



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 758 OF 2018

(Before Hon. Lady Justice Hellen S. Wasilwa on 24th October 2018)

JULIANA NDINDA MULEI.....CLAIMANT

-VERSUS-

KENYATTA NATIONAL HOSPITAL.....RESPONDENT

RULING

1. The Applicant/Claimant herein filed a Notice of Motion application dated 18/5/2018 on the 21/5/2018 through the firm of Shadrack Mwendwa Mwinzi under Certificate of Urgency and brought under Article 50 of the Constitution of Kenya, 2010, Sections 3,12 (1) (2) (3) of the Employment and Labour Relations Court Act, 2011, Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and all other enabling provisions of the Law seeking the following orders:-

- a. THAT this Application be certified urgent and service of the same be dispensed with in the first instance and the Application be heard ex parte.**
- b. THAT pending the hearing and determination of this Application inter partes, an interim order of injunction do issue restraining the Respondent from effecting a surcharge against the Claimant/Applicant.**
- c. THAT pending the hearing and determination of the main suit herein, an order of injunction do issue restraining the Respondent from effecting a surcharge against the Claimant/Applicant.**
- d. THAT costs of the application be borne by the Respondent.**

2. The Application is supported by the Affidavit of JULIANA NDINDA MULEI the Applicant herein and also grounded on the following grounds:-

- 1. THAT the Claimant/Applicant, who is aged 57 years, has been an employee of the Respondent for 39 years since the year 1980 without any blemish on her record.**
- 2. THAT on 8th May, 2018 the Respondent wrote to the Claimant/Applicant informing her of a surcharge amounting to Kshs. 2,715,815.35 with effect from May, 2018;**
- 3. THAT the decision was arbitrary, illegal and unwarranted and was made without subjecting the Claimant/Applicant to due process, which includes a hearing before the Divisional Disciplinary Committee of the Respondent and further before the Surcharge Committee which would grant the Claimant/ Applicant an opportunity to be heard as to whether she should be surcharged, and how much.**
- 4. THAT if the surcharge is effected as threatened the Claimant/Applicant will be exposed to great financial and economic distress.**
- 5. THAT there is no prejudice to be suffered by the Plaintiff/Respondent in the event the orders sought are granted.**
- 6. THAT the Respondent's payroll is about the close hence the urgency of the matter.**

7. **THAT** we beseech this Honourable Court to aim at dispensing substantive justice to the parties.

8. **THAT** this application has been filed immediately the Defendant/Applicant became aware of the intended surcharge and without unreasonable delay.

3. In the supporting affidavit, the Applicant contends that she has been notified of a surcharge by the Respondent of Kshs.2,715,815.35 for the period of 2002 to 2008 which matter she had given an explanation to on 21/10/2009. She assumed the matter had been resolved but was shocked to receive the surcharge notification without being given an opportunity to explain the same.

4. She contends that this surcharge is tantamount to being condemned unheard and is against the Respondent's own Human Resource Manual which sets out when an employee can be surcharged. She depones that the surcharge will cause her untold suffering as it is illegal and hence should be stopped by Court. She annexed documentary proof of the averments as made.

5. The Respondents opposed this application. They filed a Replying Affidavit to this application on 27.6.2018 through the firm of Morara Apiemi and Nyangito Advocates. The affidavit was sworn by Peris Nyawira Ndungu the Respondent's Chief Human Resource Manager.

6. She deponed that there was a Board of Inquiry appointed by the Respondent's Chief Executive Officer in 2015 to review stock taking discrepancies for the year 2001/2002, 2002/2003, 2003/2004, 2004/2005. That the inquiry revealed that the Applicant had unexplained stock deficit amounting to Kshs.2,715,815.35 for the year 2003 to 2008.

7. She avers that the Applicant was issued with a Notice to Show Cause why disciplinary action should not be instituted against her and her explanation as given was considered and found unsatisfactory. A decision was then made to surcharge her.

8. The Claimant filed a supplementary affidavit in response to the Replying Affidavit and also submissions on 18/7/2018.

9. She reiterates that there was no inquiry established in 2018 as alleged but the same was in 2005 and she responded accordingly. She avers that the board's report was never availed to her nor was she given an opportunity to be heard on the same.

10. I have considered the averments and submissions made before me. In determining this application, I rely on the celebrated case of **Giella vs Cassman Brown** which establishes the principle on the grant of interlocutory application.

11. The 3 principles as established are that:-

1. A prima facie case must be established

2. The Applicant must establish she stands to suffer if the orders are not granted.

3. Where there is doubt, the Court will determine the matter in question.

12. It is apparent from the submissions of the Applicant herein that she has established a prima facie case. There is no indication she has been heard on the allegation levelled against her.

13. In my view, the direction taken by the Respondent flouts its own disciplinary rules and procedures. In the circumstances, I find the Applicant's application is meritorious. I therefore allow the orders sought and henceforth stop the intended surcharge pending the hearing and determination of this claim.

14. Costs in the cause.

Dated and delivered in open Court this 24th day of October, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Parties