



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

AT NAIROBI

CAUSE NO.1948 OF 2016

GEORGE MUIRURI RUGURU.....CLAIMANT

VERSUS

OLD MUTUAL LIFE ASSURANCE.....RESPONDENT

RULING

1. The Respondent, Old Mutual Life Assurance by application and Notice of Motion dated 3rd May, 2017 made under the provisions of sections [Rules] 3, 11, 19 and 20 of the Employment and Labour Relations Court (Procedures) Rules, 2016 and article 25, 31, 41 and 50 of the Constitution and seeking for orders that;

a) This court be pleased to issue a permanent mandatory injunction against the respondent [claimant] from taking out or taking steps towards taking out and if taken out, effecting summonses to attend court (to give testimony or produce documents) as against an employee of the Applicant Company – one Ms Clarise Wananyanga – or any other employee of the Applicant Company without having first moved this court by way of a formal application.

b) In the event that the respondent has at the time of filing of this instant application taken out summons to attend court to give testimony or produce documents) as against any employee of the applicant Company and more so one Clarice Wananyanga the same be set side.

c) This court be pleased to declare section 20(4), (5), (6), (7), (8) and (9) of the Employment and Labour Relations Court (Procedure) Rules, 2016 unconstitutional and thereby null and void in so far as they violate, inter alia, articles 25, 31,41, and 50 of the constitution.

d) This court be pleased to make such other order/s as it may deem fit and just in the circumstances of the case.

e) The costs of this application be borne by the respondent.

2. The application is supported by the affidavit of George Muchiri, Advocate for the respondent and Applicant Company and on the grounds that the claimant has illegally and unprocedurally been taking out witness summonses as against an employee of the Applicant Company and respondent herein without having a formal application seeking the same and without having been heard by the court. the taking out of the summonses as done violates the applicant's and concerned employee's right to a fair hearing as the said employee is being summoned without having been given the reasons for the same and is not a party to these proceedings.

3. The taking of such summonses violates the concerned employee's right to privacy as well as her labour rights as they seek to compel her to reveal personal details concerning her personal engagement with the applicant company. The claimant has unprocedurally taken two witness summonses seeking to attend court of the concerned employee, Ms Clarice Wananyanga.

4. The principles of natural justice and fair hearing demand that the applicant company and Ms Wananyanga be allowed to articulate their views on any application to be made by the claimant as regards summoning Ms Wananyanga. The applicant has demonstrated a *prima facie* case with a probability of success in so as there is no evidence of an application for the issuance of the summonses having been made nor any representations before the court by the claimant.

5. The applicant stands to suffer irreparable harm and damage and prejudice if the claimant is allowed to continue unprocedurally in taking out summonses. The right to fair hearing is severely compromised in that no reasons have been given as to why one of its employees is purportedly being summoned before the court. Unless the court intervenes, the employee who is being summoned to attend to give evidence and produce documents stands to be ambushed on the stand and so too shall the applicant as no reasons have been provided as to why the said employee is required in court.

6. Parliament and the Rules Committee of the Employment and Labour Relations Court did not possibly have intended to limit parties' right to a fair hearing through the enactment or in passing sections 20(4), (5), (6), (7), (8) and (9) of the Employment and Labour Relations Court (Procedure) Rules, 2011 and Rule 20 of the Employment and Labour Relations Court (Procedure) Rules, 2016.

7. The application is filed in good faith and without undue delay and in the interests of justice and thus orders sought should be granted.

8. In reply, the claimant filed Grounds of Opposition and on the grounds that the application by the respondent is with the sole intent to delay the hearing and determination of the main claim as article 159 of the constitution requires the court to proceed without undue regard to procedural technicalities. Section 20(1) of the Employment and Labour Relations Court Act reiterates that all proceedings by the court should be without undue regard to technicalities.

9. The claimant took out summons for attendance of witnesses on the 20th December, 2016 and again on 2nd March, 2017 and none of these witnesses, Ben Ireri and Claris Wananyanga have raised an objection as to appearing and testifying in court and furnishing their contracts of employment with the respondent. The respondent cannot object to the witnesses being summoned for attendance as these are private citizens with their own constitutional rights and they are capable of defending their rights.

10. The claimant served a Notice to Produce Documents upon the respondent on 7th June, 2016 which notice requested for discovery of employment contracts of the parties whom are the subject of the witness summons. The respondent neglected to comply with the request at the pre-trial stage the respondent cannot make an objection at this stage when the suit has been set down for hearing was held in

Concord Insurance Co. Ltd versus NIC Bank Ltd [2013] eKLR.

11. other grounds are that the summonses for attendance of witnesses taken out by the claimant have always been signed and sanctioned by the court pursuant to Rule 20(3) of the Employment and Labour Relations Court (Procedure) Rules, 2016.

12. The orders seeking to declare sections of the Employment and Labour Relations Court Act as unconstitutional is defective as such is the preserve of constitutional petitioner and ought to include the office of the Attorney General and the national assembly as parties to such suit. The inclusion of this order is only meant to delay the hearing of the main claim.

13. The orders sought are without merit as mandatory injunction should only issue in exceptional cases as held in **Muchuha versus Ripples [1999-1994] E.A.** and **Kenya Breweries Limited & another versus**

Washington O Okenyo [2002] eKLR.

14. Both parties filed written submissions.

15. The respondent as the applicant submit that the mode adopted by the claimant in taking witness summons is unprocedural, unfair and illegal as this is in violation of the right to fair hearing of Ms Wananyanga. The requirement to have the witness summoned on matters relating to the claim without first making a formal application is unprocedural. Before an order for discovery is made the basis must be laid out and found to have merit as this is the essential of the judicial process herein. The court cannot order discovery if the purpose is to compel the other party to prove its case at the discovery stage as held in **Nicholas Muturi Okemwa & 8 others versus Judicial Service Commission [2015] eKLR.**

16. The respondent also submit that The principles for discovery are set out under the case of **Oluoch versus Charagu [2003] 2 EA** that there must be sufficient evidence that the documents exists which the other party has not disclosed the document relates to the matter in issue and such documents are in the possession of the other party. Discovery is thus not allowed as a matter of course, there must be a basis.

17. Sections 20(4), (5), (6), (7), (8) and (9) of the Employment and Labour Relations Court Act and Rule 20 of the Employment and Labour Relations Court (Procedure) Rules, 2016 are unconstitutional an null and void for being inconsistent with article 25(c), 31, 41, and 50 of the constitution. In so as the law and the rules thereto allow a party to take witness summonses without a formal application is contract to the constitution. The claimant therefore proceeded on an illegality when he was granted witness summonses and the statutory provisions under section 20 and rule 20 of the Employment and Labour Relations Court Act and the rules thereto should be declared unconstitutional. The court has jurisdiction to issue the orders sought.

18. The respondent has met the threshold for the grant of the orders sought and the balance of convenience favours the respondent. Irreparable damage and injury will result where the orders sought are not issued.

19. The claim submit that article 159(2) of the constitution provides that the court should administer justice without undue regard to technicalities. Section 20(1) of the Employment and Labour Relations Court Act reintegrate these constitutional provisions. The application by the respondent is only made with intent to delay the hearing of the main claim.

20. The claimant has sworn an affidavit and attached the employment contract of Claris Wananyanga dated 22nd September, 2015 with evidence that the position of Head of Retail Mass existed way after the claimant was terminate din July, 2015. Instead of making a response, the respondent has applied technicalities to avoid the truth.

Determination

The issues that emerge in this matter are;

Whether the court should issue a mandatory order restraining the claimant from applying for witness summons and

Whether sections *section 20(4), (5), (6), (7), (8) and (9) of the Employment and Labour Relations Court (Procedure) Rules, 2016* should be declared unconstitutional.

21. In conducting proceedings, the court general powers and provisions as set out under section 20 of the Employment and Labour Relations Court Act, 2011 requires that where appropriate proceed without undue regard to technicalities provided that relevant facts are taken into account that the material before court or required to be produced or brought before the court are material to the proceedings. Section 20 provides as follows;

S.20 General Powers of the Court

(1) In any proceedings to which this Act applies, the Court shall act without undue regard to technicalities: Provided that the Court may inform itself on any matter as it considers just and may take into account opinion evidence and such facts as it considers relevant and material to the proceedings.

(2)...

(3)...

(4) For the purpose of dealing with any matter before it, the Court may by order in writing signed by or on behalf of the Court require any person to—

(a) furnish in writing or otherwise, such particulars in relation to such matters as it may require;

(b) attend before it;

(c) give evidence on oath or otherwise; and

(d) produce any relevant documents.

22. Therefore, the court on its own motion or upon being moved by the parties can order a party to attend, produce evidence or documents. The Rules of the court, the Employment and Labour Relations Court (Procedure) Rules, 2016 thus require parties, when filing their pleadings to also include their evidence. This is unlike the High Court proceedings regulated under the Civil Procedure Act and the rules thereto. The court a court separate and foundationally different from the High Court as under article 162(2) of the constitution has its own rules of procedure.

23. Rule 14 (4) therefore provides as follows;

(4) Pleadings may contain evidence:

Provided that the Court may require the evidence to be verified by an affidavit or sworn oral evidence.

24. Rule 15 allow for pre-trial for the parties to attend before court and agree on how to conduct the hearing. Such I find are matters settled in good practice and ease the expeditious disposal of suits.

25. In this regard therefore, the provisions of article 50 of the constitution must be read in context. For proceedings before this court, Such is to be found under section 20 of the Employment and Labour Relations Court Act, 2011. The rules of the court as part of subsidiary legislation have the constitutional and statutory underpinnings and rule 20 must be seen in this light. In this regard therefore where Rule 20 requires that a party seeking to have a witness attend at any proceedings, the process is to seek summons for examination of any person deemed to have information which is relevant to any issue(s) before the court. the occur on its own motion may also direct such a party or any other party to attend and give evidence or produce evidence or document. Rule 20 provides as follows;

20. (1) The Court may, either on its own motion or at the request of a party, summon for examination any person who has information relevant to any of the issues before it.

(2) The Court may direct a party applying for witness summons to be responsible for service and to pay such money as is sufficient to cater for the expenses of the witness including travel and subsistence allowances at a reasonable rate determined by it.

(3) *The summons for examination shall be signed by the Registrar and shall—*

...

26. The rules of the court are therefore premised on the objectives of the court under section 3 of the Employment and Labour Relations Court Act, 2011 read together with section 20 on the how the our should conduct its proceedings. Such are processes and proceedings not alien to matters set out under article 50 of the constitution and by compliance to the court constitutive Act and the rules thereto, I find no departure from the constitutional principles or an infringement to the right to natural justice or right to privacy.

27. The injunctive orders thus sought by the respondent and seeking to restrain the claimant from taking steps, taking out, effecting summons to attend court by a witness, interrogated in the light of both constitutional and statutory provision under article 50 of the constitution and section 20 of the Employment and Labour Relations Court Act, 2011 to allow such would in essence stifle the claimants right to a fair hearing.

28. It is common cause that the claim herein is premised on the question of redundancy and the termination of the claimant's employment with the respondent. the challenge thus that must be posed at the hearing is whether at the time when the claimant was terminated from his employment there was a reason(s) that genuinely existed to be fair and valid to justify the termination of his employment on account that there was a redundancy within the business. Where indeed the position held by the claimant still exists within the respondent business, then such evidence becomes material.

29. The principles thus enumerated by the court in the above cited cases of ***Oluoch v Charagu (2003) 2 EA, 649 and quoted with approval in Nicholas Muturi Okemwa & 8 others v Judicial Service Commission [2015] eKLR*** on the finding that;

The law allows a party to a suit to seek production of documents in the possession of the opposing party if the documents sought are specific and important for the advancement of the case of the party seeking production. ... In Timothy Njoya v Attorney General and another [2014] eKLR, Lenaola J held that an applicant seeking production of documents under Article 35(1) of the Constitution must state clearly the information required the right they wish to advance and how the information sought would assist in the advancement of that right.

29. The claimant in seeking witness summons is clear and specific.

30. Without going into the merits of the case, the claimant has made application for Notice to Produce. Such was not honoured.

31. The notice for witness summons has been applied for and the Registrar of the court has dully issued the same to Ms Wananyaga. What is sought to be restrained is spent and even where such had not been issued the application for witness summons is lawful and procedural in accordance with section 20 and rule 20 of the Employment and Labour Relations Court Act, 2011 and the rules thereto.

32. As set out above, the other question the court must address is whether the provisions of sections *section 20(4), (5), (6), (7), (8) and (9) of the Employment and Labour Relations Court (Procedure) Rules, 2016* are unconstitutional.

33. It is imperative that where a party is seeking to address the court on any statutory provisions that are found as unconstitutional to be clear and precise. This is to ensure that where such an order is granted, there will be no ambiguity and the same can be enforced to the letter and word of the order(s) made. Such clarity and precision must start with the pleadings made and filed.

34. First, the framing of this order made by the respondent is problematic in the sense that reliance on the provisions of *section 20(4), (5), (6), (7), (8) and (9) of the Employment and Labour Relations Court*

(Procedure) Rules, 2016 is not similar to the provisions of the Employment and Labour Relations Court Act, 2011. Where the intention was to rely on the Act and not the Rules, the duty vests on the respondent as the applicant. The court cannot on its motion surmise the intent of the respondent save to add that clarity in pleadings is important.

35. Secondly, regard must be given to the constitutive law of the court. the Employment and Labour Relations Court Act, 2011 and its precursor the Industrial Court Act, 2011 have their basis under article 162(3) of the constitution. Such constitutional provisions give parliament the mandate to enact legislation and determine the jurisdiction of the court. thus section 12 of the Employment and Labour Relations Court Act, 2011 set out the wide powers of the court. under such mandate the court is required that disputes between an employer and employee are expeditiously addressed without undue regard to technicalities and ensure that parties before the court are heard within the rules of the court unlike suits filed before other court. as such, the rules of the court are lawful to the extent that they are consistent with statutory and constitutional values and principles to ensure justice.

36. In addressing matters of how and when to apply the rule on technicalities and the need for counsels in complying with the rules of procedure and not overly rely on the provisions of article 159(2) of the constitution, 2010 even where such provisions do not aid the case, the Court of Appeal in the case of **Humphrey Nyagoe Makori versus Kenya Airports Authority [2017] eKLR** held as follows;

*This Court has severally stated that **Article 159(2) of the Constitution** is not a panacea for all deficiencies in observance of laid down procedures, nor was it meant to throw all the Rules of procedure out through the window. It cannot be used by counsel as a shortcut or a cover for ineptness, or dereliction of duty. Simply put, it cannot aid counsel in this case. (See **Hunker Trading Company Ltd vs Elf Oil Kenya Ltd, Civil Appeal No. Nai 6 of 2010.**), where this Court reiterated the need to guard against arbitrariness and uncertainty when applying the O2 principle and insisted that Rules and precedents that are O2 compliant must be followed in order to maintain certainty and consistency, lest the principle turns into a unruly horse which the courts will not be able to contain. We note that in this case, learned counsel had not even realised that her application was fatally defective and it took the Court's initiative to bring that fact to her attention and even advise her on what she needed to do and gave her leave to do so. Instead of complying with those simple and straightforward instructions, counsel allowed the leave to lapse, and filed a totally incompetent application. She cannot find shelter under the umbrella of **Article 159 (2) of the Constitution** or the overriding principle.*

37. The above findings give emphasis that parties should not overly rely on a technicality in matters before court. Effort should be given to addressing the substantive issue at hand.

38. On the above analysis, the application by the respondent is found without merit.

Accordingly, application dated 3rd May, 2017 is hereby dismissed with costs to the claimant. Noting the hearing date allocated has since been overtaken by events and following the application by the respondent, parties shall be allocated a hearing date in court.

Dated and delivered in open court at Nairobi this 7th day of August. 2017.

M. MBARU JUDGE

In the presence of:

Court Assistants: Lillian Njenga & David Muturi

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