



Jacinta Sekoh Ochieng v Kenya Pipeline Limited [2017] eKLR

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Neutral citation: [2017] KEELRC 2013 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2301 OF 2016
L NDOLO, J
JANUARY 27, 2017

BETWEEN

JACINTA SEKOH OCHIENG CLAIMANT

AND

KENYA PIPELINE LIMITED RESPONDENT

RULING

1. This ruling proceeds from the Claimant's application brought by Notice of Motion dated 14th November 2016 and filed in Court on even date. The application which is supported by the Claimant's application sworn on 14th November 2016 seeks the following orders:
 - a) That a temporary injunction be granted restraining the Respondent from filling the position of Chief Corporate Communications Officer previously held by the Claimant pending the hearing and determination of the claim;
 - b) That a stay of execution be granted on the termination letter dated 5th August 2016 addressed to the Claimant pending the hearing and determination of the claim;
 - c) That the Claimant be reinstated to her position pending the hearing and determination of the claim.
2. The application is based on the grounds set out below:
 - a) The termination of the Claimant's employment as contained in letter dated 5th August 2016 violated her rights as set out and guaranteed under the Employment Act, the Fair Administrative Action Act and the Constitution of Kenya, 2010;
 - b) The process that led to the termination of the Claimant's employment was malicious, ill-informed and in violation of Section 45 of the Employment Act;



- c) The process that led to the Claimant's termination reeked of discrimination and was therefore in violation of Article 27 of the Constitution of Kenya, 2010;
 - d) The Respondent's action of converting the Claimant's leave days into suspension was illegal;
 - e) The Respondent's action of subjecting the Claimant to compulsory leave which is not provided for in the Staff Rules and Regulations was illegal;
 - f) The Respondent has acted in an opaque, inimical and noxious manner by denying the Claimant a right to fair hearing before an independent and impartial tribunal or body as guaranteed under Article 47 of the Constitution of Kenya, the Fair Administrative Action Act, the Mwongozo Code of Governance for State Corporations and the Respondent's Staff Rules and Regulations, 2015;
 - g) The Respondent acted maliciously, capriciously, spuriously and illegally by subjecting the Claimant to a body bereft of jurisdiction to discipline her;
 - h) The Respondent acted and conducted itself in a manner actuated by malice and personal vendetta which is inimical to proper conduct of a public body by denying the Claimant the right to appeal as the appellate body exercised original jurisdiction;
 - i) The Respondent's actions as exhibited in its correspondence with the Claimant show that there was no intention to subject the Claimant to due process;
 - j) The impugned decision to terminate the Claimant's employment was in violation of the Claimant's inalienable right to be heard and was driven by personal vendetta.
3. In her supporting affidavit sworn on 14th November 2016, the Claimant depones that on 21st April 2016, she was issued with a show cause letter on allegations of gross misconduct, particulars being failure to surrender subsistence allowance advanced to her. The Claimant was also accused of failure to take instructions from her supervisor.
 4. The Claimant further depones that she was not allowed adequate time to prepare her response to the charges levelled against her. The Claimant adds that she was singled out for discriminatory treatment.
 5. The Respondent's response is contained in a replying affidavit sworn by its Managing Director, Joe Sang on 18th November 2016. He depones that the Claimant had obtained allowances from the Respondent for an event that had been cancelled and for non-existent travels.
 6. The Claimant was consequently sent on compulsory leave on 7th March 2016 and by letter dated 21st April 2016 she was issued with a letter detailing misdeeds and acts of gross dishonesty on her part.
 7. The Claimant was required to show cause why disciplinary action should not be taken against her. She presented her written response on 22nd April 2016 and she was invited to a hearing before the Respondent's Staff Disciplinary Committee on 23rd May 2016 at which she made representations.
 8. Sang states that after taking the Claimant's representations into consideration, the Staff Disciplinary Committee found her explanation unsatisfactory and made a recommendation that she be summarily dismissed. This recommendation was affirmed by the Board Human Resource Committee and approved by the full Board on 30th May 2016. The Claimant's employment was therefore terminated by letter dated 5th August 2016
 9. It is the Respondent's case that the decision to terminate the Claimant's employment was lawful and in the public interest. The Respondent states that to stay the Claimant's termination would in effect



- reverse and/or annul the Respondent's decision. It is the Respondent's position that the prayer for reinstatement is in the nature of a final order which cannot be granted at the interlocutory stage.
10. Additionally, it would not be in the public interest to halt recruitment of a Chief Corporate Communications Officer for the Respondent which is a strategic government agency. At any rate, the Claimant's employment having been already terminated, an order for stay would have the effect of reviving a non-existent contractual relationship.
 11. The issue for determination in this application is whether the Claimant has made out a case for grant of the orders sought at the interlocutory stage. The Claimant seeks stay of her termination, an order restraining the Respondent from recruiting for the position held by her and her reinstatement to that position.
 12. The Claimant's prayers in this application constitute both mandatory and prohibitive injunctive orders. The conditions for granting of such orders were well stated in the famous case of *Giella v Cassman Brown & Company Limited* [1973] EA as follows:
 - a) An applicant must show a prima facie case with a probability of success;
 - b) An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages;
 - c) If the Court is in doubt, it will decide the application on the balance of convenience.
 13. The question before the Court is whether the Claimant's application satisfies the conditions set out in *Giella v Cassman Brown* (supra). It was submitted on behalf of the Respondent that the orders sought are final in nature and cannot be granted at the interlocutory stage.
 14. In advancing this line, Counsel for the Respondent relied on the decision in *Gladys Boss Shollei v Judicial Service Commission* [2013] eKLR where Nduma J citing an earlier decision in *Alfred Nyungu Kimungui v Bomas of Kenya (Cause No 620 of 2013)* held that reinstatement is a substantive remedy that should normally issue after a full hearing.
 15. This is the law as I understand it. Once a termination of employment has occurred, the Court will not ordinarily issue an interlocutory order, whether it be called a stay of termination or an outright reinstatement, whose effect is to reverse the termination. The only exception would be where a termination is effected in defiance of a subsisting court order (see *Evans Mumo Mwangangi v Kitui County Public Service Board & another* [2016] eKLR).
 16. Regarding, the prayer for an order barring the filling of the position previously held by the Claimant, the Court was referred to the decision by Nzioki WaMakau J in *Tom Otieno Odongo v Cabinet Secretary Ministry of Labour Social Security & Services & National Social Security Fund Board of Trustees (Cause No 1174 of 2013)* where in declining to grant a similar order, the Judge stated that it would not be in the public interest to halt the recruitment process as the National Social Security Fund was expected to continue running efficiently even as the Claimant's case against it progressed. Nduma J reached a similar conclusion in the *Gladys Boss Shollei Case* (supra).
 17. I agree with the foregoing decisions and add that the right of an employee in the public service must always be balanced against the public interest. In this regard and applying the final test in *Giella v Cassman Brown*, the Court finds that the balance of convenience tilts in favour of the Respondent.
 18. Ultimately, the Claimant's application is declined. The costs of the application will be in the cause.
 19. The interim orders granted on 14th November 2016 are vacated.



20. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 27TH DAY OF
JANUARY 2017**

LINNET NDOLO

JUDGE

Appearance:

Mr. Okoth for the Claimant

Miss Nyagah for the Respondent

