



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE 709 OF 2015

JEFF MILTON O. ODONGO.....CLAIMANT

VS

KENYA PORTS AUTHORITY.....RESPONDENT

RULING

Introduction

1. The claimant was employed by the respondent in July 2007 as a casual in the Health Safety & Environment Department. On 15.7. 2008 he was appointed Senior Clerical Assistant, Grade HG1 for 2 years contract after a successful interview. However, on 11.1.2010, he was employed on permanent and pensionable terms in the same position and later he was promoted to Assistant Safety Officer {Statistics}, Grade HM4. Prior to his appointment, he presented his academic as well as professional certificates to the respondent's personnel Department and filled an Employee Details Form.

2. On 16.4.2015, he received Show Cause letter dated 28.2.2015 from the respondent, alleging that he had presented forged academic certificates to the respondent's management for purposes of securing employment or career advancement. He denied the offence and requested for a personal hearing which was done on 23.6.2015 by a committee of inquiry chaired by a Mr. Yobesh Oyaro before which he again denied the alleged offence. Two months after said hearing, and before the decision was pronounced, the claimant was summoned by the Ethic and Anti-corruption Commission by a letter dated 4.9.2015 and questioned on the same matter of presenting fake academic and professional certificates to the respondent.

3. The claimant was offended by the foregoing hearings and processes and brought this suit on 16.9.2015 seeking the following orders:-

- a. Permanent injunction and or prohibitory order to restrain the respondent and or her agents, from interfering with the claimant's employment with the respondent, or taking the purported or any administrative , disciplinary action against the claimant, dismissing or in any other manner whatsoever terminating or suspending the employment as purported or at all.
- b. The respondent be compelled to produce the report prepared by the committee of inquiry aforesaid together with the recommendations to this court and further serve the claimant with a certified copy of the same.
- c. Compel the respondent to expunge and or remove the claimant's name from the list of the respondent's employees with fake or forged certificates.
- d. General, punitive and exemplary damages for the illegal and unfair administrative actions and embarrassment.

4. Contemporaneously with the suit, the claimant filed the Notice of Motion dated 16.9.2015 seeking order a, b and c above pending the hearing and determination of the suit. The Motion is supported by the claimant's affidavit sworn on 16.9.2015. The gist of the Motion and the Supporting affidavit is that the alleged misconduct of presenting fake certificates is not valid and as it has not been substantiated. That, he never presented any fake academic and professional certificates to the respondent for purposes of securing employment or career progression. That, if the injunction sought is denied, he will not only be severely prejudiced but also stand to suffer irreparable loss and damage.

5. The respondent has opposed the Motion by the Replying Affidavit sworn on 10.10.2015 by Mr. Marco Ngolia. The gist of the the Replying Affidavit is that the respondent received direction from the Public Service Commission (PSC) on 27.6.2012 to confirm the veracity of the Academic and professional certificates of her entire workforce including the claimant. That she established a committee of Inquiry to carry out the verification exercise and the committee presented its report to the respondent's Board. That the report implicated 130 employees including the claimant with the offence of presenting fake certificates for purposes of securing employment or career advancement.

6. As a result of the aforesaid report, respondent set up a disciplinary committee to hear and recommend disciplinary action against the implicated employees. That the claimant was heard by the committee on 23.6.2015 and a decision on his guilt or otherwise is pending. That according to the respondent, the process of the verifying the claimant's certificates and the disciplinary hearing was fair and should be allowed to continue to its logical conclusion. The motion was disposed by way of written submissions.

Analysis and Determination

7. The issue for determination herein is whether the claimant's Motion meets the threshold for the grant the injunction and the other orders sought pending the hearing and determination of the suit. For injunction to issue at this stage to issue, the applicant must prove that:

- a. He has a prima facie case with probability of success,
- b. If the order is denied, he shall suffer irreparable injury,
- c. The balance of convenience is in his favour.

Prima facie case

8. The respondent has accused the claimant of presenting to her fake or forged academic certificates especially the KCSE Certificate. The claimant has however denied the alleged offence and maintained that the certificate he presented during the verification exercise was genuine and it indicated a mean score of D+ and not B- as indicated in the Employee Details Form used by the respondent to accuse him. The claimant has denied being the author of the said employment details form and further denies that the same has the status of an academic certificate. According to him the whole verification exercise is illegal, malicious, unlawful, wrongful and unfair.

9. The respondent has admitted the authenticity of the KCSE certificate produced by the claimant with a mean grade D+. She has also confirmed the claimant never presented his KCSE certificate but police abstract to prove the loss of the certificate at the time of his recruitment. The question that begs for answer is whether the claimant is validly being accused of presenting a fake or forged academic certificate.

10. After careful consideration of the material placed before it, the Court is of the view that the applicant has proved a prima facie case with a probability of success. The reason for the foregoing finding is that the reason being advanced for taking disciplinary action against the claimant is not consistent with presenting fake or forged academic and professional certificates.

Irreparable harm

11. The claimant has submitted that if the injunction is denied he will suffer irreparable harm because he

may be summarily dismissed from employment. The respondent has however denied that the claimant will suffer any irreparable loss if injunction is denied. She submitted that injunction is only ordered where the injury to be suffered is irreparable. That at common law damages is ordinarily adequate remedy in employment. she relied on Court of Appeal decision in *Nguruman limited v Jan Bonde Nielsen & 2 others[2014] e KLR* where the court held:-

“in conclusion, we stress that it must always be borne in mind that the very foundation of the jurisdiction to issue orders of injunction vests in the probability of irreparable injury, the inadequacy of pecuniary compensation and the prevention of the multiplicity of suits and where facts are not shown to bring the case within the these conditions the relief of injunction is not available.”

12. The burden of proving the existence of real injury that cannot be adequately compensated by damages rests with the applicant. In this case the claimant has not shown that if he is dismissed from employment after the disciplinary process damages will not be adequate remedy in the event his suit succeeds after trial. In the opinion of this court the employment Act (AE) has provided for robust reliefs including damages and reinstatement to remedy for unfair and wrongful termination of employment of every employee in Kenya. Consequently, the court finds that the claimant will not suffer irreparable harm if injunction is denied at this stage.

Balance of convenience

13. As it was established in the *Giella v caseman Brown &co Ltd[1973] EA 358*, if the court is in any doubt, it will decide the application on a balance of convenient . However in this case although, the claimant has established a prima facie case with probability of success the court has no doubt that he will suffer no irreparable loss if his suit is successful.

14. In addition the claimant has not proved that the respondent is acting in breach of the law and or the employment contract. It is trite law that an employer has the legal right to subject his employees to disciplinary process provided that he does so having in mind the procedural safeguards erected by the law. In the present case the claimant has undergone the inquiry and what remains is the verdict from the Disciplinary committee. The court therefore sees no need to muzzle the committee from delivering its verdict because the claimant will have an opportunity to challenge it if it turns out to be unlawful, unfair and or wrongful.

Yobesh Report and Recommendations

15. The prayer for an order to compel the respondent to avail to this court the Report and the recommendations of the disciplinary hearing under review herein cannot be granted. The court will normally not interfere with internal disciplinary mechanism except where the employment relationship has a statutory under pinning and it is shown that the employer in the said internal is exceeding his mandate or is acting in breach of the law. In the present case however, although the applicant is a public servant, his appointment lacks statutory underpinning. The respondent will therefore not be compelled but put at liberty to file a copy of the report after the Committee of Inquiry delivers its decision.

Expunge claimant’s name

16. The prayer to compel the respondent to remove the name of the claimant from the list of employees with fake certificates is final in nature and cannot be granted at this stage. It must await the hearing of evidence before a determination can be made on merits.

Disposition

17. For the reasons highlighted above, the claimants Notice of Motion dated 16.9.2015 is dismissed for lack of merits.

Signed, dated and delivered this 26th day of February, 2016.

ONESMUS MAKAU

JUDGE