



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 295 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

GREGORY OTIENO OWOUTHCLAIMANT

VRS

MUMIAS SUGAR CO. LIMITED.....RESPONDENT

R U L I N G

The Claimant filed a Memorandum of Claim dated 4th August, 2015 against the Respondent seeking the following remedies:-

1. An Order lifting the suspension of the Claimant effected by a letter dated 27/3/2015.
2. An Order restraining the Respondent from terminating the Claimant's employment by redundancy or otherwise without following due process and in accordance with the Employment Act, 2007.
3. Costs of this suit

Together with the Memorandum of Claim the Claimant filed a Notice of Motion under certificate of urgency seeking the following orders:-

1. This application be certified urgent and service thereof be dispensed with in the first instance
2. That upon prayer 1 being granted the Respondent, its servants and/or agents be restrained from terminating the Claimant's employment without following due process in accordance with the Employment Act, 2007 pending the hearing of this application inter-partes.
3. That upon prayer 2 being granted the Respondent, its servants and/or agents be restrained from terminating the Claimant's employment without following due process in accordance with the Employment Act, 2007 until this claim is heard and determined.
4. The costs of this application be provided for.

The application is supported by the affidavit of the Claimant and on the following grounds:-

- a) The Respondent has suspended the Claimant on false allegations on matters which do not concern him or his department.
- b) The Respondent has suspended the Claimant without affording him an opportunity of defending himself.
- c) The Respondent is unprocedurally declaring its employees redundant on same grounds

without following due process.

d) The Respondent's moves against the Claimant are geared towards unfairly terminating the claimant's employment.

e) It is fair and just that the injunctive orders sought be granted

The Respondent filed a replying affidavit of Voi Chiuli opposing the application. The application was argued on 23rd September, 2015.

Mr. Bruce Odeny appeared for the Claimant while Mr. Okweh Achiando appeared for the Respondent.

Background

The Claimant was employed by the Respondent on 22nd October, 2002. At the time material to this case the Claimant was an Area Trade Development Manager (Ethanol Exports) in the Respondent's Commercial Department.

On 27th March, 2015 the Claimant received a Notice of Suspension. The suspension notice states that preliminary investigations regarding ethanol sales process caused the Respondents Board to believe that the Claimant was involved in fraudulent activities that border on grave criminal acts relating to ethanol sales contrary to the Claimant's employment contract. The suspension letter further states that the Claimant is suspended to facilitate further investigations. As at the time of filing suit on 4th August, 2015, the Claimant was still under suspension.

In his affidavit in support of the application the Claimant contends that the Respondent is intent on terminating his employment on unsubstantiated issues of ethanol as there were no complaints of non-deliveries of ethanol. The Claimant further states that he was not required to respond to the letter of suspension whose charges are vague and that the suspension is for an unspecified period. He avers that the suspension is a witch hunt and from what had happened earlier he feared that the Respondent intended to terminate his employment by way of redundancy or other means. He is therefore seeking protection to prevent the Respondent from terminating his employment without following due process.

The Claimant annexed copies of letters of suspension, show cause and redundancy notices for other employees of the Respondent to support grounds for his fears that the Respondent intends to terminate his employment.

At the hearing Mr. Odeny, Counsel for the Claimant submitted that the Respondent had by the time of hearing which was 6 months into the suspension, not given the Claimant particulars of the charges against him or served him with a notice to show cause. He further submitted that no further action had been taken by the Respondent since the Claimant was issued with the letter of suspension and the delay in resolving the issue of suspension had become inordinate.

Mr. Odeny submitted that the letter of suspension was signed by the Managing Director, the highest ranking office and there is no other office the Claimant can seek intervention from that this is in contravention of Section 12(1)(b) of the Employment Act which requires the employer to have disciplinary rules containing particulars on whom the employee can appeal to if dissatisfied with disciplinary action taken against him.

For the Respondent Mr. Achiando submitted that in the application filed by the Claimant there is no prayer relating to suspension, that the Claimant's prayer is on termination and declaration of redundancy. He submitted that the Counsel for the Respondent referred to Section 10 of the Employment Act which provides for particulars which are contained in the Respondents Human Resource Manual.

On the signing of the suspension notice by the Managing Director of the Respondent Mr. Achiando submitted that the Claimant has not stated who should have signed or what prejudice has been caused to

the Claimant by the signature of the suspension letter by the Managing Director. He submitted that all letters are signed on behalf of the Managing Director.

On the Claimant's contention that he was not involved in the sale of ethanol Mr. Achiando submitted that the matter is still under investigation and further that the Respondent has not stated that the report attached to the Claimant's affidavit Appendix "GOO 4" is the basis of the Claimant's suspension. Mr. Achiando further submitted that the Claimant's contention that the list of companies to whom ethanol should be sold was provided by KRA is irrelevant as KRA has no authority to discipline the Claimant, that fraud is both a civil and criminal wrong and the Respondent is only concerned with the civil aspect.

Mr. Achiando submitted that the letters written to other employees appended to the Claimant's affidavit which the Claimant relies upon as proof that he is being targeted for termination relate to employees who are litigants in court and cannot be used as a point of reference as litigation is *in persona* and not *in rem*.

Mr. Achiando further submitted that the Claimant is mixing up redundancy and termination which are two different modes of separation provided for separately under Section 40 and 41 of the Employment Act respectively. That the fact that the Claimant has been suspended means that he is under disciplinary action under Section 41 and his contention that the Respondent is intent on declaring him redundant has no basis.

Relying on the case of *Giella v Cassman Brown* Mr. Achiando submitted that the Claimant has not demonstrated that he has a legitimate cause of action or that he will suffer irreparable loss as he is still earning full salary and allowances and living in premises of the Respondent. He submitted that the Claimant's case does not meet the threshold.

Relying on the case of *David Kimei v Energy Regulatory Commission [2013] eKLR* Mr. Achiando submitted that what the Claimant is asking the court to do is to take over the disciplinary process from the Respondent. In that case the court held that disciplinary process is the preserve of the employer's internal disciplinary mechanisms.

Mr. Achiando also referred to the case of *Joseph Muthura Mberia & Another v Council Jomo Kenyatta university of Agriculture and Technology* in which the court held that the employer is entitled to suspend an employee provided it is within the disciplinary provisions of the Respondent and is not inconsistent with the constitution.

Mr. Achiando also relied on the case of *Alfred Nyungu Kimungui v Bomas of Kenya [2013] eKLR* in which the court quoted with approval the decision in Industrial Court Cause No. 1200 of 2012 between *Professor Gitile Naituli v University Council Multimedia University College & Another*. In that case the court held that:-

"In the Industrial Court Cause Number 1200 of 2012 between Professor Gitile Naituli v University Council Multimedia University College and another, this Court refused to issue a temporary injunction restraining the employer from interference with the employee's peaceful performance of his duties (read initiation of a disciplinary process), pending the hearing of the main claim. The Court stated this of interlocutory orders:-

"The Employment Act does not intend that Courts take away managerial prerogatives from employers. To give the interim order would have the effect of stifling the management prerogative in staff administration. It would mean the employer does not have any more say in the contract of employment it has authored. This would be contrary to the intention of the Employment Act, which seeks to merely protect the weaker of the bargaining partners, not deprive the employer the power to run its business altogether."

Mr. Achiando submitted that the Claimant is asking the court to stop the Respondent from taking disciplinary action against him for fear of being declared redundant. He submitted that both discipline of employees and redundancy are a managerial prerogative of the employer and the court cannot tell the

employer what to do. He submitted that the court has not been told that the process does not meet the threshold of Section 41. Mr. Achiando also referred to the case of *Dorothy Ndavi v Board of Management of Kenya High School & 3 others* and the case of *Mrao Ltd v First American Bank Ltd & 2 others (2003)eKLR* which set out the threshold in the case of *Giella v Cassman Brown (supra)*. He further referred to *Rebecca Ann Maina & 2 Others v Jomo Kenyatta University of Agriculture and Technology (2014)eKLR* in which the court set out the circumstances when the court will intervene in disciplinary process.

Mr. Achiando also referred to the case of *Gladys Boss Shollei v Judicial Service Commission (2013) eKLR* where the court declined to reinstate the applicant at interlocutory stage.

Determination

I have considered the application together with the grounds and affidavit in support thereof as well as the replying affidavit. I have also considered the submissions by Counsel.

Although Counsel have delved in detail on the principles in *Giella v Cassman Brown (Supra)* on interlocutory injunctions and on the extent to which the court can interrogate the exercise of managerial prerogative powers, in my opinion the issue for determination is neither of the two. The specific prayers in the Claimant's application under consideration are that the court restrains the Respondent from terminating the Claimant's employment without complying with due process, first, pending the hearing of the application and secondly, pending the hearing of the claim. The basis of the claim is that the Claimant has been suspended without being afforded a hearing and because the employer was terminating and/or declaring employees redundant he fears that he may suffer the same fate. Mr. Odeny was emphatic that he is not seeking the lifting of the suspension at interlocutory stage.

The Claimant's only reason for seeking injunction against his termination is that other employees have either been terminated or declared redundant. As Mr. Achiando has pointed out, suspension is not evidence of redundancy and the fact that one employee has been declared redundant is not evidence that the Claimant is about to be declared redundant. He has not stated that the Respondent has taken any steps towards declaring him redundant and his fears of being declared redundant are thus unfounded.

The Claimant's grounds for seeking injunction against termination is that other employees have been terminated. This too is unfounded in my opinion. The Claimant has not demonstrated that any of the other employees whose letters he has appended have been terminated. All he has demonstrated is that they have been suspended and are undergoing disciplinary process.

Even if the said employees had been terminated the Claimant would have to show that they had been terminated unfairly and that he is also about to be terminated unfairly for the court to grant him an injunction.

I do not find any merit in the Claimant's contention that he is about to be terminated or declared redundant.

As I stated earlier however, the real issue disclosed in the oral submissions of both parties is whether the Claimant's suspension is valid. Mr. Odeny for the Claimant argues that the duration of the suspension was inordinate and that he had not been given a hearing before he was suspended. He also argues that the suspension was by the Managing Director and he was therefore denied a chance to appeal against the suspension.

My understanding of suspension is that it is resorted to only where there is reasonable suspicion that the employee has committed gross misconduct but further investigation is necessary which would more conveniently be carried out while he is temporarily out of office. This means that there may still be insufficient evidence to require him to show cause. Where there is sufficient evidence the suspension letter also doubles as or is issued together with a show cause letter requiring the employee to explain why he should not be subjected to disciplinary action. This was decision of the court in *Joseph*

Mutuura Mberia & Another v Council of Jomo Kenyatta University of Agriculture and Technology (Supra). It is therefore not feasible to give an employee a hearing before suspension when the very essence of suspension is to gather more information to justify the employee taken through the disciplinary process. The above case also dealt with the issue of a suspension letter being issued without reasons. It is only necessary to give reason where an employee is required to respond to the charges against the employee. In the present case since the case was under investigation and the Claimant was not required to respond to any charges at the point of suspension, the reasons given in the suspension letter, being that there was reason to believe the Claimant had been involved in fraudulent activities, was sufficient.

I have however noted that the Respondent's Staff Manual under Policy No. 47 on Disciplinary Procedures, at Paragraph 47.4 under the subheading "Authority" provides that:-

"Fragrant (read flagrant) breaches of discipline can always be dealt with by suspension. This at least gives the manager the opportunity for consultation with his immediate supervisor and with HR Department before final punishment is decided on. Periods of suspension should not be for longer than 21 days."

The Claimant has been on suspension from 27th March 2015. At the time of filing his claim on 4th August, 2015, he had been on suspension for more than 4 months, yet the Staff Manual provides for suspension for up to 21 days only. At the time of hearing Mr. Achiando stated that investigations were still going on and the Claimant should wait for the outcome of investigations and not put the cart before the horse. He further stated that the Claimant would be given a show cause letter at the employer's discretion.

I do not agree with Mr. Achiando's position. The Respondent cannot put an employee on indefinite suspension against the provisions of its very own regulations. If the Respondent was not ready to conclude the process within the prescribed period of 21 days it should have carried out its investigations and finalised them before sending the Claimant on suspension. Although it is not formal punishment, an employee on suspension is saddled with the uncertainty of not knowing his fate. His self esteem is punctured and his right to work is interfered with. Any disciplinary action must take the shortest time possible, otherwise it turns into a punishment.

Having kept the Claimant on suspension far beyond the 21 days period allowed by the Staff Manual, the suspension is unprocedural and unfair. The Claimant must therefore be relieved of the burden of the suspension.

For the foregoing reasons I direct that the suspension letter be withdrawn forthwith.

For the avoidance of doubt, the withdrawal of suspension letter is not a bar to disciplinary action being continued against the Claimant provided that the same is in compliant with both the law and the Respondent's disciplinary procedure.

The costs of the application shall be costs in the suit.

Dated signed and delivered this 21st day of January, 2016

MAUREEN ONYANGO

JUDGE