



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

CAUSE NO. 1158 OF 2016

(Before Hon. Justice Hellen S. Wasilwa on 29th June, 2017)

BERNARD MUTUA KIONO.....CLAIMANT

- VERSUS -

KENYA ELECTRICITY

GENERATING COMPANY LIMITED.....RESPONDENT

RULING

1. There are two Applications before the Court. The first is by the Claimant/Applicant dated 16.6.2016 brought under Section 3, 12(1), (3), 20, 29 of the Employment and Labour Relations Court Act, Rule 16 of the Industrial Court (Procedure) Rules 2010, and all other enabling provisions of the law seeking for orders:

- 1. That the application be certified as urgent and the same be heard ex parte in the first instance.*
- 2. That pending the hearing and determination of this application inter partes this Honourable Court be pleased to order stay of retirement of the Claimant on medical grounds with effect from 18th June, 2015.*
- 3. That pending hearing and determination of this application inter partes, the Claimant be re-assessed by an independent neuropsychologist to determine his current medical status.*
- 4. That the Claimant be allowed to resume duties as per the medical report dated 10.11.2014.*
- 5. That the notice to retire the Claimant on medical grounds be withdrawn pending the hearing and determination of the main suit.*
- 6. That this Honourable Court be pleased to make such other appropriate orders in this matter.*

2. The Application is premised on the grounds that:

- a. The Claimant was involved in a road traffic accident on 26.9.2008 and suffered head injuries.*
- b. The Claimant underwent medical treatment and was in the process of recovery and there are*

recommendations by the doctors for him to resume duties as the recovery process was pegged on his resumption of duties in familiar environment.

c. The Respondent refused and/or failed to assign duties to the Claimant as per the recommendations of the Doctors.

d. The Respondent instead referred the Claim to a reassessment by the medical review board.

e. The Respondent on 18th May, 2016, retired the Claimant on medical grounds based on a medical report by the National Medical Board which the Claimant was never given a copy.

f. This was in blatant violation of the rules of natural justice.

g. It is only fair and just that the orders sought be granted.

3. The Application is supported by the Claimant's affidavit wherein he reiterates the grounds on the face of the application and adds that in the process of recovery there was a recommendation from one Dr. Michael Adriani Clinic and several other medical reports that his recovery was pegged on resumption of duty in familiar environment with familiar tasks and colleagues which the Respondent ignored.

4. He states that on 5.3.2015, the Respondent again compelled him to undergo a re-assessment by the national medical board, thereafter; he was given a notice of removal from payroll if he failed to go for re-assessment whereas the Respondent had failed to implement the recommendations of the 1st report. The Respondent proceeded to issue a notice of retirement on medical grounds on recommendations from Kenya Medical Practitioners and Dentists Board report which has never been availed to the Claimant despite requesting for a copy through his advocates on record.

5. The Respondent replied to the application by filing a Replying Affidavit by one James Obondo the Chief Administration Officer Medicare with the Respondent. He states that it is a term under the Respondent's procedure for retirement on medical grounds where there is evidence to its satisfaction that an employee is incapable by reason of any infirmity of mind or body of discharging the duties of their office and that the infirmity is likely to be permanent. That in the said procedure it is also provides that the Respondent shall before retiring an employee on medical grounds subject such employee to a medical examination by a practitioner appointed by the Respondent, to determine the employee's capacity for continued employment which it did on 29.10.2015 and a report was prepared attached to their Replying affidavit as JO2.

6. That the above cited report recommended the retirement of the Claimant on medical grounds which the Respondent did on 18.5.2016.

7. They further aver that the Claimant has persistently shown signs of cognitive impairment which have hindered his productivity at work and as such they are entitled to exercise their prerogative to retire the claimant on medical grounds. They pray for the Application to be dismissed with costs.

8. At the interim stage prayer No. 2 of the Claimant's Application was granted which order is still in force to date.

9. The Respondent have also filed an Application dated 30.9.2016 brought under section 3 of the Employment and Labour Relations Court Act, Rule 16(3) of the Industrial Court Rules and Articles 201 and 232 of the Constitution seeking for Orders:

1. That this Honourable Court be pleased to certify this Application urgent and service thereof be dispensed with in the first instance.

2. That pending the inter partes hearing and determination of this application, this Honourable Court be pleased to stay the Orders issued by the Honourable Lady Justice Wasilwa on 17th

June, 2016.

3. That this Honourable Court be pleased to vary, discharge and/or set aside the orders issued by the Honourable Lady Justice Wasilwa on 17th June, 2016.

4. That costs of the Application be in the cause.

10. The Application is based on the grounds that:

1. The Claimant was employed as an Electrical Engineer at the Respondent's Eastern Hydros Plant.

2. On or about 26th September, 2008, the Claimant herein was involved in an accident in which he suffered severe head injuries and the Respondent has at all material times offered financial and moral support in the Claimant's recovery process.

3. That upon conducting several medical examinations the Medical Board recommended that the Claimant be retired on medical grounds and on 18th May, 2016, the Respondent notified the Claimant of its intention to retire him on medical grounds with effect from 18.6.2016.

4. That on 17.6.2016, the Honourable Lady Justice Wasilwa issued orders restraining the Respondent from retiring the Claimant with effect from 18.6.2016, pending hearing and determination of the Claimant's application.

5. That the core duties of an Electrical Engineer are inter alia: Provide electrical engineering expertise while serving in a lead capacity over projects, develop equipment modifications and replacements as needed, ensure system commissioning, functional testing, documentation and operator training of newly installed equipment; develop and maintain an effective maintenance program for all electrical equipment associated with the projects; provide technical assistance to crews performing maintenance; Direct and/or participate in periodic or specialized tests of project electrical equipment.

6. That the nature of the severe head injuries sustained by the Claimant in the aforementioned accident impaired his capability to effectively and safely carry out the aforesaid tasks as the various medical reports indicated that performance in colour trails has not improved and that the Claimant had mild and moderate impairment of memory.

7. That on or about the year 2011 the Claimant's caregivers recommended that the Claimant herein be reintroduced to the work environment to assist his medical rehabilitation especially with a view to improving his memory during his social relations with his work colleagues.

8. That during the rehabilitation period, the Claimant was not afforded any work but was only given an opportunity to socially relate to his colleagues with a view to assist his recovery process.

9. That the Respondent has at all times morally and financially supported the Claimant in his rehabilitation process and despite the Claimant not having worked or carried out any of his duties for the last eight (8) years the respondent has expended substantial public resources in continuously paying his salary.

10. The Respondent herein is a public Company entirely reliant on public funds in carrying out all its operations including those at the Hydro Generating Power plant at which the Claimant was stationed.

11. That Pursuant to the provisions of Article 201 read together with Article 232 of the Constitution the Respondent has a duty to ensure that public funds are used in a prudent and responsible manner and there is an efficient and effective use of the said funds.

12. That the Claimant's duties are sensitive and the technical nature of operations at the Hydro Generating power plant and the effect of the orders issued by the Honourable Lady Justice Wasilwa places the Claimant herein, the Respondent's employees as well as the general public in imminent danger.

13. That the Claimant suffers from mental disorientation and the Respondent cannot in the present circumstances guarantee his safety and that of the Respondent's employees at the Hydro generation power plant.

14. That the Respondent has a duty to comply with the provision of section 6 and 55 of the Occupational Safety Health Act.

15. That the Hydro Generating power plant is highly sensitive and dangerous environment for the Claimant and we hereby invite the Honourable Court to visit the site to establish this fact.

16. This Application has been brought in good faith and without undue delay on the part of the Applicant.

17. It is in the interest of justice that the application herein is certified urgent and the Orders sought granted.

11. The Application is also supported by the affidavit of Daniel Mwendandu the Chief Human Resource and Administration Officer for Eastern Hydros of the Respondent wherein he reiterates the grounds on the face of the Application.

12. The Claimant has filed a Replying Affidavit to oppose the Respondent's Application wherein he states that the Respondent have not demonstrated why they want to retire him on medical grounds before the hearing and determination of his application of 16.6.2016 and yet the Respondent would not suffer any prejudice in the meantime.

13. He further states that the Respondent/Applicants have stopped remitting his salary from the month of July, 2016, to date which in his view is an indication of impunity and disregard of the Court's orders. Additionally that the Respondent have failed to comply with the recommendation of the doctors of his resumption of duties for his quick recovery.

14. The Claimant/Respondent states that the Respondent admits in their application that he was never afforded any opportunity to resume his duties as recommended by the medical specialist. Further that he would not be a danger to anyone as the medical specialist recommended that he go back to work.

Submissions

15. The Respondent submits in regards to the Claimant's application dated 16.6.2016 states that there are various tests to be applied before an employee is retired on medical grounds.

16. The objective test which takes into consideration whether a reasonable fair employer, in the circumstances, would have reached the same decision. They submit that he Claimant having been involved in a road traffic accident on 26.9.2008 did everything possible to make sure he was fit to return to work. This included paying for the Claimant's medical expenses both locally and abroad to the tune of excess of Kshs 1,430,125.36. The Respondent also transferred the Claimant from his position before the accident to a less strenuous one under close supervision.

17. They cite the case of **Kennedy Nyanguncha Omanga Vs. Bob Morgan Services Limited (2013) eKLR** it was held:

"While employers are entitled to terminate employment on the ground that an employee is too ill to work, they must exercise due care and sensitivity. First, the employer must show support to

the employee to recover and resume duty. Second, once the employer begins to consider termination, they must subject the employee to a specific medical examination aimed at establishing the employee's ability to resume work in the foreseeable future."

18. The Respondent state that they have fulfilled this test and the intended retirement of the Claimant is long overdue.

19. The other test that Respondent submit on is the subjective test in applying this test the Court will treat as relevant factors the terms of the contract the nature and expected duration of employment, the period of past employment, and the prospects of recovery.

20. They submit that they provided support to the Claimant to return to work but when the Claimant's health deteriorated, they subjected him to a subsequent medical assessment and withheld action until there was medical evidence that he would not be able to resume his duties in the foreseeable future.

21. The Respondent submits that they have done far and beyond what a typical employer would do, and adhered to procedural fairness.

22. There are no submissions on record filed by the Claimant Applicant on the aforestated application.

23. On the Application to discharge the orders of 17.6.2016, dated 30.9.2016, the Respondent submit that in obtaining the *ex parte* Orders the Claimant did not disclose all material facts to the Honorable Court and is in the circumstances undeserving of the injunctive reliefs granted.

24. They state that the Claimant suppressed the truth in presenting to the Honorable Court information to the effect that the Respondent seeks to unlawfully retire him from his employment on medical grounds without justifiable cause.

25. This they submit was intended to persuade the Court to grant an injunction without anticipating the extent of the harm that would result to the Respondent. They rely on the case of **Go TV Kenya Limited Vs. Royal Media Services Limited & 2 Others (2015) eKLR** where the Court cited with approval the case of **Tate Access Floor Vs Boswell (1990) 3All ER 303** where it was held:

"No rule is better established and far more important than the rule (golden rule) that a Plaintiff applying for ex parte relief must disclose to the court all matters relevant to the exercise of the Court's discretion whether or not to grant relief before giving the defendant an opportunity to be heard. If that duty is not observed by the Plaintiff, the Court will discharge the ex parte Order and may mark its displeasure, refuse the Plaintiff further inter-partes relief even though the circumstances would otherwise justify the grant of such relief."

26. They state that he Claimant's working environment is one that is highly sensitive and technical in nature. In view of the Claimant's health, they state that they are unable to guarantee his safety and the rest of its employees as required by the Occupational Safety Health Act. They pray for the Orders to be discharged for concealing material facts which if had been brought to the attention of the Court, it would not have granted the Orders.

27. The Claimant have filed submissions in relation to the Respondent's application dated 30.9.2016, wherein they state that it is only just that the parties be heard inter partes before the said Orders can be discharged. To grant the prayers sought by the Respondent the Claimant states would be to condemn him unheard.

28. The Claimant submits that it did not conceal relevant facts from the Court as he states that he has led evidence to show that he was retired on medical grounds and yet the Respondent had not taken steps to implement the Doctor's report which were that

1. He works in a familiar environment and with familiar tasks and colleagues.

2. A close supervision put in place until an adequate level of competency is reached.

3. Reduced workload which can be increased gradually.

29. The Claimant is of the view that the Application by the Respondent is a way to subvert obedience of the Orders of the Court dated 17.6.2016. They pray for the Application to be dismissed with costs.

30. In determining these Applications this Court has to establish whether the Applicant has established a prima facie case with a likelihood of success to warrant issuance of orders sought.

31. The Applicant Claimant has averred that he has been unfairly retired without being granted a hearing which is unprocedural.

32. It is not clear as to what processes the Respondent took the Claimant through before the retirement on medical grounds. It is noted that the Claimant Applicant is contesting the fairness in the whole process.

33. The Respondent on the other hand avers that they acted in all fairness and want the Interim orders discharged.

34. I have considered prayers sought in the entire claim which in my view are similar to those sought in the application by the Claimant.

35. If the application is determined at this stage, the entire claim will be determined. However, for expeditiously disposal of this case so that justice can be met for both parties, I will allow the Interim orders to subsist and have this claim fixed for hearing at the earliest opportunity.

Read in open Court this **29th day of June, 2017.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mugogo holding brief for Bosire for Claimant – Present

No appearance for Respondent