



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1276 OF 2017

(Before Hon. Lady Justice Hellen S. Wasilwa on 1st September, 2017)

MARIE CLAIRE BISAMAZA.....CLAIMANT

VERSUS

REGIONAL CENTRE ON SMALL ARMS

IN THE GREAT LAKES REGION, THE HORN OF

AFRICA AND BOARDING STATES (RECSA).....RESPONDENT

RULING

1. The Application before Court is the one dated 6.7.2017. This application was filed through a Certificate of Urgency brought by the Applicants through their Counsel Njuguna Kahari & Kiai Advocates. This application was brought through a Notice of Motion brought under Article 2(4), 27, 47 and 50 of the Constitution and Sections 5 and 45 of the Employment Act, Sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya and all other enabling provisions of the law.

2. The Applicant seeks the following orders:

1. That due to the urgency of this motion, the same be certified urgent, service of the same be dispensed with and the Motion be heard exparte in first instance.

2. That upon hearing exparte, the decision made by the Respondent vide a letter dated 23rd May, 2017 to summarily dismiss the employment of the Claimant be stayed and an order be issued restraining the Respondent from advertising, soliciting, interviewing and/or appointing person(s) and/or candidates(s) for the position of Project Coordinator for the African Union Project Funded by European Commission "The fight against the illicit accumulation and trafficking of firearms in Africa" pending the hearing and determination of this Application.

3. That upon hearing interpartes, the decision made by the Respondent vide a letter dated 23rd May, 2017 to summarily dismiss the employment of the Claimant be stayed and an order be issued restraining the Respondent from advertising, soliciting, interviewing and/or appointing person(s) and/or candidates(s) for the position of Project Coordinator for the African Union Project Funded by European Commission "The fight against the illicit accumulation and trafficking of firearms in Africa" pending the hearing and determination of the suit herein.

4. And/or in the alternative upon hearing interpartes, the decision made by the Respondent vide a letter dated 23rd May, 2017 summarily dismissing the Claimant herein be vacated and/or set aside and the Claimant be reinstated forthwith to the similar position of Project Coordinator for the African Union Project Funded by European Commission “The fight against the illicit accumulation and trafficking of firearms in Africa” pending the hearing and determination of the suit herein.

5. That costs of the Application be provided for.

3. The Motion is also supported by the supporting affidavit of the Applicant herein Marie Claire Bisamaza and on the following grounds:

1. That the Claimant has been in employment with the Respondent on contract since August 2011.

2. That on 1st January 2017 the Claimant’s employment was renewed by the Respondent for the position of Project Coordinator for the African Union Project Funded by European Commission “The fight against the illicit accumulation and trafficking of firearms in Africa” for a period of six (6) months.

3. That the Claimant’s period of employment with the Respondent was further extended until 28th February, 2018 in the 3rd Project Steering Committee meeting for the AU/EU SALW PROJECT held on 10th February, 2017 at Whitesands Hotel-Mombasa Kenya.

4. That the decision to summarily dismiss the Claimant’s employment is biased, flawed, irregular, unlawful and null and void as the same was based on malice and bent to target the person of the Claimant.

5. That the African Union and the European Union delegation to Kenya have also written to the Respondent with respect to the unlawful and irregular dismissal of the Claimant and have also demanded reinstatement of the Claimant to the position of AU-EU Project Coordinator.

6. That the Disciplinary Committee and the Executive Secretary of the Respondent acted ultra vires contrary to Articles 2, 27, 47 & 50 of the Constitution and the principles of natural justice.

7. That the Claimant stands to suffer prejudice and injustice without the intervention of this Honourable Court.

8. That no prejudice will be occasioned to the Respondent if the orders sought are granted.

9. That it is in the interest of justice that the orders sought be granted.

4. The main contention by the Applicant is that the Respondents have made a decision to summarily dismiss her without due regard to the law and procedures and that her reputation is at stake. She seeks to be reinstated and that the Respondent be barred from filling up this position.

5. The Respondent filed a replying affidavit to this application on 19.7.2017. The Application was sworn by one Philip Ouma Awino, the Respondent’s Director of Administration and Finance. The same was filed through H. Kago & Company Advocates.

6. The Respondents aver that they had a written contract with the Applicant as per Annex MCB 2 and this contract expired on 30.6.2017 and could not be renewed by any other person even Sponsors or Partners. They aver that the role of Partners and Sponsors was supervisory and 3rd Party and so they could not extend the Claimant’s contract unless it crystalizes into a written contract.

7. They contend that the Claimant has not established a prima facie case. They also aver that her Appendix MCB 7 was a request for documents and not an appeal. They also aver that the disciplinary committee was properly constituted and Director of Finance appeared as a witness and so the Applicant suffered no prejudice.

8. They aver that the balance of probabilities tilt in favour of the Respondent and ask the Court to dismiss the application with costs.

9. The Applicants contend that the letter of 8/6/2017 is an appeal as it states grounds of appeal and the records sought were for lodging an appeal. They aver that they have established a prima facie case and want the application allowed.

10. I have considered the averments of both parties. The issue for determination is whether the Applicants have established a prima facie case with a probability of success to warrant issuance of the orders sought. The celebrated case of **Giella vs Cassman Brown** has laid down the principles for Courts to consider before awarding injunction. The principles are as follows:

1. ..“The Applicant must show a prima facie case with a probability of success.

2. An Injunction will not be granted unless the Applicant might otherwise suffer irreparable injury which would not be compensated by award of damages and

3. When the Court is in doubt, it will decide the application on the balance of convenience.”

11. This principle has further been referred Halisbury’s Laws of England, Vol II (2009) 5th Edition, paragraph 385 which states that:-

“On an application for an Interlocutory Injunction, the Court must be satisfied that there is a serious question to be tried. The material available to Court at the hearing of the application must disclose that the claimant has real prospects for succeeding in his claim for a permanent Injunction at the trial. The former requirement that the Claimant should establish a strong prima facie case for a permanent Injunction before the Court would grant an interim injunction has been removed.”

12. I considered this principle in **Petition No. 46 of 2015 Idris Aden Mukhtar vs. the County Government of Carissa & Another (i.e KLR 2015)** where there were similar circumstances to the current application. The Applicants had also been dismissed by the Respondent and prayed for similar orders of reinstatement.

13. In seeking to determine whether the Applicant has placed before Court material to show she has real prospects of succeeding – I note she has shown she was dismissed before completing the disciplinary hearing appeal process. She had written a letter dated 8/7/2017 where in part she stated as follows:-

“This letter is to appeal against your decision for a summary dismissal for serious misconduct. My grounds of appeal are based on your decision to disrespect the laid down procedure of completing the disciplinary hearing as stipulated in the Staff Manual.....”.

14. She also requested for the disciplinary committee recommendation of the hearing held on 17/5/2017 and all records and statements to enable her prepare the appeal but these were never granted to her.

15. This prima facie case shows a flaw in the disciplinary process hearing as provided for in the Respondent’s Staff Manual. However the presence of a prima facie case alone will not be the sole consideration by this Court in determining whether to grant or not to grant orders being sought.

16. Limb No. 2 and 3 of the **Giella** case go beyond the prima facie case to the consideration of whether the Applicant can be compensated in damages and where the balance of convenience lies.

17. This Court has stated over and over again that it would be improper to grant final orders at the interlocutory stage.

18. My Learned brother Justice Rika in **Alfred Njungu Kiungui vs Bomas of Kenya Case No. 620/2013** rendered himself thus:

“The protection given under the Employment Act are to be taken by employees as a shield not a sword placed in their hands to impose themselves with the aid of the Court at the workplace. The Court has witnessed a large inflow of interlocutory applications when the employees wish to be protected against disciplinary processes. Some of the employees have approached the Court seeking ex parte orders of reinstatement. Rule 16(8) of the Industrial Court (Procedure Rules) 2010, states that the Court shall not grant an ex parte order which reinstates an employee whose services have been terminated”.

19. I do agree with the above proposition. It would be improper for this Court to decide this cause to finality at this stage by reinstating the Applicant to her position however flawed the process seems. I believe this is a proper case where the Applicant can be aptly compensated in damages.

20. In my view granting of the order of reinstatement at this stage would not augur well in the circumstances and the Court’s finding is that the balance of convenience tilts in favour of not granting the interim orders to reinstate as sought.

21. However so that the substratum of the entire cause is preserved, I will allow prayer No. 2 injuncting the Respondents from advertising, soliciting, interviewing and/or appointing persons to the substantive position of Project Coordinator for the African Union Project Funded by the European Commission – “the fight against the illicit accumulation and trafficking of firearms in Africa” pending the hearing and determination of this cause.

22. Given the nature of the orders granted I hereby direct that the main case be set down for hearing on priority basis.

23. Costs in the cause.

Read in open Court this **1st day of September, 2017.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Mwachuo for the Claimant Applicant – Present

Munawa for Respondent – Present