



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1349 OF 2016
(Before Hon. Lady Justice Hellen S. Wasilwa on 16th January, 2017)

EDNA SEMITI.....CLAIMANT

VERSUS

INTEX CONSTRUCTION LIMITED.....RESPONDENT

RULING

1. The Application before Court is the Notice of Motion Application dated 12.7.2016 filed in Court under Certificate of Urgency. The Notice of Motion was filed under Rule 16 of the Industrial Court (Procedure) Rules 2010, Section 1A, 1B, 3 and 3A of the Civil Procedure Act and all enabling provision of law.

2. The Applicant seeks the following orders:

1. That the Application be certified as urgent and heard in the ex-parte in the first instance.

3. That the Honourable Court do issue an order restraining the Respondent, its servants, agents and or any other person acting through the Respondent from altering, varying, breaching, terminating or in any other manner whatsoever so deal with Claimant's employment contract dated 12th January 2015 until the final disposal of this Application.

3. That the Respondent either by itself, servants or agents be restrained by an order of this Court from terminating, altering, varying, breaching or abrogating the terms of the Claimant's employment contract dated 12th January 2015 until the final disposal of this suit.

4. That the costs of this Application be provided for.

3. The Application is supported by the supporting affidavit of Edna Semiti sworn on 12th July 2016 and on the following grounds:

1. That between 6th and 8th July 2016 the Respondent has through emails and letters demanded that the Claimant do execute a Consultancy Agreement in breach of the terms of the Claimant's existing employment contract.

2. That between 6th and 8th July 2016 in incessant verbal demands the Respondent has without any colour or right demanded that the Claimant executes a Consultancy Contract without due

regard to the existing contract of employment.

3. That if the Claimant executes the said Consultancy Agreement it will amount to a Constructive Termination of the Claimant's employment contract of employment with the Respondent.

4. That the Claimant earns a salary of Kshs.425,000/= and her livelihood and that of her children who are in school will be greatly prejudiced if the existing status quo was to be varied.

4. The Applicant has averred that she signed an appointment letter with the Respondent dated 12th January 2012 – Annex ES. 2. Initially she earned Kshs.350,000/= as per her payslip Annex ES. 3. The salary was finally increased to Kshs.425,000/= as per her Annex ES. 4.

5. She avers that by a letter dated 26th April 2016, the Respondent signified to her that they had accepted her verbal intention to resign voluntarily as per Annex ES.5.

6. That upon receiving the Respondent's letter dated 26th April 2016, she immediately wrote to the Respondent a letter dated 31st May 2016 denying any intention to resign. The letter is marked as Annex ES.6.

7. On 1.7.2016, she was forwarded a Draft Consultancy Agreement which she was expected to execute. The same is Annex ES.7.

8. Upon careful perusal of the same, she realized that the terms of the said Consultancy Agreement were a complete opposite of the terms contained in her existing employment contract. She perceived that the intention of the Respondent was to attempt to terminate her contract of employment without following due process. It is for this reason that she has come to Court seeking orders above.

9. Parts of the Application above have been spend and now what the Applicant wants the Court to order is to prevent the Respondents from terminating or varying her appointment.

10. The Respondents have filed a Replying Affidavit, filed in Court on 5.9.2016 sworn by one Sharon Mwakugu, the Respondent's Legal Manager.

11. The Respondents have deponed that on 14th March 2016, the Applicant verbally informed the Respondent's Managing Director that she was resigning from employment. That this was the 2nd time the Claimant had resigned as she had previously done so in December 2015. That the resignation was accepted by a letter dated 26th April 2016.

12. They deny the fact that they were forcing the Applicant to resign. The Respondents aver that the Applicant retracted her resignation when it was too late.

13. The Respondents aver that the issue of consultancy only came in because the Applicant was serving her notice period and this issue was discussed verbally in June 2016. The Respondent then followed up the matter by drafting a consultancy agreement for her review and comments. They now state that the consultancy agreement has now been withdrawn.

14. The Applicant avers that if the consultancy has been withdrawn, then the Applicant is still in employment.

15. Having considered the submissions of both parties, I note that Appendix ES.2 is the Applicant's letter of appointment. Under Clause 6 of the said Appendix it is indicated as follows:-

“Upon confirmation of the probationary period either party may terminate this letter of appointment by giving either party a three (3) months' written notice or three (3) months salary in

lieu of notice. After 3 years of service the notice period shall be 6 months or 6 (six) months salary in lieu of such notice.....”.

16. This letter is dated 2015 and so the Applicant has not served for over 3 years. The notice period applicable to her is therefore 3 months.

17. The Respondents have averred that the Applicant tendered her resignation verbally which Applicant has denied. From the appointment letter above a verbal notice was never envisaged and so the contention by the Respondent that the Claimant Applicant gave a verbal notice to resign is not tenable.

18. It therefore follows that the issue of the Applicant resigning is contestable and the Respondent cannot purport to terminate her services on this verbal resignation.

19. I therefore make a finding for the Applicant and order that the services of the Applicant cannot be terminated by the Respondent if they so wish without following due process and for valid reasons.

20. Those are the orders of this Court.

Read in open Court this 16th day of January, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Wanjiru for Respondent – Present

Wangalwa for Claimant – Absent