



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

CAUSE NO. 2252 OF 2015

ARCH. FRANCIS KARIUKI NJUGUNA.....CLAIMANT

VERSUS

NATIONAL CONSTRUCTION AUTHORITY.....RESPONDENT

(Before Hon. Justice Hellen S. Wasilwa on 7th June, 2016)

RULING

1. The Notice of Motion Application before Court is one dated 16.12.2015, brought under Articles 27, 41, 47 & 50 of the Constitution and Sections 28, 45, and 46(B) of the Employment Act, Section 3A of the Civil Procedure Act, Cap 21 Laws of Kenya, and all other enabling provisions of the law, where the Applicant seeks the following Orders:

1. ***That due to the urgency of this motion, the same be certified urgent service of the same be dispensed with and the Motion be heard ex parte in the first instance.***
2. ***That upon hearing ex-parte, the decision made by the Respondent on 4th December, 2015, to summarily terminate the employment of the Claimant herein be stayed and an order be issued restraining the Respondent from advertising, soliciting and/or interviewing persons and/or candidates for the position of General Manager – Registration Compliance and Training pending hearing and determination of this Application.***
3. ***That upon hearing inter-partes, the decision made by the Respondent on 4th December, 2015, to summarily terminate the employment of the Claimant herein be stayed and an order be issued restraining the Respondent from advertising, soliciting and/or interviewing persons and/or candidates for the position of General Manager – Registration Compliance and Training pending hearing and determination of the substantive suit and or further orders of the Court.***
4. ***And or in the alternative upon hearing inter-partes, the decision made by the Respondent on 4th December, 2015, summarily dismissing the Claimant herein be vacated and or set aside and the Claimant be reinstated forthwith to the similar position of General Manager – Registration, Compliance and Training pending hearing and determination of the main suit herein.***
5. ***The Honourable Court do give directions on the hearing of the substantive suit.***
6. ***The costs of this Application be borne by the Respondent in any event.***

2. The Application is premised on the grounds that:

1. ***The decision to summarily terminate the Claimant's employment is biased, flawed, irregular, unlawful, null and void as the same was based on malice bent to target the person of the Claimant.***
2. ***That the Board of the Respondent acted ultra vires their mandate and acted contrary to the rules of natural justice.***
3. ***That notwithstanding the fact that the Claimant was served with a notice to show cause as to why disciplinary action should not be taken against him, the Claimant was not served with a formal statement of charge outlining the allegations preferred against him.***
4. ***That no preliminary investigations were conducted into the allegations levelled against the Claimant herein.***
5. ***That the decision by the Respondent made on 4th December, 2015, is in violation of the Claimant's constitutional rights, has no basis in law and is contrary to the provisions of Articles 27, 41, 47 and 50 of the Constitution and is therefore a nullity in law.***
6. ***That to allow the Claimant to be dismissed from employment on the basis of the Respondent's purported investigation will be tantamount to sanctioning an illegality or a nullity in law and courts of law do not sanction illegalities.***
7. ***That without the intervention of this Honourable Court, the Claimant's constitutional rights stand violated.***
8. ***That it is in the interest of justice that the orders sought be granted.***

3. The Application is supported by the Affidavit of Arch. Francis Kariuki Njuguna the Applicant herein wherein he states that, in December, 2013, he was appointed to the position of General Manager, Registration Compliance and Training and Head of the most significant technical department of the Respondent. During his time in the stated position the department was the highest rated by the performance contracting secretariat at 300% results in 2014 and exceeded all targets in 2015.

4. He goes on to state that on 24th September he proceeded on leave having issued notice to all the Managers of the Respondent in the prescribed manner. On 16th October, 2015, he received a show cause letter dated 8.10.2015 from the Executive Director of the Respondent for being absent from the office without leave or permission in violation of the Public Officers Ethics Act, the Human Resource Policy and terms and conditions of his appointment.

5. He alleges that he responded to the said letter from the Executive Director on 19.10.2015, explaining the circumstances under which he took his leave. On 2.11.2015, he received a letter from the Chairperson of the Human Resource Committee of the Respondent indicating that the matter had been forwarded to them for deliberation and the Claimant was required to provide a statement within 7 days of the letter and to prepare for a hearing on 25.11.2015.

6. The Claimant states that he prepared his statement raising the following issues:

- a. ***The submission to the Committee was not given to him to assist him prepare his defence.***
- b. ***The chairperson of the Board does not have authority to instruct the Human Resource Committee to institute disciplinary proceedings against any employee.***
- c. ***Impartiality of the Chairperson to the Board.***
- d. ***He demonstrated that the same Chairperson of the Board had previously referred a matter to the Executive Director of the Respondent pertaining to his person following a private meeting***

that was illegal, unofficial, unprocedural and contrary to Corporate Governance Procedures.

- e. *A preliminary investigation had not been conducted as provided in the Human Resource Policy neither had witness statements been obtained from the persons who dealt with his leave application and those officers who had been involved in circulation of his leave notice.*
- f. *That his leave programmes have previously been interfered with by the Executive Director who has called him back to the office.*
- g. *That his leave applications have previously never been declined.*
- h. *That the Executive Director had over a period of time interfered with the activities of his department.*
- 1. *He requested to be supplied with the charge sheet, witness statements and various documents to help him prepare his defence.*

7. The Applicant states that he raised his grievance with the Chairperson of the Human Resource Technical and Board Audit Committees over interference by the Executive Director with his department's mandate and execution of duties. He also states that he raised the issue that the hearing convened was illegal, unprocedural, frivolous and malicious with a set ruling to recommend his removal for the Respondent's employment.

8. True to his fears the Applicant states that at the hearing he was informed that they would not be referring to a charge sheet but to the show cause letter only despite his persistence to be supplied with a charge sheet. He states that the charges were read to him and he was not given time to respond and the hearing adjourned.

9. On 4th December, 2015, the Respondent sought to negotiate a retirement package with the Claimant but the Claimant refused which led to him being handed a termination letter on the same day.

10. For the aforesaid reasons the Applicant seeks for the application to be allowed as prayed.

11. The Applicant in submissions raises the following issues for consideration by the Court:

- 1. **Whether or not the inquiries and/or investigations, if any on the conduct of the claimant carried out by the Respondent were in accordance with the Labour Laws and/or the laid down procedures.**
- ii. **Whether or not the Respondent's findings and decision made on 4th December, 2015, were unlawful, irregular, illegal, invalid, substantively and procedurally unfair.**
- 3. **Whether or not the Applicant is entitled to the Orders sought given the factual and/or legal circumstances obtaining herein.**

12. On the 1st issue, the Applicant submits that the Respondent disregarded the provisions of Article 47 of the Constitution of Kenya 2010 by being denied procedurally fair administrative action by the Respondent. He refers to the case of Shankar Sakiani Vs DHL Global Forwarding (K) Ltd (2012) where it was held that the national values and principles of governance apply to all persons and the principles and values include human rights. He also cites the case of Alphonse Machanga Mwachanya Vs Operation 680 Limited (2013) eKLR; where it was held that employers must comply with their internal disciplinary procedural rules.

13. On the second issue he states that the Respondent acted in contravention of Sections 43, 45(2) and 46(b) of the Employment Act 2007 and as such the termination was unlawful. He refers to the case of Abisalom Ajusa Magomere Vs Kenya Nut Company Limited (2014) eKLR where it was held that procedural fairness must be upheld in matters of termination.

14. The Applicant further submits that he is entitled to the prayers sought for the reasons that he was denied a fair administrative action, he was terminated without substantive justification and that mandatory injunctions can be granted at an interlocutory stage.

15. The Respondent opposed the Application and filed a Replying Affidavit where they admit being the Applicant's former employer having dismissed him for gross misconduct. They state that the Claimant without leave or other lawful cause absented himself from the place appointed for the performance of his work.

16. The Respondent refer to clause 4.4 (v) of its Human Resource and Administration Policy on Leave Management which provides that:

“Before any employee proceeds on leave, he/she must apply for such leave in a prescribed form and approval granted before proceeding. To avoid interference to service delivery, leave must be applied one month in advance and such leave shall be in accordance to the leave roster.”

17. It is the Respondent's contention that the Claimant neither applied for nor obtained any approval before he absented himself from his workplace from 30th September, 2015, till 12th November, 2015. That notwithstanding, if leave had been applied for, they state that it did not meet the threshold of applying for such leave at least one month prior to proceeding on leave.

18. That the leave notice alleged to have been issued to all the managers is not useful as the same did not amount to a leave application. He is also accused of insubordination by failing to get the required leave approval from his Executive Director and neither did he report back to him on reporting back to work. He allegedly also missed two management meetings and failed to render an apology.

19. The Respondent further avers that all due process was followed in terminating the Applicant's employment. They deny that the chairperson of the Board to the Human Resource Committee made any submission as alleged by the Claimant and the letter dated 27.10.2015 only reiterated the relevant facts set out in the Notice to Show Cause Letter.

20. The Respondent also states that the Applicant responded to the Notice to Show Cause Letter vide a letter they received on 19.10.2015 in which the Applicant never presented any evidence in support of the allegations made against the Respondent. They go on to state that the Respondent's Human Resource Manual does not talk of a charge sheet but refers to charges and thus it was in order to read charges to the Applicant without providing him with a charge sheet.

21. It is the Respondent's contention that the Applicant has not proved how he will be affected should the Orders sought not be granted and as such not met the requirements for the granting of a mandatory injunction. If the Orders sought are granted the Respondent are of the view that the same would amount to the Court involving itself in the day to day running of the Respondent. They refer to the case of **Benedict Abonyo Omollo Vs Judicial Service Commission (2015)eKLR**; where it was stated that:

“to grant the Orders would mean the Court has entered the employment place exercising the management prerogative on behalf of the employer. The Court cannot stay termination of the employer's decision.”

22. The Respondent is of the view that any loss suffered by the Claimant if at all can always be compensated by way of damages as quantified in the Claim should the Claim be successful. The Respondent submits that the Applicant has not met the requirements for the granting of an injunction laid out in the case of **Giella Vs Cassman Brown & Company Limited (1973) EA 358**.

23. Further it is the Respondent's submission that the leave application alleged to have been made by the Applicant in any event did not meet the requirement of Clause 4.4 (v) of the Human Resource and Administration Policy on Employees Discipline.

24. The Respondent further submits that the prayers sought by the Applicant at this stage are untenable since they are substantive in nature and will require the benefit of a full hearing. They cite the case of **Alfred Nyungu Kimungui Vs Bomas of Kenya (2013) eKLR**, in support of this position.

25. For the foregoing reasons the Respondent prays for the Application to be dismissed with costs.

26. Having considered the submissions of both parties, the issues for consideration are as follows:-

- ***Whether the Applicant has established a prima facie case to warrant issuance of orders sought.***

27. The tact in the grant of injunction is set out in the case of **Giella vs. Cassman Brown and Company Limited (1973) EA 358**.

The tact is 3 fold that the case has a high probability of success, that if the orders sought are not granted, the Applicant will suffer irreparable injury that cannot be compensated with damages and thirdly that the matter must be decided on a balance of convenience.

28. Using this tact, the issues of whether the Claimant was fairly or unfairly treated cannot be resolved as an application of this nature without calling evidence to take this Court through what happened to him.

29. Secondly on the issue of irreparable damage, the Applicant has not demonstrated he stands to suffer irreparable injury. This is because the orders he seeks now are orders he can still get at the close of the entire suit including an order of reinstatement if this Court finds that viable.

30. He is also capable of being compensated in damages if he succeeds at the end of the case.

31. On a balance of probabilities it would be better not to reinstate a dismissed employee at this interlocutory stage that reinstate him and later find that he should never have been reinstated. This principle of reinstating dismissed employees has been discussed in other cases by this Court; see **Benedict Abonyo Omollo vs. Judicial Service Commission Cause No. 47/2015 (2015) eKLR** where I cited Professor **Gitile Naitule vs. University Council Multimeida University College** where Hon. J. Rika declined to grant for reinstatement by stating that:

“---To grant the orders sought would mean the Court has entered the employment place exercising the management, prerogative on behalf of the employer. The Court cannot stay termination of the employer’s decision”.

32. I do not find it a balance of convenience to reinstate a dismissed employee at this stage and I therefore decline to grant an order in that line.

33. However, given the issues that need to be determined including whether to reinstate or not, it would be in the interest of justice not to allow the filling up of the Applicant’s previously occupied position.

34. I therefore order that the Respondent be restrained on its own or through his employees or agents from advertising, soliciting and/or interviewing persons and/or candidates for the position of General Manager – Registration Compliance and Training pending the hearing and determination of this suit.

35. Costs in the cause.

Read in open Court this 7th day of June, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Nyonge for Respondent – Present

Njuguna for Claimant – Present