



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 2360 OF 2016

DANIEL WANJOHI MWANGI.....CLAIMANT

VERSUS

CHUNA COOPERATIVE SAVINGS AND

CREDIT SOCIETY LIMITED.....RESPONDENT

RULING

1. On 21st November 2016, the Claimant came to Court by way of Notice of Motion under certificate of urgency seeking the following orders:

- a) A temporary injunction restraining the Respondent from terminating the Claimant's employment and reinstating him to the position of Accountant;
- b) A temporary injunction restraining the Respondent from recovering the sum of Kshs. 602,132.50 from the Claimant.

2. The application which is supported by the Claimant's affidavit sworn on 17th November 2016 is based on the following grounds:

- a) The Respondent unlawfully demanded from the Claimant the sum of Kshs. 602,132.50 being part of monies embezzled from the Respondent by another employee;
- b) The Respondent demanded that the said amount be paid on or before 15th November 2016 failing which the money would be loaded onto the Claimant's loan account to facilitate the refund;
- c) The Respondent had gone further to interdict the Claimant without any justifiable cause;
- d) The actions of the Respondent have been undertaken arbitrarily and unlawfully without affording the Claimant a hearing;
- e) The Respondent is likely to load the said amount of Kshs. 602,132.50 onto the Claimant's loan account and further unlawfully dismiss the Claimant from employment;
- f) It is in the interest of justice that the orders sought are granted.

3. In its grounds of opposition filed on 2nd December 2016 the Respondent states the following:

a) That the Claimant has failed to satisfy the conditions for grant of an order of injunction as set out in ***Giella v Cassman Brown & Company Limited [1973] EA,358***;

b) The Claimant has misrepresented to the Court that his services have been terminated when in fact he was merely interdicted to allow for investigations;

c) The Claimant seeks an injunction against a legal process which was contractually sanctioned by the parties to determine the fate of the Claimant's employment in circumstances where the Respondent's funds were lost;

d) The Claimant has not come to Court with clean hands as he had admitted liability before the Respondent only to countermand when issued with a demand letter; in any event he was guilty of neglect of duty leading to the loss of Kshs. 1,924,265;

e) The Court has no jurisdiction to interfere with the terms of contract mutually entered into by the parties.

4. In a replying affidavit sworn by the Respondent's Chairman, Joseph Kiprop Maiyo on 1st December 2016, he reiterates the contents of the grounds of opposition. Maiyo adds that the Claimant had neglected to perform his duties thereby resulting to a fellow employee, one Oscar Ndula defrauding the Respondent the sum of Kshs. 1,924,265.

5. Maiyo states that as the Accountant, the Claimant was duty bound to reconcile bank statements daily, weekly, monthly and yearly but he grossly neglected to perform his duties resulting to the said Oscar Ndula committing fraud over a period in excess of 2 years.

6. The Claimant together with one Edward Nabangi were summoned by the Respondent to meet the Board on 26th July 2016 and after being offered an opportunity to defend himself, the Claimant failed to provide a satisfactory answer.

7. The Respondent therefore wrote to the Claimant on 29th July 2016 demanding payment of Kshs. 602,132.50 being his share of liability for neglect of duty. A similar letter was sent to Edward Nabangi.

8. The Claimant refused to pay the amount demanded and was summoned to the Board again on 18th October 2016 when he was interrogated at length. The Claimant failed to convince the Board of his innocence.

9. The Claimant seeks injunctive orders against the Respondent. The conditions upon which such an order may be granted were well articulated in ***Giella Vs Cassman Brown & Company Limited*** (supra) as follows:

a) That the applicant must show a *prima facie* case with a probability of success;

b) That an interlocutory injunction will not normally issue unless the applicant might 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.

10. In ***Nguruman Limited v Jan Bonde Nielsen & 2 others (CA No 77 of 2012)*** the Court of Appeal held that the three conditions established in ***Giella v Cassman Brown*** (supra) are sequential and cumulative.

11. In opposing the Claimant's application, the Respondent was emphatic that the Court should not interfere with an internal disciplinary process agreed upon by the parties. In ***Fredrick Sandu Amolo v Principal Namanga Day Secondary School & 2 others [2014] eKLR Mbaru J*** held that the Court should not interfere with an ongoing internal disciplinary process except in exceptional circumstances.

12. While acknowledging the holding in the *Fredrick Sandu Amolo Case* as good law, this Court in *Dr. Evans Mumo Mwangangi v Kitui County Public Service Board & another [2016] eKLR* held that in restraining itself from interfering with an internal disciplinary process, the Court is not to render itself a hapless bystander as injustice is meted out against an employee.

13. On 29th July 2016, the Respondent wrote to the claimant communicating the decision of the Board to surcharge him the sum of Kshs. 602,132.50 being a portion of money alleged to have been embezzled by Oscar Ndula. Subsequent to this, the Claimant was interdicted by letter dated 3rd November 2016 stating as follows:

“Dear Mr. Mwangi,

RE: INTERDICTION FROM DUTY WITH EFFECT FROM 4-11-2016

The Board of Directors of CHUNA Sacco Ltd during their meeting of 3rd

November, 2016 decided to suspend you from duty with immediate effect. The Board arrived at this decision due to the following reasons:

1. You committed an act of insubordination by refusing to obey legitimate instructions issued by the board to you. The instructions had been agreed upon between you and the board during the meeting of 18-10-2016. The board has punished you in line with clause 21.10 of the Terms of Service.

2. You also failed to carry out your duties efficiently and failed to comply with the terms of your appointment between 2013 and 2016 which led to loss of society funds.

3. You have also divulged society official matters by taking confidential issues to the lawyer. The lawyer has subsequently written to CHUNA.

This calls for punishment in line with clause 21.4

During the period of interdiction you will receive half pay and full house allowance. You are supposed to keep away from CHUNA premises but only come to CHUNA upon invitation. Hand over the office to the Chief Executive Officer.

Yours faithfully,

(Signed) J.K. MAIYO

CHAIRMAN”

14. A reading of this letter which makes reference to both suspension and interdiction suggests that the action taken by the Board against the Claimant was in fact summative punishment rather than interim action pending investigations.

15. Regarding the surcharge which the Claimant contests, the Court finds that the decision by the Board amounted to a final disciplinary action. What is critical is that there was no evidence of any prior disciplinary process. The Court therefore reached the conclusion that the decision to surcharge the Claimant amounted to disciplinary action without due process.

16. Additionally, it would appear that the subject matter of the surcharge was the same as that of the suspension/ interdiction thus subjecting the Claimant to double jeopardy.

17. Finally, the accusation contained in the interdiction/suspension letter that the Claimant had divulged

what the Respondent deemed as confidential information to his Advocate flies in the face of Section 46(h) of the Employment Act which outlaws disciplinary action on account of an employee pursuing legal redress against his employer.

18. In light of the foregoing the Court finds that the Respondent's actions against the Claimant were in total violation of the law and therefore makes the following orders:

- a) The letter of surcharge issued to the Claimant on 26th July 2016 is hereby nullified;
- b) The letter of interdiction dated 3rd November 2016 is also nullified and the Claimant reinstated back to his position of Accountant without loss of benefits;
- c) The Respondent will pay the costs of this application.

19. These are the orders of the Court.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 26TH DAY OF MAY 2017

LINNET NDOLO

JUDGE

Appearance:

Mr. Chege for the Claimant

Miss Nyamwata for the Respondent