



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1212 OF 2016
GEORGE MWONGELA MALINGA.....CLAIMANT
VERSUS
THE NATIONAL GOVERNMENT CONSTITUENCIES
DEVELOPMENT FUND BOARD.....RESPONDENT

Mr. Mutia for claimant

Mr. Omwenga for respondent

RULING

1. The notice of motion application dated 29th July 2016 seeks the following orders;

(i) That this application be certified urgent and be heard ex-parte in the first instance.

(ii) That the court be pleased to order the respondent to immediately facilitate the travelling of the Claimant to India for treatment by securing him the permission, undertaking to cover the medical expenses including and not limited to paying for travel expenses for the claimant and his assistant.

(iii) That the court be pleased to order the respondent to immediately process and pay all the outstanding claims by the claimant for running the Eastern Region office on behalf of the respondent and all other pending claims so as to enable the claimant facilitate his stay at India for treatment.

(iv) That the court be pleased to suspend the interdiction as implemented by the respondent against the claimant and order the respondent to immediately restore the respondent to his duties and restore all his benefits, pending the hearing and determination of this claim.

(v) That the court be pleased to issue a restraining order against the respondent restraining her from terminating the services of the claimant until this claim is fully determined.

(vi) That the costs of this application be borne by the respondent.

2. The application is supported on the following grounds set out on the face of the notice of motion;

(i) The claimant is suffering from cancer and his treatment has been stopped awaiting a PET CT evaluation which is not available in Kenya and this has put his life at risk.

(ii) A hospital in India, Dharamshila Hospital, where the claimant was treated earlier has accepted to take him for further treatment.

(iii) For the claimant to travel for the medical treatment outside the country he needs to be cleared by the Principal Secretary in the relevant ministry and that clearance can only be facilitated by the respondent.

(iv) The respondent has a contractual obligation to also pay for the medical expenses of the claimant on account of the claimant being her employee.

(v) The respondent has also been sitting on claims made by the claimant without any justifiable reasons and should immediately release the same to the claimant.

(vi) The claimant' constitutional right to life continues to be compromised by the act of the respondent failing to facilitate him and his assistant to travel for medical assistance for a condition that the respondent is aware is life threatening and if not adequately addressed can lead to termination of his life.

(vii) It is fair and just in the interests of justice and fairness for the application to be allowed.

(viii) The respondent will suffer no prejudice if this application is allowed.

3. Further grounds are contained in the supporting affidavit of the claimant sworn on 29th July 2016.

4. The application is opposed vide a replying affidavit of Simon Ndweka, Corporate Secretary sworn on 11th August 2015.

5. The butt of the response may be summarised as follows: -

(i) That all the employees of the respondent (inclusive the claimant) are medically covered by **BRITAM**. The respondent does not pay and or reimburse any medical bills incurred by its staff and or does not control, manage and direct the medical provider (Britam) to give any preference to any of its staff and or employees.

(ii) The medical insurance cover has its terms, conditions and limits and therefore in any event the court can not order the medical provider to give preference to the claimant. It is basically an Insurance Policy and or contract between the insurer and the insured and the procedure of getting one to be treated is spelt out in the policy document.

(iii) That the respondent has confirmed at paragraph 6 of the affidavit that, the respondent runs a medical schemes for its staff and condition 10 of the letter of renewal of contract states as below:

“The corporation operates a staff medical scheme subject to a satisfactory medical report at the time of appointment arising from a medical examination by a registered medical practitioner appointed by the Board or MOH you will be a member of the scheme and will be entitled to medical benefits as per the scheme rules.”

(iv) That the respondent being a Quasi state managed institution would not have allowed the claimant to use his personal money to run the offices of the respondent in the Eastern Region. The claimant was interdicted and is facing a disciplinary case before the respondent as provided for in the National Government Constituencies Development Fund Act 2015.

(v) That there is no evidence before the court to demonstrate that the claimant was authorised to use

his personal resources to run the said office at the alleged sum of Kshs.1,313,746/=or any other sum or at all.

(vi) That the application as filed and if granted will deny the respondent the right to a fair hearing as all the allegations raised by the claimant have been denied in toto since the filed defence raises serious triable issues for full trial.

(vii) That the claim is contested by the respondent and the orders prayed for in the application are summary in nature hence the application should be disallowed.

Determination

6. The court has carefully considered the application and is of the considered view that the applicant has not set out a *prima facie* case with a probability of success to warrant the court to grant the interim prayers sought pending the hearing and determination of the suit. (See **Giella –vs– Cassman Brown Ltd**).

7. Furthermore, the prayers sought are summary in nature and are only capable of grant after the hearing and determination of the main suit.

8. It would be a travesty of justice to grant these substantive claims at the interim stage without hearing both parties on the contested facts.

9. Accordingly, the application lacks merit and it dismissed with costs in the cause. The main suit be granted a hearing date on a priority basis.

Dated, Signed and Delivered at Nairobi this 22nd day of September 2017

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE