



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NUMBER 813 OF 2015

ANTONY MUTIA MWANDIKA.....CLAIMANT

VERSUS

KENYA CIVIL AVIATION AUTHORITY.....1ST RESPONDENT

JOSEPH KIPTOO CHEBUNGEI (Acting General Director,

Kenya Civil Authority).....2ND RESPONDENT

RULING

1. By a Notice of Motion filed on 14th May, 2015 brought under certificate of urgency, the claimant sought orders among others that pending the hearing and determination of this claim an order of injunction do issue restraining the 1st and 2nd respondent from terminating his employment as Managers Corporate Communications of the 1st Respondent or from conducting any recruitment or otherwise, of Corporate Communication of the respondent since his termination was unlawful and would cause him and his family irreparable harm and interfere with his rights under the Constitution particularly article 41(1) and (2).

2. The application was supported by the affidavit of the applicant who deponed on the main that:-

- a. That he was employed by the 1st respondent as Chief Public Relations Officer in May, 2005.
- b. That In November, 2007, he was appointed Acting Manager, Corporate Communications, and later appointed as the Manager Corporate Communications after a competitive process, drawing a monthly salary of Kshs.430,384/= a position he had held to date.
- c. That on 6th October, 2014, I was given a memo by the Acting Director General, Mr. Joseph Kiptoo Chebungei, the 2nd Respondent herein, informing him that he was to appeared before the Board of Directors Disciplinary Committee/finance & Human Capital Committee (FHCC) on 16th October, 2014 to show cause why appropriate disciplinary action should not be taken against him for unsatisfactory performance, noted errors, commissions and negligence.
- d. That the aforesaid accusations were based on memos that he had received dated back to 2005 when he was a Chief Public Relations Officer with the most recent being a memo dated 27th May, 2013.

- e. That on 16th October, 2014, he did appear before the finance & Human Capital Committee (FHCC) accompanied by his former supervisor (his predecessor) one Mrs. Kentice L. Tikolo so she could give a professional view on issues raised by the respondents.
- f. That vide a memo dated 20th November, 2014 written by the 2nd respondent, he was informed that his unsatisfactory performance had been sufficiently demonstrated and that the Board had resolved that he be given three (3) months to demonstrate improvement.
- g. That on 11th March, 2015, the 2nd respondent requested that he furnishes him with a report of the corporate communications department activities from December, 2014, to February, 2015, and gave him only two (2) hours within which to submit the said report.
- h. That on the same day, he submitted a detailed report which clearly showed the various activities undertaken by the Corporate Communications Department.
- i. That on 26th March, 2015, while attending a Board of Directors retreat at Sopa Lodge in Naivasha, the 2nd respondent handed me a memo at the lodge's parking area in which he was informed that the Finance & Human Capital Committee (FHCC) had reviewed his three (3) months report and found the activities therein to be more of routine tasks that did not meet the strategic expectations to turn around the Corporate Communications function and therefore his performance was unsatisfactory.
- j. That on 2nd April, 2014, he did respond to the aforesaid memo and clearly outlined what the Corporate Communications Department does and why the 'routine' activities were part of the foundation, building blocks and pillar that the department was using to achieve the respondent's corporate goals.
- k. That Section N of the Respondent's Human Resource Manual states that the performance appraisal will be the tool for evaluating an officer's performance.
- l. That the claimant's performance for 2012-2013 and 2013-2014 had continued to improve from 63%, an improvement of 14%.
- m. That in any event, under the respondent's Human Resource Manual, Appendix 2 thereof, failure to improve on work performance is a minor offence which does not warrant dismissal.
- n. That it is a Best Practice Requirement in Performance Management that where an officer is found to be underperforming, the officer's supervisor is expected to hold discussions with the officer to clearly outline the areas of underperformance, state the reasons/challenges for the underperformance, agree on mitigation including resources and facilitation required to achieve the said goals and set a reasonable time for further review, but his was never done by the respondent.
- o. That the letter dated 26th September, 2014 did not adhere to the requirement under the 1st respondent's Human Resource Manual as the alleged disciplinary case was not reported in the approved format for a charge sheet clearly indicating the exact nature, date and time of the offence including its repercussions on work and on the 1st respondent's operations.
- q. That the laid down disciplinary procedure under the 1st Respondent's Human Resource Manual was never followed hence unfair termination of the claimant.
- q. That the 2nd respondent has on various occasions before the termination herein requested him to resign for no reason at all.
- r. That the alleged Board Meeting that passed the resolution to dismiss him was held in a hotel in

Naivasha contrary to the requirement under the State Corporations Act, Chapter 446 of the Laws of Kenya, that the Board Meeting of State Corporations should be held at the organizations premises/facilities.

s. That he was advised by his advocates on record, which advise he verily believes to be true that the Civil Aviation Act of 2013 did not have a continuity clause for the Board which was appointed by the 2002 Act and as such the said Board is illegally in office and has no capacity whatsoever to pass any resolutions on behalf for the 1st respondent.

3. The respondent through the 2nd respondent filed a replying affidavit in which the 2nd respondent depones in the main as follows:-

a. That in response to paragraph 2 and 3, the respondents averred that the claimant employment, appointment and termination was subject to the provision of the Kenya Civil Aviation Authority Human Resource Manual for staff Regulations and Administration and the Employment Act.

b. That in response to paragraph 4, the respondents averred that they wrote a notice to show cause letter to the claimant regarding his unsatisfactory work, willful neglect to perform duties, noted errors, commissions and negligence.

c. That in further response to paragraph 4, the respondents averred that in full compliance of the law, the 2nd respondent wrote a Notice to Show Cause letter to the claimant disclosed to him all the allegations of offences against him and referred his case to the KCAA Board of Directors' Disciplinary Committee (FHCC) in accordance with the Human Resource Administration Manual. Further, the respondents averred that the letter gave the claimant an opportunity to respond to the claims raised, right to a hearing and an opportunity to show cause why disciplinary cause should not be taken against him.

d. That in response to paragraph 5, the respondents averred that during the claimant's tenure as Manager Corporate Communications, he was served with memos all raising allegations of willful neglect to perform work, improperly performing work resulting in unsatisfactory performance, failure to account for Authority funds (unsurrendered imprest) and poor work performance which all amount to gross misconduct.

e. That in response to paragraph 6, the respondents averred that it is wrong for the claimant to allege that the issues raised in the memos were closed whereas he is fully acquainted with the disciplinary process of the 1st respondent herein which is only considered closed if deliberations by the committee are approved by the Board.

f. That in response to paragraph 7, the respondents averred that the claimant appeared before the Finance and Human Capital Committee (FHCC) with his former supervisor, he confirms that he was given a right to hearing and a right to have a person of his choice present during the hearing. This is a clear indication that due process and procedure was followed in disciplinary proceedings in accordance to Employment Act, 2007 and the KCAA manual.

g. That in response to paragraph 8, the respondents averred that the said memo to the claimant was only meant to give a chance to redeem himself and give him an opportunity to perform his duties properly as required of a person in his capacity and averred that the purpose of the appraisal in February was to assess if he had demonstrated a strategic turnaround of his department to achieve its functional objectives during the 3 months period.

h. That in response to paragraph 11, the respondent's averred that the memo to the claimant was meant to give feedback on his three months report and inform him what the Finance & Human Capital Committee (FHCC) had decided.

i. That in response to paragraph 12, the respondent averred that the claimant confirms that during the 3 months period he had been involved in routine activities which he ought to have attended to during the early stages of his career as Manager Corporate Communications. This is further confirmation that he had failed to properly discharge his work during his tenure by not laying the expected foundation for his department to build on to achieve the strategic expectations and corporate goals of the 1st respondent.

j. That in response to paragraph 13 and 14, the respondents averred that the reason why the claimant had been sent several letter to show cause why disciplinary proceedings should not be taken against him was because of his individual performance as Manager Corporate Communications whose performance was not pegged on performance of any other staff of the 1st respondent and further averred that it is wrong for the claimant to suggest that his unsatisfactory performance was due to lack of staff.

k. That the claimant was found liable for willfully neglecting to perform work and improperly performing work which all amounted to gross misconduct as provided for by the KCAA manual HD 82 No. 18.

l. That in further response to paragraph 19 the respondents averred that the claimant was not dismissed from employment but he was lawfully terminated from employment on account of gross misconduct which disciplinary measure is within the KCAA Manual and the Employment Act 2007 and further states that the claimant was indeed served with a one months' notice of termination from service dated 16th April 2015.

m. That in further response to paragraph 21, the respondents averred that the main aim of charge sheet was to disclose the particulars of the officer, nature of offence committed, date and time of the offences committed and the likely repercussions of the offences and averred that the memorandum dated 26th September, 2014 captured the necessary information to disclose to the claimant the offences he had committed, the specific dates he had committed those offences, and the consequences of the offences thereof.

n. That in response to paragraph 25 and 26, the respondents averred that the manual provides for appeals to the Appeals Committee as a matter of right for any officer of the 1st respondent who wishes to dispute disciplinary action or measure taken against him within 42 days upon receiving communication of disciplinary measure against him or her, this right was communicated to the claimant in the Notice to Terminate letter dated 16th April, 2015.

o. That the claimant had not exhausted the appeal process provided for under the KCAA manual and therefore this suit is premature and misconceived.

4. In her submissions before the Court Ms. Mogire for the claimant submitted that the principles for grant of interlocutory injunction are established by the case of **Giella v. Cassman Brown & Co. Ltd** which are that an applicant must show they have a prima facie case with probability of success and that an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which cannot adequately be compensated by an award of damages. If the Court is in doubt, it will decide the application on a balance of convenience.

5. Ms. Mogire submitted that the purported termination of the claimant was done without observance of the 1st respondent's rules of procedure contained in the Human Resource Manual. According to Counsel, Clause H5 (a) of the 1st respondent's manual provides that all disciplinary cases be reported in an approved format of a charge sheet and that the charge sheet shall indicate particulars of the officer, exact nature of the offence, date and time the offence was committed and repercussions of the offence on work and KCAA operations.

6. According to counsel, it was not denied by the respondent that they failed to comply with these

provisions. The memo dated 26th September, 2014 could not qualify as a charge sheet as provided under the Human Resource manual, she argued.

7. Counsel further submitted that the purported termination of the claimant was actuated by malice, witch hunt and personal vendetta as evidenced from the manner the 2nd respondent handled the claimant. Counsel contended that the request to the claimant by the 2nd respondent that he furnishes a report on his department within 2 hours on 26th March, 2015 while attending a Board of Directors retreat at Naivasha and the handing over by the 2nd respondent of a Memo at a parking lot was evidence of such malice and witch hunt.

8. Ms. Mogire further contended that, the Civil Aviation Act, 2013 which repealed the 2002 Act had no continuity clause for the Board which was appointed under the 2002 Act hence the Board that purported to dismiss the claimant was illegally in office and could not pass any resolution on behalf of the 1st respondent. Form the foregoing, counsel submitted that the applicant had demonstrated that it had a prima facie case with probability of success since the respondents acted in breach of the claimant's rights envisaged under the Constitution, the Employment Act and 1st Respondent's Human Resource Manual.

9. On the issue whether damages could adequately compensate the claimant, counsel submitted that the applicant would suffer irreparable injury if the orders sought are not granted. According to counsel, one of the main prayers sought was reinstatement hence irreparable harm will occur if the orders sought are not granted. According to counsel terminating the services of the claimant who had been diligently working for the respondent for over ten years must be done fairly and within the principles of natural justice and fair administrative procedure as provided under article 47 of the constitution. To support this contention counsel relied on the case of **Dinah Musinderwezo v. African Women Development and Communication Network (Fermnet) 2012 eKLR.**

10. On the issue of balance of convenience, counsel submitted that this was titled in favour of the claimant. According to counsel, if the injunction is denied and the claimant terminated from employment, there will be nothing left to try because the substratum of the suit will have been destroyed rendering the suit nugatory.

11. The respondents counsel Mr. Mwaura on the other hand submitted that the termination of the claimant's services was legal and based on a culmination of various acts/omissions on the claimant's part which compromised smooth operations of the 1st respondent. The acts or omissions were set out as neglect to perform work, improperly performing work resulting in unsatisfactory performance, failure to account for the authority's funds (unsurrendered imprests) which acts amounted to gross misconduct warranting termination. Counsel further submitted that due procedure was followed as per the 1st respondent's Human Resource Manual. According to Counsel, the respondents wrote a notice to show cause letter to the claimant, the letter disclosed to him all the allegations of offences against him and referred the case to the 1st respondent's Board of Directors Disciplinary Committee (FHCC) in accordance with Human Resource Administration Manual. Concerning format and content of the charge sheet, counsel submitted that no specific form is provided for by the manual save that the charge sheet must detail all the information aforementioned. The assertion therefore by the claimant that the prescribed format was not used was a mere technicality further that the failure by the 1st respondent to label the memorandum as charge sheet did not occasion the claimant any prejudice or injustice and for attendance of the claimant to the disciplinary process to its completion implied the charges were properly instituted. Counsel further submitted that if the requirement was material the claimant would have raised an objection during the disciplinary committee hearing.

12. Regarding the disciplinary process, Mr. Mwaura submitted that the claimant was subjected to the disciplinary process as provided in the 1st respondents Human Resource Manual. According to counsel the claimant admitted that on 16th October, 2014 he appeared before the Finance and Human Resource Capital Committee with his former supervisor, one Mrs. Kentice Tikolo. The claimant further confirmed that he was given a right to hearing and opportunity to have an employee of his choice present during the

hearing. This according to Counsel, was evidence that due process was followed.

13. Mr. Mwaura further submitted that the claimant had not exhausted the appeal process provided for under the 1st respondent's disciplinary manual hence the current application was premature and misconceived in law.

14. On the issue of the legality of the Board, Counsel submitted that this was unfounded as the transition clauses in the Act saved the existence of the Board. Counsel in conclusion submitted that the applicant had not established a prima facie case and further he does not stand to suffer any irreparable loss or injury if the orders sought are not granted in event his loss can be adequately compensated by an award of damages.

15. This is an interlocutory application and the Court must be careful not to delve too deep into merits and demerits of the reasons and process of terminating the applicant. However, the Court needs to be satisfied that the applicant has made out a prima facie case with probability of success and if so, the loss suffered if he is ultimately successful in the main claim cannot be adequately compensated by damages. The claimant in this suit challenges the termination of his services arguing the same was done based on invalid and or unjustifiable reasons. He further contends that in terminating his services the 1st respondent did not follow the procedure set out in its Human Resource Manual and the Employment Act. He further questioned the legality of the Board that passed the resolution to dismiss him from service stating the Kenya Civil Aviation Act 2013 did have transition provisions hence the Board appointed under the old Act were illegally in office.

16. The respondent on the other hand has denied the respondents allegations arguing that the reasons for terminating the claimant's services were valid and that the procedure followed in terminating his services were in accordance with the 1st respondents Human Resource manual and Employment Act. The respondent further argued that the claim was premature as the claimant had not exhausted the 1st respondent's disciplinary mechanism, in that he had not appealed against the dismissal to the 1st respondent's appeals committee. The allegations and responses thereto constitute triable issues hence a prima facie case has been made out.

17. The second question would then be whether damages would adequately compensate the claimant if his claim is ultimately found successful.

18. By the time this claim was filed, the claimant's services had been terminated. His prayers to Court are therefore that he be reinstated or in the alternative the 1st respondent fully compensate him for unfair, unlawful and wrongful termination. This implies that if reinstatement is not the appropriate order to make after the full hearing then an order for compensation would suffice. In termination of employment claims damages assessed as per the employment contract and statute are usually considered to adequately compensate an employee found to have been wrongfully dismissed and or unfairly terminated. An order for reinstatement although is one of the primary remedies available in wrongful dismissal and unfair termination cases is usually made in exceptional cases and taking into consideration the common law principle against the order of specific performance in contracts for personal service. Before this order is made the Court will take into account more the reasons for termination than the process. The reasons must be substantially flawed, malicious and or in clear breach of the law. For instance the reasons set out under section 46 of the Employment Act would present a strong case for an order of reinstatement.

19. The claimant herein was dismissed on grounds of unsatisfactory performance, noted errors and negligence. He had disputed these reasons hence the present suit. If proved against him, they would constitute valid grounds for dismissal. If not proved, they would not reach the threshold for ordering reinstatement. The Court is therefore of the view that if the claimant ultimately becomes successful, in his claim, an order for compensation as sought in the alternative would suffice. In the circumstance the Court will not grant the injunction sought with the consequence that the prayers sought in the motion dated 14th May, 2015 are found without merit and the motion is hereby dismissed. Costs in the cause.

20. It is so ordered.

Dated at Nairobi this 11th day of March 2016

Abuodha J. N.

Judge

Delivered this 18th day of March 2016

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge