



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2326 OF 2016

(Before Hon. Justice Hellen S. Wasilwa on 31st May, 2017)

FELIX LUVANDA MWIRITSA..... CLAIMANT

-VERSUS-

CABINET SECRETARY MINISTRY OF
INFORMATION, COMMUNICATION

AND TECHNOLOGY.....1ST RESPONDENT

THE PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. Before the Court is a Notice of Motion Application dated 18th November 2016, under Section 16 (4), (5), (6) and (7) and Section (23) of the Industrial Court (Procedure) Rules 2010 Article 41 and 40 the Constitution of Kenya and all other enabling provisions of law, where the Claimant prays for orders:-

- 1. That the application herein be certified as urgent case and be heard ex parte on account of its urgency.***
- 2. an order do issue declaring the instant case as a test suit for cases number 2327 to 2345.***
- 3. pending the hearing and determination of this application and suit, an order do issue compelling the 1st Respondent to reinstate the Claimants herein without victimization and discrimination.***
- 4. That pending the hearing and determination of this application and suit an order do issue stopping the 1st Respondent from recruiting to replace the Claimants herein.***
- 5. That this Honourable Court be pleased to give any other or further orders as it may deem fit and just in the circumstances.***
- 6. That costs of this application be bone in the cause.***

2. The application is based on the following grounds and the annexed affidavit of Felix Luvanda Mwiritsa, Joseph Mwangi Macharia, Anne Naumbwa Osyanju and Jairus Okari as well as other grounds to be adduced at the hearing.

a) That the Claimant herein with 20 others were employed by the 1st Respondent on a 3 months casual basis in different departments between the year of 2009 and 2016.

b) That during the subsistence of their casual employment 1st Respondent failed to renew the said casual contract but continued to use their services and paying them as per the respective wages bill for different years.

c) That since July 2016, the 1st Respondent refused to pay their monthly salaries and maintained the status for a period of 4 months.

d) That on the 31st of October 2016 with no notice or reason, the 1st Respondent issued termination letters to them and ordered them to immediately vacate its premises failing to pay them for the 4 months salary that was due to them.

e) That through struggle the 1st Respondent has agreed to pay for 3 months but has refused to pay the salary for the months of October 2016.

f) That it is in the *interest of justice and expediency that the orders sought be granted.*

3. The Respondent has filed a Replying Affidavit dated 9th December 2016 deposed to by Sammy Itemere the Principal Secretary for the 1st Respondent. They aver that on diverse dates, casuals were recruited depending on need and available budgetary provisions.

4. He avers that the casuals were engaged for three months and were paid a wage of Kshs 17,035.00 a month and not a wage salary. The casual workers' contract lapsed and were not renewed until their termination in the 2016/2017 financial year.

5. He avers that the contract stipulated that they were not entitled to any benefits or allowances during the period of engagement nor did the appointment carry with it a guarantee for permanent employment. The contract also contained an express term that it was liable to be cancelled without notice and that the renewal was not guaranteed at the end of the contract period.

6. He avers that they do not have the mandate to employ permanent and pensionable employees as that mandate belongs to the 2nd Respondent under Article 234 (2) (a) of the Constitution.

7. He avers that he is a stranger to the allegations that the Principle Accountant Mrs. Edith Nkanatha stated that she would pay the Claimants their salary of September 2016, giving no information as to payment of the rest of their dues.

8. He avers that the application is malicious and an abuse of the Court process, the orders sought go against public interest and public policy and if granted will occasion grave hardship to the Respondent and affect constitutionally granted mandate of the 2nd Respondent.

Submissions

9. The Claimants submits that they were engaged at a monthly salary of 17,035/= per month as per the provisions of the Wages Act.

10. The 1st category of Claimants were engaged as casuals in October 2009 for a 3 months contract that was to expire in December 2009 and they include:-

a) Felix Luvanda Mwirista engaged through a letter dated 23rd October, 2009;

b) Kaptum J. Monica 23rd October, 2009;

c) Alvin Mbalilwa 23rd October, 2009.

11. Upon the lapse of the said contract, the same was not renewed nor terminated but the 1st Respondent continued enjoying their services with constant pay from the 1st Respondent for the last 7 years.

12. The 2nd category of the Claimant were engaged equally as casuals in 2011 for a contract of 3 months which lapsed in April, 2011. The same was not renewed nor terminated but the 1st Respondent continued enjoying their services for the last 5 years, they included:-

a. Jairus Okari engaged on the 28th January, 2011

13. The 3rd category of Claimant successfully applied for the position after the same was advertised by the 1st Respondent on the 20th of May, 2014 (Exhibit 4 of claim is a copy of the advertisement) and were engaged on the 21st of October 2014 for a period of 3 months which expired in January, 2014. The same was not renewed nor terminated but the 1st Respondent continued enjoying their services with constant pay from the 1st Respondent for the last 2 years and they included:

a) Monica Wairimu Ngugi

b) Patrick Salau Muntolol

c) James Macharia

d) Henry Ntimama Konana

e) Kevin Chweya Morris

f) Erick Oloo Ogodo

g) Standly Aswani Ingolo

h) Abubakar Fatma Abdillahi

i) Juma Frank

Anne Naumbwa Osyanju

k) Catherine waihiga Njure

l) Daglous Namunane

m) Joseph Mwangi Macharia

n) Jennifer Mueni Kimongo

14. The last category of Claimants were engaged in February, 2016 equally as casuals on a 3 months contract basis which expired in May, 2016, the same was not renewed nor terminated but the 1st Respondent continued enjoying their services with pay from the 1st Respondent for the last 10 months and they included;

a) Yvonne Agiza Locho

b) Peris Waithera Kariuki

15. On the 31st day of October, 2016 the 1st Respondent without notice, reason or explanation purported to terminate the aforementioned employment contract purporting to terminate the contract commenced 1st July, 2016 and expired on 30th September, 2016 (see Exhibit 8 are copies of the termination letters) which contract were nonexistent and had never been given to any of the Claimants and not signed by them.

16. The Claimants submit that Code of Regulation of the 2nd Respondent under Section E sub-section E21 provides that:

“Employment of casuals;

E.21 (1) Permanent Secretaries/Authorized Officers will be responsible for approving the hiring of casual workers after ascertaining that there is need to hire them and that funds are available within their budgetary provision to meet the resultant expenditure.

(2) The Casual Workers should be hired on a piece rated jobs and should be paid in accordance with the minimum wage guidelines issued by the Government from time to time”.

17. They submit that the Respondents through an affidavit sworn by one Sammy Itemere at Exhibit “S11” have annexed a letter dated 6th January, 2006 drafted by the 2nd Respondent giving authority to the 1st Respondent to engage casuals without seeking approval from the 2nd Respondent, with an exception, that is in the very last paragraph that states that:

“...Due care should be taken to avoid hiring the same casual workers repeatedly to avoid breaching existing labour laws on the same”.

18. Further, via a letter dated 10th August, 2016 (EXHIBIT 12) the 1st Respondent through its Director of Human Resource was given an approval to hire 40 casuals within its departments.

19. They therefore submit that the Respondent acted within its mandate to hiring the Casuals.

20. The Claimants submit that it is agreed that they were in casual employment and that under Section 2 of the Employment Act 2007:

“Casual employee” means a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time”.

21. Further, the guiding principle then is the period of payment to the said worker which should be daily.

22. Under Section 37(1) of Employment Act:

“Notwithstanding any provisions of this Act, where a casual employee:

a) Works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or

b) Performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or are paid monthly and section 35 (1) (c) shall apply to that contract of service.

23. They submit that they were not paid daily but monthly and they worked continuously for up to 7

years, 5 years, 2 years and 10 months depending on the date of employment. The Respondent did not adduce any evidence to prove its claim that the Claimants were casual employees as defined in law. They were therefore not casual employees but permanent employees.

24. The Claimants submit that the termination of the employees was not procedurally or substantively fair. They cite **INDUSTRIAL CAUSE NUMBER 146 OF 2012 ALPHONCE MAGHANGA MWACHANYA VERSUS OPERATION 680 LIMITED J.RADIDO** states:-

“.....in order for an employer to meet the legal requirements of procedural fairness, Section 41 of the Employment Act, it should meet or show as a matter of factual evidence that it did the following:

i. Explained to the employee in a language the employee understood the reason why it was considering the termination.

ii. Allow a representative of the employee, being either a fellow employee or a shop floor representative to be present during the information/explanation of the reason.

iii. Heard and considered any explanation by employee or his representative.

iv.”.

25. Further In **INDUSTRIAL CAUSE 1050 OF 2011 LOICE OTIENO VERSUS KENYA COMMERCIAL BANK LIMITED J.RADIDO** states:

“The doctrine of natural justice or procedural fairness is now an essential part of the employment relationship. An employer must comply with procedures set out in section 41 even in circumstances where summary dismissal or what the Respondent referred to as instant dismissal is contemplated”.

26. They submit that in the Claimant’s case, termination was without any reason or cause, the 1st Respondent issued them with termination letters purporting to terminate an employment contract dated 1st July, 2016 which in fact never existed as the Claimants never signed such a contract.

27. As to the order of reinstatement, the Claimant submits that they are young and able, and were terminated unlawfully, the Respondents who had authority to hire them would not suffer any loss should they be reinstated. They submit that some of the terminated employees have been called back to offer services due to the desperate state of the 1st Respondent.

28. They rely on **INDUSTRIAL CAUSE NUMBER 21 OF 2012 KENYA UNION OF PRINTING, PUBLISHING, PAPER MANUFACTURERS WORKERS VERSUS TIMBER LIMITED J. Onyaya** stated:

“It is further the opinion of the Court that the suspension or termination was unlawful or unfair, the employee is entitled to at least partial reinstatement, and therefore, a total of the salaries during that period”.

29. They submit that the annexed Exhibit 12 of the application clearly shows that the 1st Respondent have been given money for purposes of retaining casual employees and if the order restraining them from engaging other employees in replacement of the Claimants is not issued, the 1st Respondent will go on to engage other persons. They should therefore be restrained.

30. The Respondent has filed written submissions dated 19th January 2017. They submit that the order for reinstatement without victimisation and discrimination is a final order in nature and cannot issue at this preliminary stage thus can only be issued after hearing and determination of the main suit by the

Honourable Court.

31. They submit that the Claimants have not demonstrated the balance of convenience and irreparable injury they are going to suffer before interlocutory final order can be sought at this stage.

32. They cite the case of **Deoraj vs. State of Maharashtra & Others Civil Appeal No 2084 of 2004** where it was held that balance of convenience and irreparable injury need to be demonstrated before interlocutory final orders can be granted.

33. They ask for the application to be dismissed with costs to the Respondents.

34. Having considered the submissions of both parties, the issues for determination are as follows:

1. Whether the Applicants have established a prima facie case with a probability of success to warrant issuance of orders being sought.

2. Whether the orders sought can be granted in the circumstances.

35. On 1st issue, the orders being sought are Interlocutory orders pending the hearing and determination of the suit. The orders given for payment of October 2016 salary was complied with.

36. The pending orders are for reinstatement which however deserved are final orders as prayed in the main suit and should not be given at the Interlocutory stage. It is this Court's position that the orders sought can only be given at the end of the hearing of the main cause if need be and so I decline to grant them.

37. I order that the parties take a convenient hearing date at the registry.

38. Costs in the cause.

Read in open Court this 31st day of May, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Muhanda for Claimant – Present

No appearance for Respondent