REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 293 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

PAMELA NELIMA LUTTA...CLAIMANT

Versus

MUMIAS SUGAR COMPANY LIMITED.............................RESPONDENT

R U L I N G

Before me are two applications. The first is the Notice of Motion filed by the Claimant dated 31st July, 2015. The application seeks 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 servantsand/or agents be restrained from declaring the Claimant redundant or otherwise terminating her 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 servantsand/or agents be restrained from declaring the Claimant redundant or otherwise termination her employment without following die 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 second is the Respondents Notice of Preliminary Objection dated 12th August, 2015. It raises the following 3 grounds of objection:-

1. **THAT** the claimant's Application does not comply with themandatory provision of **section 10, rule 3(1) and (2) of the High Court Practice (Vacation) rules of the Judicature Act Cap 8 Laws of Kenya** as the Applicant failed to seek leave of the Court before filing the substantive motion before the Honourable Court. The Claimant should have first sought for the Court's leave to file herApplication and Memorandum of Claim as required by the Law which is coached in mandatory terms.

2. **THAT** the Honourable Court lacks the jurisdiction to hear and determine the matter as the issues raised in the Application and Memorandum of Claim have been overtaken by event in that the Applicant has been summarily dismissed from employment by the Respondent.

3. Therefore for the aforementioned reasons, the Application and Memorandum of claim lack merit, frivolous, vexatious, an abuse of the process of the Honourable Court and should be dismissed with costs.

The two applications were by consent of the parties canvassed by way of written submissions.

I will first deal with the preliminary objection.

Preliminary Objection

The first ground of objection is that the Claimant's application offends the provisions of section 10 Rule 3(1) and (2) of the High Court Practice (vacation) Rules of the Judicature Act. It is my opinion that this is a non-issue for two reasons. The first is that the application was made and determined by Justice Ndolo in Nairobi on 5th August, 2015.

The second is that this is a technicality that would not qualify as a ground of preliminary objection. Apart from Article 159(1) of the Constitution and section 20(1) of the Employment and Labour Relations Court Act both of which require this court to administer Justice without undue regard to technicalities, the nature of the objection does not fit within the definition of the preliminary objection as defined in the celebrated case of **MUKISA BISCUIT MANUFACTURING LIMITED v WEST END DISTRIBUTORS LIMITED (1969) EA 696 as follows**;

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

The wording of section 3 of the Judicature Act in my opinion is a matter of discretion by a Judge and after a Judge has dealt with a matter during the vacation, whether or not the application referred to in subsection 3(1) was made, it cannot be contested by any of the parties to a suit or an application on that ground alone.

The second and third grounds of objection are matters for evidence and do not qualify for argument as preliminary objections.

As I ruled on 23rd September, 2015 the issues raised in the preliminary objection should have been raised as grounds of opposition to the application. The upshot is that the entire preliminary objection stands dismissed.

The Notice of Motion

The purport of the notice of motion which was supported by the claimant's affidavit sworn on 31st July, 2015 is that the Claimant should not be either terminated or declared redundant by the Respondent without following due process. The claimant states that at the time material to this suit she was in the employment of the Respondent as Commercial Director. She was suspended from employment by letter dated 27th March, 2015 on grounds of suspicion that she was involved in fraudulent activities that border on grave criminal acts related to ethanol sales processes contrary to her employment contract. The letter of suspension stated that the suspension was done to facilitate further investigations.

The Claimant avers that no further action was taken until 27th July, 2015 when she received a show cause Notice requiring her to show cause within 48 hours why disciplinary action including summary dismissal should not be taken against her.

It would appear that the Claimant responded to the show cause letter but none of the parties have filed a copy of her response in court. There is however a letter inviting her to a disciplinary hearing on 11th August 2015 and a letter of dismissal dated 15th August, 2015. Among the grounds for dismissal is that she failed to attend the disciplinary hearing.

For the Claimant to be granted the orders sought she must show that her case fits into the principles set out in the case of **Giella v Cassman Brown & Co. Limited (1973) EA 358.** These are first, that she has a prima facie case with high probability of success; secondly, that the applicant will suffer injury that cannot be compensated by way of damages should the orders not be granted; and, finally, that should the court be in doubt, on a balance of convenience.

This case however presents a further twist, that the applicant had actually been served with a letter of dismissal at the time of hearing the application. There are therefore two further issues that arise from the applicant's supplementary affidavit which are whether or not the Respondent was aware of the restraining orders that the Claimant was granted on 12th August 2015, and whether the Respondent initially intended to declare the Claimant's position redundant and her dismissal was prompted by her filing of this suit.

Both parties have swamped me with authorities. The Claimant referred to 3 authorities. The Respondent on the other hand filed 4 lists of authorities with a total of 25 authorities. I think this is uncalled for in such a mundane issue as an interim injunction which can be easily demonstrated by a few pertinent authorities.

The Respondent has in its submissions raised several issues. The Respondent submitted that the Claimant was summarily dismissed as a consequence of failing to attend the disciplinary hearing and not because she filed this suit and that the letter of redundancy attached to the Claimant's supplementary affidavit was only a draft and did not prejudice the Claimant in any way.

The Respondent further submitted that this court has no jurisdiction or justification to reinstate the Claimant following her dismissal on 11th August 2015, that at the time of the dismissal there was no order restraining the Respondent from terminating her employment and further the Employment Act does not intend that courts take away the management prerogative of employers and that the Act is a shield and not a sword.

Finally the Respondent submitted that the Claimant has no prima facie case as the evidence before the court shows that her dismissal was justified and there is very little likelihood of the court ordering reinstatement upon hearing the main suit.

The Respondent further submitted that the Claimant will not suffer irreparable loss as the court retains the right to order reinstatement, re-engagement or award compensation upon hearing the parties and in the event that the Claimant's case succeeds. The Respondent further submitted that the Claimant's position is no longer available and there is no likelihood of the court ordering reinstatement. The Respondent further submitted that the Claimant has not demonstrated any exceptional circumstances that would warrant her reinstatement. The Respondent also submitted that the Claimant did not pray for an order of reinstatement and the court has no powers to grant an order not prayed for. In this regard the Respondent referred to the East Africa Court of Appeal decision in **CAPTAIN HARRY GANDY v CASPAIR AIR CHARTERS LIMITED (1956) Vol.23 E.A.C.A.** in which the court stated that;

"as a rule relief not founded on the pleadings will not be given ... the case must be decided on the issues on record..."

The Respondent also submitted that the prayers prayed for have been overtaken by events following the summary dismissal of the Claimant, that the Claimant has not taken any steps to amend her pleadings and that the balance of convenience is in favour of the Respondent.

Determination

From the submissions of the parties it is evident that they are at cross purposes. The Claimant based her submissions on the basis that her dismissal was done after the court preserved her employment while the Respondent's submissions are based on the premise that the orders made by the court preserving the Claimant's employment were overtaken by events as the Claimant's employment had by then been terminated and she had not sought orders for reinstatement which is in fact what the court did on 12th

August, 2015.

There is the further issue of whether the Claimant was aware of the letter inviting her to the disciplinary hearing of 11th August, 2015 whose failure to attend led to her dismissal.

Although all these issues are pertinent, I must remind myself that what I am dealing with are the prayers in the Claimant's application.

The prayers were for orders to restrain the Respondent from declaring the Claimant redundant or otherwise terminating the Claimant's employment without compliance with the law.

The issue for determination based on the prayers, is whether the "Claimant is entitled to an order restraining the Respondent from terminating her employment or declaring her redundant. It is a fact that the Claimant was summarily dismissed from employment on 11th August 2015 while the court made an order preserving her employment on 12th August, 2015 pending inter partes hearing of the application.

In order to determine this application I therefore have to consider if inspite of the orders granted by the court on 12th August, 2015 and after hearing the parties, the Claimant warrants the orders sought in her application.

For such orders to be made the Claimant must satisfy the principles set out in Giella v Cassman Brown Limited.

The Claimant's reasons to justify the first principle, that she has a prima facie case, is that she was placed on suspension for longer than the 21 days provided for in the terms and conditions of service of the Respondent. Her other reason is that the Respondent first wanted to declare her redundant, but terminated her because of filing this suit.

I do not find these to be sufficient reasons to warrant the grants of the orders sought by the Claimant. There is no demonstration that as at the time of her filing suit the Respondent had done anything against the law. The Claimant has not annexed a copy of the disciplinary code of the Respondent that provides that she cannot be on suspension for longer than 21 days. She has also not demonstrated that the Respondent intended to declare her redundant without compliance with the law as the letter she relied upon, that is the notification to the County Labour Officer, is part of the compliance process as section 40(1) of the Employment Act requires notification to be sent to the Labour Officer at least one month prior to declaring an employee redundant. The Claimant has not contested the grounds stated in the letter or the selection criteria.

I therefore find that the Claimant has not demonstrated a prima facie case.

On the second limb of irreparable harm, the Employment Act has provision for remedies available to the Claimant in the event the court after hearing the parties finds that the termination of her employment was unfair. She has not demonstrated in either her application or her written submissions that she will suffer irreparable loss. Indeed in the written submissions there is no mention at all of the irreparable loss. The application must also thus fail on this ground too.

After finding that the Claimant has not demonstrated the first and second limbs, there is no need to consider the third limb which only comes into play if the court is unable to determine the issue on either of the first two limbs.

On the whole therefore I find that the Claimant has not demonstrated that she is entitled to the orders of temporary injunction restraining the Respondent from declaring her redundant or in any other way terminating her employment without following due process in accordance with the Employment Act, pending the hearing and determination of her case herein.

The application is dismissed. Costs shall be in the cause.

Ruling Dated Signed and Delivered this 26th day of May, 2016

MAUREEN ONYANGO

JUDGE