



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1981 OF 2016

PAUL NGEI KISILU.....CLAIMANT

VERSUS

ASTRAZENECA PHARMACEUTICALS LIMITED.....RESPONDENT

RULING

By application dated 25th November, 2016 the claimant, Paul Ngei Kisilu is seeking for orders that;

1. ...

2. *Spent.*

3. *The applicants disciplinary case hearing in absentia on 19th octobr, 2016 be and is hereby declared null and void.*

4. *The respondent's summary dismissal letter dated 1st November, 2016 be stayed and/or set aside pending the hearing and determination of this suit.*

5. *The applicant to resume duty without harassment, intimidation, threats of termination and/or termination of the applicant's employment pending the hearing and determination of this suit.*

6. ...

1. The application is supported by the annexed affidavit of the Claimant and on the grounds that on 17th October, 2016 the Claimant received notice of disciplinary hearing and suspension from duty for 7 days. On 1st November, 2016 the Claimant received letter of summary dismissal while the suit was pending in court and there were no justifiable grounds for the dismissal. The Respondent acted to circumvent the process of the court which is superior to the respondent's internal disciplinary process and undermine the dignity and authority of the court. The Claimant is a victim of witch-hunt especially after he filed his claim herein.

2. Further grounds in support of the application is that the respondent's disciplinary hearing on 19th October, 2016 was held in the absence of the Claimant in total disregard of his rights. The Claimant had served the Respondent for over 20 years before his dismissal and was denied his terminal dues.

3. In his Supporting and Supplementary affidavit, the Claimant avers that he moved the court under certificate of urgency for injunctive orders against the Respondent after he was served with a disciplinary enquiry notice which orders were granted and served upon the Respondent and hearing scheduled for 11th

October, 2016. The application was erroneously dismissed for non-attendance of advocate who proceeded to file an application for reinstatement of the application. At the hearing on 24th October, 2016 the Respondent asked for 7 days to file reply for hearing on 4th November, 2016 but within that time the Respondent proceeded to summon the Claimant and issue summary dismissal letter.

4. The Respondent was aware that the matter was in court but proceeded to dismiss the claimant. The reasons given for dismissal are farfetched as they relate to duties not allocated to the claimant. The charges levelled against the Claimant are false and without justification. The orders sought should issue by the letter of summary dismissal dated 1st November, 2016 being set aside.

5. The application of 26th September, 2016 was dismissed for non-attendance and another application filed on 17th October, 2016 seeking the reinstatement of the dismissed application. While the matter remained in court and the Respondent was aware of the same they proceeded with issuing disciplinary hearing and dismissal of the claimant. The Claimant has been at the service of the Respondent for long since 1998 without any conflict and there is no evidence of any misconduct.

6. In reply the Respondent filed Replying Affidavit sworn by Irene Kaimuri and dated 2nd December, 2016 and avers that as the Human Resource Business Partner – East and Southern Africa region of the Respondent has authority to reply herein. On 11th October, 2016 at 9 am the claimant's application dated 26th September, 2016 came for hearing but he was absent and the same was dismissed with costs. The Respondent is not in contempt of court orders and the disciplinary hearing undertaken against the Claimant was an internal management process of the respondent. The Claimant was notified by letter on 21st October, 2016 and which he failed to attend. This was followed with summary dismissal with an option of appeal which the Claimant failed to do.

7. Ms Kaimuri also avers that on 21st November, 2016 the Claimant collected his terminal dues.

8. The disciplinary process was not meant to circumvent the process of the court as the orders of 11th October, 2016 had not been set aside and the Respondent was entitled to proceed with its internal management and disciplinary process. The dismissal was justified and in accordance with the law following acts of commission and omission by the claimant.

9. The orders sought by the Claimant cannot issue in the interim and should await full hearing. The position held by the Claimant with the Respondent required trust and the relationship between the parties is strained with the loss of trust and if the orders sought are granted this would force the parties into a strained relationship.

10. Both parties filed written submissions.

11. The Claimant submits in reiteration of his application and based on the following cases – **Mary Chemweno Kiptui versus Kenya Pipeline Company Limited [2014] eKLR** that before termination the employee must be given notice and reasonable time to give defence and a reinstatement can be issued in the clearest of cases. In **Fredrick Odongo Owegi versus CFC Life Assurance Limited [2014] eKLR** the court held that an employee can sue on a wider cause of action for unfairness rather than wrongful breach of contract and in **Moses Kaunda Moro versus CMC Motors Group Ltd [2013] eKLR** it was held that standard procedure for handling cases of misconduct or poor performance is set out under section 41 of the Employment Act and where the court finds that the procedure was not followed there are remedies.

12. The Respondent submits that the mandatory order of injunction the Claimant is seeking cannot be issued at the interlocutory stage except in very clear cases and special circumstances. Section 49 of the Employment Act requires the court to consider the circumstances under which termination took place including the extent to which the employee contributed to the same as held in **Mundia Njeru Gateria versus Embu County Government & 3 others [2013] eKLR**. Reinstatement is a remedy not available

to the Claimant as the Respondent had valid reasons to dismiss the Claimant as held in **Locabail International Finance Ltd versus Agro-Export & Another [1986] 1 Al ER**, a mandatory injunction ought to be granted on an interlocutory application in the absence of special circumstances and only in clear cases. The employer has the prerogative to discipline its employees which must be protected by the court as held in **Dock Workers Union versus Kenya Ports Authority [2015] eKLR**. In this case the Claimant was given a fair chance to defend himself but refused to attend. In **BIFU versus Barclays Bank of Kenya Ltd [2014] eKLR** the court held that the employer cannot be faulted when an employee invited to a disciplinary hearing fails to attend without any justifiable cause. In this case therefore the orders sought cannot issue.

Determination

13. It is common cause that pending the hearing of this case that was filed on 26th September, 2016, the Claimant was dismissed from his employment with the Respondent on 1st November, 2016. The Claimant moved the court under Certificate of Urgency on 27th September, 2016 and interim orders were granted stopping the harassment of the Claimant and further staying the disciplinary hearing against the claimant. Hearing was scheduled for 11th October, 2016 but application and orders issued were dismissed due to the non-attendance of the claimant. The Claimant applied to have application reinstated and while the parties were seeking directions, the Respondent proceeded and issued disciplinary notice to the Claimant for attendance on 21st October, 2016. The Claimant did not attend and this was followed with letter of dismissal.

14. The fact of dismissal of the Claimant has taken effect. The substance of the orders sought is that the summary dismissal letter issued to the Claimant and dated 1st November, 2016 should be set aside and or stayed and the disciplinary hearing conducted in the absence of the Claimant be nullified.

15. To set aside the letter of 1st November, 2016 as issued to the Claimant would in essence be a reinstatement back to his employment with the Respondent and to stay or nullify the disciplinary hearing conducted in the absence of the Claimant would be to return the Claimant back to work and place at the a position subsisting before his disciplinary case was heard.

16. Such orders as sought ought to be approached with great caution as an order of reinstatement is a remedy available to an employee pursuant to section 49 of the Employment Act and can issue as a final order and upon hearing the merits of the case. In the case of **Stephen Ongoya versus Nairobi Academy (H) Limited [2014] eKLR**;

The claim for reinstatement is subject to various conditions as outlined under section 49 of the Employment Act. This is a provision for specific performance which should only be granted in the rarest of cases.

17. In **Paul Nyandewo Onyangoh versus Parliamentary Service Commission & Others, Cause No.2292 of 2016** the court declined to order a reinstatement pending hearing of the main suit noting that the employee had been issued with notice for his disciplinary hearing and was therefore given a fair chance to address his defence at the shop floor. That in a case where termination has taken effect and putting into account Rule 17 of the Employment and Labour Relations Court (Procedure) Rules and the powers of the court to remedy unfair termination in terms of section 12(3) of the Employment and Labour Relations Court Act read together with section 49 of the Employment Act, the remedy of reinstatement or re-engagement is available upon the court hearing both parties in the main. See **Ahmed Aden Hire versus Natiff Jama & Garissa County Government, Petition No.121 of 2016**.

18. As such, even in this case, the parties will have a chance to argue their case and articulate all issues for the court to make a holistic approach to all matters in dispute and render judgement.

19. Before conclusion, I wish to bring to the attention of the parties herein that where an employer proceeds to issues termination or dismissal letter to an employee for filing suit with the court, this a

matter specifically prohibited under section 46(h) of the Employment Act and where there is proof of the same, the court has power to remedy the same. Where there is a finding that the claim is justified and was filed for good cause, but the employer uses the same to dismiss the employee, such can specifically be remedied by the court on its own motion. However Such can only be addressed and discerned from the evidence of the parties.

Accordingly, orders sought herein shall not issue in the interim; the Respondent shall file defence within 14 days; and parties be allocated a hearing date for the main suit. Costs in the cause.

Dated, delivered in open court at Nairobi this 16th day of March, 2017.

M. MBARU

JUDGE

In the presence of:

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