



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 211 OF 2016

ALEXANDER IRUNGU WANJIRU.....CLAIMANT

VERSUS

THE REGISTERED TRUSTEES OF

THE SISTERS OF MERCY.....RESPONDENT

RULING

1. The claimant herein filed a Notice of Motion dated 16th February seeking orders inter alia:-
 - a. That the respondent be restrained whether acting by itself, its trustees, employees, agents and/or whosoever from advertising the impugned termination in any platform, advertising the position left vacant by the applicant or substantively filling the position left by the applicant pending inter partes hearing of this application.
 - b. That the termination letter dated 12th February, 2016 be temporarily suspended for violation of orders of 10th February, 2016 under Cause 141 of 2016 and upon suspension the applicant be put on full salary pending hearing and determination of the suit.
 - c. That the respondent be restrained whether acting by itself, its trustees, agents, employees and/or whosoever from advertising the impugned termination in any platform, advertising the position left vacant by the applicant or substantively filling the position left by the applicant pending hearing and determination of the suit herein.
 - d. That the respondents be compelled to avail to the claimants through his advocates on record the minutes, record of attendance or the disciplinary meeting of 11th February, 2016 and documentary evidence supporting all the allegations of the so called gross misconduct.
2. The application was supported by the affidavit of the claimant in which he deponed in the main that:-
 - a. That on 2nd February, 2016 an officer of the respondent wrote a letter to him making various unfounded and unsubstantiated allegations against him touching on issues which happened while he was on leave and asking him to respond within a limited period of 2 days.
 - b. That meanwhile the hospital did not substantiate within the required period and constant

harassment verbal and through emails by the acting CEO of the respondent together with Dr. Ng'ani provoked him to file a Cause No. 141 of 2016 which is still pending.

- c. That the Court through orders of 10th February, 2016 also ordered the counsel for the officers of the respondent to give firm advise to the officers of the respondent not to do anything that would unduly interfere with contractual relations with him.
- d. That the said respondent was very determined to dismiss him such that even before the due process and rules of natural justice was adhered to on 8th February, 2016 he received an internal memo from the respondent's officers taking away key functions from him.
- e. That the respondent through its officers, Human Resource Officer, wrote a letter to him dated 9th February, 2016 asking him to appear for a disciplinary hearing on 11th February 2016 again a very short notice.
- f. That again through his lawyers wrote a letter dated 10th February, 2016 asking for more time to identify a witness, employee of the respondent, of his choice so as to accompany him to the meeting as required by the law.
- g. That he attended the hearing on 11th February, 2016 and further sought for more time to prepare and identify a witness and also requested for documentary evidence substantiating allegations.

3. The respondent opposed the application by filing grounds of opposition and replying affidavit. In the grounds of opposition, counsel for the respondent contended among others that:-

- a. The applicant had abused the process of this Court by filing two (2) concurrent suits, causes nos. 141 of 2016 and 211 of 2016, on his employment dispute.
- b. The applicant had abused the process of this Court by preparing, extracting and serving an alleged order of this Court in spite of the fact that his Court did not make any ruling or decision on 10/2/2016, in respect of the Notice of Motion dated 4/4/2016 in Cause no. 141 of 2016.
- c. The applicant was abusing the process of this Court by pleading, and making sworn averments in cause no. 211 of 2106, on an alleged disobedience of a Court order in cause no. 141 of 2016, without first bringing contempt of Court proceedings to establish the disobedient with the attendant consequences.
- d. The prayer for an order of interim injunction in the Notice of Motion dated 16/2/2016, is misconceived and unavailable, as there was no pleading made in the statement of claim dated 16/2/2016, with respect to the prayer for an injunction.

4. The respondent further filed a replying affidavit through one Dr. Agnes Chege in which she deposed inter alia that:-

- a. That the Mater Hospital is managed in the spirit of Mercy Health Care Philosophy. The Hospital charges for its services and is managed under sound business principles. The revenue earned is applied towards the running of the Hospital. The expenses met include payment of staff salaries, training of staff members. Any surplus earned is channeled towards the funding of other charitable work as determined by the Trustees.
- b. That the Trustees expect and demand that the management, and staff of the Hospital, do imbibe and espouse the Mercy Health Care Philosophy in carrying out their work. They are agents, and fiduciaries of the Trustees serving with utmost honesty.
- c. That in carrying out the duties of his office, and in conformity with the Mater Hospital's in-house

disciplinary process, he issued a Notice to show cause to the applicant dated 2nd February, 2016. The said Notice on its face clearly set out the 5 charges or allegations made against the applicant.

- d. That the applicant responded to the Notice to show cause by a letter from his advocate dated 3/2/2016, and served on him on 4/2/2016. The applicant instructed an Advocate to supervise the in-house disciplinary process of the Hospital. The Advocate for the Applicant prematurely proceeded to file Cause no. 141 of 2016, *Alexander Irungu v. Agnes Chege & Victor Ng'ani* on 4/2/2016 in an endeavor to pre-empt the in-house disciplinary process.
- e. That the said suit sought some wide-ranging reliefs, inter alia, a permanent injunction restraining the respondent from “subjecting the claimant to unfair labour practices and also from summarily dismissing the claimant.
- f. That the managerial investigation have unearthed reasonable or sufficient evidence establishing that the applicant (rigged the tendering and bidding process in respect of the Tender Medical Gases, and unlawfully awarded some to Kenya Medial Gases Engineering; and (b) he unlawfully altered or amended, inter alia, clause 1.3 of the Procurement Policy MH-POL01 (2) to empower himself with the discretion to unilaterally award tenders.
- g. That in light of the fact that the rigging of the Tender for the Medical Gases, and the altering or amendment of the procurement Policy document by the applicant involved the offence of fraud, he reported the matter to the Director of Criminal Investigations under letter dated 4/2/2016.
- h. That the Hospital stands to suffer substantial loss or detriment in the sum of approximately Kshs,6,000,000.00 on account of the said unlawful acts by the applicant of rigging the tendering process, and awarding the tender for Medical Gases to Kenya Medical Gases Engineering.

5. In his submissions in support of the application, Mr. Kigen for the claimant submitted that from the termination letter signed by one of the respondents in cause no. 141 of 2016 it was clear that the parties who attended the disciplinary hearing were engaged in litigation with the applicant yet they sat to deliberate on the conduct of the applicant. According to counsel, there was no way they could have remained impartial. Mr. Kigen further submitted that the respondent breached section 44(4) of the Employment Act which demanded that the claimant be given ample time and documents supporting the allegations. Further that the applicant was not given time to identify a witness to accompany him for the hearing on 11th February, 2016 despite making a request.

6. According to counsel; the refusal to avail documentary evidence to back up the allegations was in breach of natural justice and amounted to unfair hearing. The claimant was not accorded an adequate opportunity to respond to the allegations which were broad in scope and lacking in detail.

7. Counsel further submitted that the documents purportedly unearthing the irregularity of tender produced by the respondent were never made available to the claimant despite request. The claimant saw the same for the first time in Court.

8. The respondent through Mr. Chiuri Ngugi submitted that the claimant brought the present action while knowing fully well that he has another cause being number 141 of 2016 pending hearing before the Court. Counsel contended that it was not in dispute that Cause no. 141 of 2016 and Notice of Motion dated 4th February, 2016 had not been withdrawn or compromised when the Notice of Motion dated 16th February 2016 in cause no. 211 of 2016 was set down for hearing on 25th February, 2016. According to Mr. Chiuri, this was an abuse of the Court process. Counsel further submitted that a perusal of the Court record showed that the motion dated 4th February, 2016 in cause no. 141 of 2016 was to be heard inter partes on 10th February, 2016. This did not take place because the advocate for the applicant sought leave to file a further affidavit. The Court did not make any ruling or decision on the Motion from which an order could be extracted

exparte.

9. The extraction and service of the alleged order which the Court did not grant is according to counsel abuse of the Court process and contempt in the face of the Court. Mr. Ngugi further submitted that the purported withdrawal of cause no. 141 of 2016 was further evidence of abuse of Court process. According to counsel, the applicant cannot approbate and reprobate. That is, he cannot rely on the order made in cause no. 141 of 2016 in the present cause at the same time withdraw the cause in which the alleged order was made.

10. Regarding the disciplinary process, counsel submitted that an employer is vested with managerial prerogative to manage his or her business. The employer has the right to lawfully hire, discipline, terminate a subsisting employment relationship for a just cause. This is an in-house private affair between the employer and the employee. The law intervenes to ensure the respective rights of the parties are respected. According to counsel, an employee who is subject to in-house disciplinary proceedings by an employer after service of a notice to show cause is not entitled to representation by an advocate. Mr. Ngugi argued that the claimant's counsel letter turned tables on his employer by requiring the latter to substantiate or prove the allegations against him.

11. Counsel conceded that the Court is vested with jurisdiction under the Constitution and applicable Labour Laws to grant the reliefs sought, however the present claim did not merit the granting of the orders sought.

12. This is a Motion seeking grant of interlocutory reliefs. The Court therefore must consider whether the applicant has put forward an arguable case with chances of success. The Court must further assess and persuade itself that if ultimately successful in the claim, damages would not constitute an adequate remedy. If not sure, the Court will decide the matter based on balance of convenience. That is to say is it more convenient to grant the orders sought by the applicant pending full trial or would it be better not to restrain or burden the defendants with a Court order pending full trial. In order to determine these parameters, the Court will conduct some sort of mini-trial in its mind but without going deep into the merits or otherwise of the case before it.

13. The main complaint raised by the applicant before me was that he was not availed the documents that informed the charges levelled against him and further that he was not afforded adequate opportunity to respond to the allegations against him.

14. The applicant was issued with a show cause letter dated 2nd February, 2016 (appendix 12 respondents bundle). The letter contained 5 accusations that required his response by 4th February 2016. These accusations, in the opinion of the Court were reasonably detailed and could have left the applicant with no doubt in his mind about their nature and import.

15. The claimant, instead through his advocate via a letter dated 3rd February, 2016 wrote to the respondent asking the respondent to substantiate, elaborate and clarify the various allegations to enable the claimant respond within the time required. The respondent did not do so prompting the claimants to file cause no. 141 of 2016.

16. On 9th February, 2016 the respondent wrote to the applicant asking him to appear for a disciplinary hearing on 11th February, 2016. The letter of invitation once again laid out with reasonable detail the charges the applicant would face at the disciplinary hearing. The letter informed the applicant that the purpose of the hearing was to give him an opportunity to make representations on the allegations as per the notice to show cause letter. This letter once again was responded to through the applicants counsel who among others asked for at least seven days to allow his client get documentation, prepare and have a witness to accompany him. From the minutes attached to the affidavit of Dr. Chege, the claimant attended the hearing and made representations. The claimant's services were subsequently terminated by a letter dated 12th

February, 2016. The letter gave reasons for which the claimant was terminated.

17. The Court observes that from 2nd February, 2016 when the claimant was issued with a show cause letter to 12th February, 2016 when he was terminated was a period of ten days. The bulk of the time was consumed by the litigation in cause number 141 of 2016 in respect of which the Court gave certain directions which the applicant thought restrained the respondent from continuing with the disciplinary proceedings against him.

18. The import of the directions made on 10th February, 2016 were to enjoin the parties to adhere to the provisions of the contract of employment and related regulations and policies that governed their relationship. The Court did not issue any of the orders sought in the application dated 4th February, 2016.

19. The Court has stated several times before that it cannot interfere with a disciplinary process in an employment relationship unless it be shown that the same is being conducted contrary to law, human resource and disciplinary procedures obtaining in the relationship or the same violates principles of natural justice.

20. The claimant was issued with a show cause letter which stated with reasonable detail the allegations against him. He instead of responding, demanded that the respondent substantiates, elaborates and clarifies these allegations. What the claimant was asking the respondent in essence was to provide him with details and conclusive proof of the allegations against him.

21. Section 41(2) of the Employment Act requires that before termination of service an employee or his representative shall be heard and their representations considered before the termination is done.

22. The section does not call on an employer to have proof of reasons for termination. It simply calls on the employer to hear and consider the representations from the employee or his representative. As to whether the allegations would be best resolved by a dismissal or termination of service, is a matter entirely within the discretion of the employer.

23. An employer would be required to prove these reasons for dismissal or termination in the event that the employee affected brings a claim to Court. (Section 43(1) of the Employment Act). In deciding whether the reasons warranted dismissal the Court would consider whether a reasonable employer would for those allegations dismiss or not. If the answer be in the affirmative the Court will uphold the dismissal. If not, the Court will declare the dismissal wrongful or termination unfair and award an appropriate remedy including reinstatement.

24. The Court has noted that the events that led to the claimants termination happened very quickly however the allegations against the claimant were serious and if proved at the trial would justify a dismissal. To this extent the Court find it inappropriate to make the interlocutory orders sought and hereby orders that the matter proceeds to full trial with no interim orders. The application is therefore dismissed. Cost in the cause.

25. It is so ordered.

Dated at Nairobi this 3rd day of June 2016

Abuodha Jorum Nelson

Judge

Delivered this 3rd day of June 2016

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha Jorum Nelson

Judge