



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

CAUSE NO.715 OF 2017

JOHN NJERUCLAIMANT

VERSUS

INTEX CONSTRUCTION LTD.....RESPONDENT

RULING

1. The ruling herein is with regard to the claimant's application and Notice of Motion dated 18th April, 2017. Directions issued on 23rd June, 2017 on application dated 15th June, 2017 relates to a Certificate of Urgency filed by the claimant urging the court to hear the application subject to this ruling and dated 18th April, 2017. Parties have filed written submissions.

2. The Notice of Motion is premised on the provisions of Order 40 Rules 1, 2, 3 and 4 of the Civil | procedure Rules and section 3A of the Civil Procedure Act and seeking for orders that;

a) The court be pleased to issue a temporary injunction restraining he respondent and/or its servants, agents or otherwise, restrained by this court from dismissing, purporting to dismiss or in any way interfering with the claimant's employment pending the hearing and determination of this claim.

b) The court be pleased to issue a temporary injunction restraining the respondent and/or its servants or otherwise, filling the plaintiff's [claimant] position in the company pending the hearing and determination of this claim.

c) The court be pleased to issue an order quashing the claimant's termination and order reinstatement of the claimant pending the hearing and determination of this claim.

d) Costs of this application.

3. The application is supported by the claimant's Affidavit and on the grounds that he was employed by the respondent as Deputy Human Resource Manager at a salary of Kshs.255, 000.00 plus transport allowance of Kshs.20, 000.00 and communication allowance of Kshs.5, 000.00 per month since 18th July, 2016. By email communication dated 13th April, 2017 the claimant was unceremoniously terminated from his employment with the respondent.

4. Other ground in support of the application are that the claimant was terminated form his employment in utter disregard of the law, it was malicious and wrongful and thus unfair. Prior to the claimant working

with the respondent he was with Mastermind Tobacco (K) Ltd and was handpicked by the respondent. The termination of employment has therefore subjected the claimant to hardship by denying him a livelihood for himself and family.

5. The claimant had by his employment secured credit with Kenya Commercial Bank which he was able to service until his termination of employment. To therefore allow the unfair practice would subject the claimant to grave hardship unless restrained by the court, the respondent will replace the claimant's position to his detriment. It is in the interests of justice to preserve the claimant's employment with the respondent until the matter is heard and determined.

6. In reply, the respondent filed the Replying Affidavit sworn by Sharon Mwakugu, legal manager for the respondent and avers that by letter dated 18th July, 2016 the claimant was offered employment by the respondent. Such employment was confirmed by letter dated 8th December, 2016. The employment was governed by the terms and conditions set out in the claimant's contract of employment and the respondent's rules and regulations to which the claimant committed him to abide.

7. On 16th January, 2017 the respondent observed frequent incidences where the claimant had failed to come to work or falsely stated that he had been in a different office which was confirmed by the respondent to be false and a warning letter was issued on 17th January, 2017. The claimant persisted in his absence from work and failed to abide lawful instructions by the respondent and by exposing the respondent to potential liability on unpaid terminal dues to former employees specifically with regard to Edward Maina a former employee of ISSACO and follow up on payment of employees at Mitunguu Quarry despite reminders and proper command from the respondent.

8. On 16th February, 2017 the claimant failed to follow up attendance at work and a warning was issued. Despite the managing director addressing the claimant on his work performance, the claimant did not take heed.

9. On 12th April, 2017 the claimant unilaterally reviewed the salary of an employee without following the requisite internal policy or obtaining approval from the managing director. The claimant thus wilfully and carelessly performed his work exposing the respondent to liability. By email of equal date the respondent's managing director asked the claimant to explain the review of salary without approval but the claimant ignored the same.

10. On 13th April, 2017 the claimant was absent from work. The claimant was summarily dismissed on equal date for careless and improper performance of work. By filing the current application the claimant has failed to take into account the substantive reasons given for the summary dismissal.

11. There is no prima facie case to justify the orders sought and the application lacks merit and should be dismissed with costs.

12. Both parties filed their written submissions.

Determination

13. In taking account the Notice of Motion dated 18th April, 2016 and the affidavits in support, the Replying Affidavit by the respondent and the documents attached therein and the submissions by both parties, the substantive issues that arise is whether the claimant should be reinstated back to his position with the respondent and whether the claimant's position as held with the respondent before the summary dismissal should be preserved until the hearing of the main claim.

14. The order of reinstatement is a final order which requires specific performance by the employer. It is a remedy available under section 49 of the Employment Act, 2007. The court is to issue such a remedy upon taking into account various factors such as the wishes of the employee; circumstances leading to the summary dismissal; the practicability of the order for reinstatement; take into account the exceptional

circumstances that this is the only sufficient remedy to award take into account the length of service; the right to press claims or any unpaid wages, expenses or other claims owing to the employee; *inter alia*.

15. As such, the court has to take into account various factors before the order for specific performance and reinstatement can be ordered. To thus order a reinstatement in the interim would deny the respondent their defence and the court would equally be denied the opportunity to fully and effectively address the matters in issue as held in **Paul Nyadewo Onyangoh versus Parliamentary Service Commission and another, Cause No.2292 of 2016**.

16. With regard to securing the position held by the claimant before his dismissal, the court must be satisfied as to whether there is a *prima facie* case with chances of success, the principle of whether there are other adequate remedies that can address the alleged wrongful acts of the respondent and the balance of convenience.

17. The claimant asserts that he was unfairly dismissed from his employment in disregard of the law and the respondent asserts that the claimant was issued with warning letters and for absconding duty and careless performance of his duties, he was summarily dismissed. Section 41 of the Employment Act, 2007 is clear to the extent that even where an employee has grossly misconducted himself at this place of work, due process demands that he should be accorded a hearing before any sanction is issued. Such due process and procedural justice should be allowed even in cases that warrant summary dismissal. The duty is upon the employer to justify the reasons for the dismissal of the employee.

18. However, such matters require call of evidence and where the court is satisfied that indeed there was unfairness in terms of procedure or the substantive reasons that led to the dismissal of the employee, there are remedies of reinstatement, re-engagement and or compensation under section 49 of the Employment Act, 2007 read together with section 12 of the Employment and Labour Relations Court Act, 2011.

19. In this case the claimant asserts that he was whimsically terminated from his employment. The respondent does not challenge the fact of summary dismissal save to justify the same with the assertion that on 13th April, 2017 the claimant was absent from work which necessitated his summary dismissal for careless and improper performance of work. Such are matters addressed under section 41(1) of the Employment Act, 2007 as follows;

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. [Underline added].

20. Questions of work performance are matters which require the employer to issue notice to the employee setting out the same so as to have the employee give their defence. Without the respondent herein demonstrating that there was compliance with the mandatory provisions of the law at this instance, I find the claimant has a *prima facie* case that warrants the court to interrogate the substantive and procedural justice issues leading to his summary dismissal.

21. However and as noted above, section 49 of the Employment Act, 2007 gives various remedies for the court to consider upon hearing both parties. Without addressing the merits of the main claim at this stage, where the court finds that there was unfairness in the summary dismissal of the claimant from his employment with the respondent, the remedies set out in law are available. Such cannot be negated for the reasons that the position previously held by the claimant has not been preserved pending the hearing of the main claim. The remedies remain available and can be addressed and put into account in the court making final orders herein as appropriate and based on the evidence.

Accordingly, orders sought at this instance shall not issue save that the claimant shall be allocated a hearing date on priority basis. Costs shall be in the cause.

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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