



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MALINDI
CAUSE NO. 42 OF 2017
JOEL GITUIRE MWANGICLAIMANT
VERSUS
KENYA CIVIL AVIATION AUTHORITY.....RESPONDENT
RULING

INTRODUCTION

1. The application before me is the Notice of Motion dated 28/9/2017. It seeks the following orders:

- (a) That pending the hearing and determination of this application, the Notice of Retirement dated 3rd June 2014 varying the terms of contract of employment be stayed and the claimant be retained in his current employment position with all benefits and terms of service as per the contract of employment.
- (b) That in the alternative, and without prejudice, the status quo be maintained pending the hearing and determination of the application and/or suit.
- (c) That the costs of this application be borne by the respondent

The motion is supported by the affidavit sworn by the claimant on 28/9/2017. The gist of the application is that the retirement notice is prematurely given because the claimant has not reached sixty years. According to him he was born in 1959 and not 16/10/1957 as indicated in his birth certificate.

2. The respondent has opposed the Motion and filed the replying affidavit sworn on 30/10/2017 by her Senior HR Officer, Ms/ Asanath Yagan. The gist of the objection is that the retirement notice was issued based on the information supplied by the claimant at the time of recruitment and afterwards that his date of birth was 16/10/1957.

APPLICANT'S SUBMISSIONS

3. Mr. Gicharu learned counsel for the claimant acknowledged that the claimants date of birth indicated in his National Identity Card (ID), Birth Certificate, Employment Application Form and Biodata is 16/10/1957. He however observed that on 3/4/2009, the claimant swore an affidavit to clarify that his date of birth was 1959 which I also the date indicated in his school leaving certificate, employment reference number and payslips. He therefore submitted that the applicant has made out a prima facie case with probability of success. He further submitted that unless injunction is granted, he will suffer

irreparable harm because even if he succeeds after trial, the retirement will have been effected. Finally he submitted that the balance of convenience favours the claimant who stands to lose his job. He therefore prayed for injunction pending trial and in the alternative, the court to order status quo to remain and hearing be done on priority basis.

RESPONDENT'S SUBMISSIONS

4. Mr. Mugambi learned counsel for the respondent submitted that the Motion was incompetent because the prayers sought being injunction are not ought in the main suit. He relied on the KCB vs Base Titanium Ltd[2015] eKLR in which the court struck out a Motion similar to the present one.

5. In addition he submitted that the Motion lacks merits because it falls far below the threshold for granting interlocutory injunction established by Giella Vs Caseman Brown Case. He submitted that the applicant has not proved a prima facie case as defined by the court of Appeal in Mraro vs first American Bank [2003] KLR page 125. In his view the applicant has not proved that his right under the contract has been breached by the respondent that calls for rebuttal by her in trial. He submitted that the Birth Certificate issued under the Birth and Death Registration Act is prima facie proof of the contents therein. He further made similar submission on the evidential value of the contents in the National ID Card which is also a statutory document. He consequently urged that the claimant's date of birth was 16/10/1957 which was confirmed by the claimant himself when he filled his employment form in 1981 and 2006 and as such the respondent was right in serving the impugned retirement notice.

6. In addition to the foregoing the counsel submitted that the claimant has not demonstrated that he will suffer irreparable harm if injunction is denied. He urged that the claimant has not proved that damages are not adequate compensation or that the respondent will not be able to meet the same if awarded.

7. Finally the counsel submitted that the balance of convenience favours the respondent because the claimant has already been removed from the respondents payroll and systems and as such is no longer factored in her budgetary allocation from 1/11/2017.

ANALYSIS AND DETERMINATION

8. The issues for determination are:

- (a) Whether the application is incompetent.
- (b) Whether the application meets the threshold for granting interlocutory injunction.

Incompetent Motion

9. I have carefully perused the reliefs sought by the claimant in the main suit and compared with the orders sought by the Motion. There is no doubt that the claimant has not sought for injunction in the main suit and as such the Motion herein is incompetent by dint of rule 17 of the rules of procedure of this court and not capable of being granted.

Merits

10. There is no dispute that the claimant filled employment forms when he was recruited in 1981 indicating his date of birth as 16/10/1957. There is also no dispute that both his Birth Certificate and National Identity Card indicate his date of birth as being 16/10/1957. It is further not disputed that in 2006 the applicant updated his Biodata and repeated the same date of birth. Finally there is no dispute that in 2009, the claimant swore an affidavit indicating that his date of birth was 1959 and not 1957.

11. After careful consideration of all the material presented to me and after considering the submissions by counsel, I agree with the respondent that the claimant has not proved a prima facie case with probability of success against the respondent. He has not proved that the retirement notice served was in

breach of his right under the contract of service. His contract of service required him to retire on attainment of 60 years. He filled employment form stating his date of birth as 16/10/1957 and thereafter provided statutory document namely birth certificate to prove the said date being birth. In my view, the reason why Birth certificate would be required by the employer is mainly to prove the date of birth and nationality. The document being statutory, I hold the view that it is prima facie proof of the contents in it. Consequently, the date of birth indicated in the claimant's birth certificate is the correct date of birth for the claimant and it could not be changed or amended by his affidavit. The claimant ought to have sought amendment of the date from the relevant office.

12. As regards irreparable harm, I agree with the respondent that the claimant has not demonstrated that if injunction is denied and the suit succeeds, damages will not be adequate remedy or that the respondent will not be able to pay any damages awarded. This being employment dispute any loss to the employee can be quantified in monetary terms.

13. Finally, I agree with the respondent that the balance of convenience favours her because as at 3/11/2017 when the Motion was heard, the claimant had already been removed from the respondent's payroll and systems, and that he was no longer factored in the budgetary allocation.

DISPOSITION

14. For the reason that the Notice of Motion dated 28/9/2017 is incompetent and lacks merits, I dismiss it with no order as to costs.

Dated, signed and delivered this 17th November 2017

O. Makau

Judge