue lifting the suspension of the Claimant/Applicant pending the hearing and determination of this application.
- iii. A temporary injunction do issue directed at the Respondent, it's Board of Directors, employees, workers, agents and/or whomsoever jointly and severally restraining them from terminating the services of the Claimant/Applicant pending the hearing and determination of this cause.
- iv. A conservatory order does issue lifting the suspension of the Claimant/Applicant pending the hearing and determination of this cause.
- v. The costs of this application be provided for.

2. An order was granted at the exparte stage restraining the Respondent from further extending the period of suspension pending the hearing and determination of the application.

3. The Respondent responded to this order by hastening the pending disciplinary process against the Claimant/Applicant prompting the Claimant/Applicant to file another application dated 5th July, 2018 to stop the Respondent from terminating the employment of the Claimant/Applicant pending the hearing and determination of the suit.

4. A further application was filed by the Claimant/Applicant on 18th July, 2018 seeking to commit the Chairman of the Board of Directors Mr. Isaac Sumba Shaunda to prison for contempt of court on allegations of having proceeded to terminate the employment of the Claimant/Applicant inspite knowledge and service of the court orders made on 2nd July, 2018 and 10th July, 2018.

5. The letter of termination dated 9th July, 2018 which terminated the employment of the Claimant/Applicant with effect from 7th July, 2018 is attached to the application dated 18th July, 2018.

6. The Application before me for ruling is however the application dated 28th June, 2018 and filed on the same date. The same is premised on grounds set out on the Notice of Motion and Supporting Affidavit of the Claimant/Applicant.

7. The nub of the application is that on 5th June, 2018 the Respondent sent the Claimant/Applicant on suspension for 21 days. The applicant had not been served with a notice to show cause or any charges or reasons for his suspension as at that date.

8. The suspension was then extended for a further 14 days.
9. The staff manual provides a mandatory suspension period of not more than 21 days.
10. The applicant prayed to be returned to work therefore in terms of the staff manual there being no charges yet made against him. The Applicant submitted further that the extension of suspension for 35 days was in violation of the Respondent's staff manual.
11. The Respondent embarked on an unlawful disciplinary hearing.
12. The Claimant/Applicant prays that interim orders be granted to stop the process, reinstate the Claimant/Applicant to his work pending the hearing and determination of the suit.
13. The court however cannot ignore subsequent information brought to its knowledge by the Claimant/Applicant that indeed the disciplinary process proceeded to conclusion and the employment of the Claimant/Applicant was terminated on 9th July, 2018. The court notes that the order issued to stop progression of the disciplinary process was issued on 10th July, 2018 after the termination had taken place.
14. The application was opposed on grounds of opposition supported by Respondent's Affidavit sworn by Flora Okoth, Company Secretary and Secretary Board of Directors of the Respondent.
15. She deposes that the Claimant/Applicant was lawfully suspended pending investigations of financial mismanagement set out in detail in the Affidavit Sworn on 6th July, 2018.
16. She prays the court to allow it to conclude the disciplinary process which is a management mandate and prerogative for good governance. That the application be dismissed with costs.

Determination

17. First issue for determination is whether the Claimant/Applicant has made out a prima facie case with a probability of success in terms of the decision in **Giella v Cassman Brown [1973] EA 358** and **Mrao v First American Bank Limited and 2 others (2003) KLR**.
18. In the Mrao case the court of appeal described a prima facie case to mean –

‘..... A case which on the material presented to court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.....’
19. From the facts before court at this stage, a disciplinary process was instituted against the Claimant/Applicant and had not been concluded by the time this suit and application was filed.
20. The main complaint was that the Respondent had violated the staff manual by not concluding the process within the 2 days it had placed the applicant on suspension and extended suspension period by a further 14 days.
21. That on this ground alone, the court stops the process and orders the Respondent to reinstate the applicant back to work.
22. Before the return date, the disciplinary process was underway. The applicant had appeared before the disciplinary committee of the Board and only a decision was pending.
23. The court served an order to restrain the Respondent from making a final decision pending the ruling in the pending application.
24. It has however come to the knowledge of the court through filings done by the applicant that by the time the court issued the injunction on 10th July, 2018 the final decision to terminate the employment of the applicant had been made on 9th July, 2018.
25. The pending suit as filed vide a memorandum of claim dated 28th July, 2018 does not deal with the issue of termination. It only deals with the issue of suspension and disciplinary process underway then.
26. The Claimant/Applicant has in the circumstances failed to make out a prima facie case with a probability of success based on the claim pending before court.
27. This court has stated time and again that it is loath to interfere with the management prerogative of employers especially on matters discipline except in exceptional circumstances of evident blatant disregard of existing law and procedure. No such case has been exhibited by the applicant thus far.
28. The issue in dispute as to the lawfulness and fairness of the disciplinary procedure and eventual termination may only be properly addressed upon hearing an amended suit on the merits.
29. Accordingly, the application dated 28th June, 2018 is dismissed with costs in the cause.

Dated and Signed in Kisumu this 17th day of September, 2018

Mathews N. Nduma

Judge

Appearances

Mr. Odeny for the Claimant/Applicant

Mr. Masavu for Respondent

Chrispo – Court Clerk