



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 312 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

ELIAS OMOLO OYOO.....CLAIMANT

-VERSUS-

MUMIAS SUGAR CO LTD.....RESPONDENT

RULING

The Claimant filed the Memorandum of claim herein against the Respondent seeking an order restraining the Respondent from terminating his employment by way of redundancy or otherwise without following the due process and in accordance with the Employment Act, 2007.

Together with the Memorandum of claim the Claimant filed a notice of motion under certificate of urgency seeking the following orders;

1. *That 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 termination the Claimant's employment without following due process in accordance with the Employment Act, 2007 pending the hearing of this application inter-parte.*
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. *That the costs of this application be provided for.*

The Motion is supported by the Claimant's affidavit sworn on 17th August, 2015 and on the grounds on the face of the motion. The Claimant also filed a further affidavit sworn and filed on 1st October, 2015.

The Respondent opposed the application and filed a replying affidavit of Voi Chiuli its Chief Human Resources Officer sworn on 1st August, 2015 and a supplementary affidavit of the said Voi Chiuli sworn on 8th October, 2015.

The Respondent filed two lists of authorities on 3rd September and 22nd September, 2015 containing the following authorities

1. *Giella -vs- Casman Brown & Co. LTD. E.A.LR 1973*
2. *Alfred Nyungu Kimungi -vs- Bomas of Kenya Industrial Cause No. 620 of 2013- Eklr*
3. *Prof, Gitile J Naituli -vs- Multi Media University College & Another Industrial Cause No. 1200 of 2012-eKLR*
4. *Dorothy Ndavi -vs- Board of Management of Kenya High School & 3 others Industrial Cause no. 2067 of 2013-eKLR*
5. *Rebecaa Ann Maina & 2 Others -vs- JKUAT Industrial Cause No,1789 of 2013- eKLR*
6. *David Kimei -vs- Energy Regulatory Commission Industrial Cause no. 1492 of 2011-eKLR*
7. *Joseph Mutuura Mberia and another -vs- the Council of JKUAT Industrial Cause of 2013-eKLR*
8. *Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 Others Civil Appeal no, 39 of 2002-eKLR*
9. *Saflo -vs- Lloyd Masika Limited Environment and Land Case 7-KLR 2009*
10. *Gladys Boss Shollei -vs- Judicial Service Commission Petition No. 39 of 2013 EKlr*

The application was argued before me on 8th December, 2015. Mr. Bruce Odeny appeared for the Claimant/Applicant while Mr. Okweh Achiando appeared for the Respondent.

The undisputed facts are that the Claimant/Applicant was employed by the Respondent on 22nd February, 2012 and was confirmed on 6th August, 2012 as a Fermentation Technician. By letter dated 27th March, 2015 the Claimant was suspended from duty. The letter of suspension states that preliminary investigations by the Respondent relating to ethanol sales process caused the Board to suspect that the Claimant was involved in fraudulent activities that border on grave criminal acts and his suspension was to facilitate further investigations.

The Claimant is aggrieved because he was not required to show cause and the suspension was longer than the 21 days provided for in the terms and conditions of service. The Claimant is further aggrieved because it is the Managing Director who wrote his letter of suspension instead of his immediate Supervisor as provided in the terms and conditions of service. He states he has no avenue for appeal against the indefinite suspension as the Managing Director to whom he would have appealed is the one who suspended him.

He further states that he became apprehensive that he may be unprocedurally declared redundant or his services may be terminated without due process following termination and redundancy of other employees who had been suspended under circumstances similar to his case.

For the Respondent Mr. Achiando submitted that it had the prerogative to discipline its employees, that the letter of suspension had reasons and there was nothing wrong with suspending the the Claimant to facilitate further investigation.

Mr. Achiando further submitted that the Claimant was guilty of non-disclosure of material facts as he had not disclosed that he had filed and withdrawn a similar case No. 294 of 2015 and that this case was an afterthought and an abuse of court process. Mr. Achiando submitted that the fact that other employees have been suspended, declared redundant or terminated is no reason for the Claimant to be apprehensive, that restraining the Respondent from disciplining the Claimant would be interference with its management prerogative, that there was nothing wrong with the Managing Director writing the Claimant's letter of suspension as all actions taken by Managers are performed on his behalf and that the Claimant has now

been issued with a notice to show cause. He submitted that the Claimant does not meet the principles under Giella v Cassman Brown Ltd as he is on full pay and has not suffered any damage. Mr. Achiando further submitted that the Claimant's affidavit does not support the notice of motion and that the Claimant is asking the court to restrain the Respondent from following due process which the Respondent has not failed to comply with. He urged the court to dismiss the application.

Determination

I have considered the pleadings and submissions by both parties. I have also considered the authorities that parties relied upon.

On the issue of the case that was withdrawn, that is cause No. 294 of 2015, it was never served upon the Respondent and as the Claimant's Counsel has pointed out, the pleadings were not availed to the court. I will therefore not belabour the issue any further.

On the issue of court's interference in the disciplinary process, the case of Rebecca Ann Maina & 2 Others .v. Jomo Kenyatta University of Agriculture and Technology (supra) is spot-on, where an employee complains about the legitimacy of the disciplinary process that is marred with irregularities, the court will intervene not to stop the process altogether but to put things right. In this case the Claimant has complained that the suspension was open-ended with no end in sight, yet the terms and conditions of service provided for 21 days. By the time the Claimant filed suit he had been on suspension for 4 months and as he has stated, he had no one to appeal to as it is the Managing Director who had signed his suspension letter, again in contravention of the disciplinary process which provided for the suspension letter to be by the employee's immediate supervisor.

I am satisfied that the Claimant had valid reason to come to court and that the Claimant's case falls under one of the few circumstances when the court will intervene in internal disciplinary processes. This case is on all fours with Cause No. 295 of 2015 between **Gregory Otieno Owuoth -v- Mumias Sugar Ltd**, the Respondent herein in which I ordered the immediate withdrawal of the Claimant's letter of suspension on grounds that it was unfair to keep an employee on suspension beyond the period allowed by the Respondent's disciplinary procedure. I hold the same view in this case.

The Claimant was issued with a notice to show cause only after he had filed this suit. The show cause letter is dated 4th September, 2015. It does not affect the fact that the Claimant was placed on indefinite suspension and had been on suspension for longer than the 21 days approved under the Respondent's disciplinary procedure.

For the foregoing reasons I find the suspension of the Claimant irregular and unfair and order the same withdrawn with immediate effect. If any salary or benefit was withheld pursuant to the said letter of suspension the same should be reinstated to the Claimant/Applicant forthwith.

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

The costs of this application shall be in the cause.

Dated, signed and delivered this 18th day of February, 2016.

MAUREEN ONYANGO

JUDGE