



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

CAUSE NO 1373 OF 2015

JENNIFER NDINDA MAINGI.....CLAIMANT

VS

SAHAL INTERNATIONAL TRADING GROUP LTD.....RESPONDENT

RULING

1. By notice dated 18th July 2016 and filed in Court on 19th July 2016, the Respondent raises a preliminary objection to the Claimant's claim on the following grounds:

- a) The Respondent employed the Claimant as a Marketing Executive vide a contract of employment dated 25th May 2015;
- b) The Claimant's employment was to commence on 5th June 2015;
- c) The Claimant's employment was subject to a probationary period of three (3) months;
- d) Either party was at liberty to terminate the contract of employment by giving the other party fifteen (15) days' notice;
- e) The Claimant's employment as a Marketing Executive was to be confirmed after satisfactory completion of the three (3) months' probationary period;
- f) On 7th July 2015 the Respondent gave the Claimant 15 days' notice of termination of the Claimant's employment effective 8th July 2015. The Claimant's contract employment was terminated within the contractual probationary period;
- g) In the premises the Claimant's suit against the Respondent contravenes Section 42 of the Employment Act and therefore lacks merit, is frivolous, vexatious, malicious and otherwise an abuse of the court process.

2. When the parties appeared before me on 5th July 2016, they agreed to dispense with the Preliminary Objection by way of written submissions.

3. The issue for determination in this case is whether the Claimant's claim is properly before the Court. The Preliminary Objection raised by the Respondent is hinged on the assertion that at the time the contract of employment was terminated, the Claimant was serving probation.

4. The Respondent relies on Section 42 of the Employment Act, 2007 which ousts probationary contracts

from the procedural fairness requirements set out under Section 41 of the Act.

5. The Court was referred to the decision in ***Danish Jalang'o & another v Amicabre Travel Services Limited [2014] eKLR*** where **Rika J** held that employers are under no obligation to give valid and fair reasons for terminating a probationary contract. The Judge added that an employee serving probation has not right to be heard prior to termination.

6. I take a different view. While agreeing that an employee serving probation may not enjoy all the rights accruing to a confirmed employee such as full notice, I think such an employee is entitled to all the requirements of due process. I say so because an employee who takes up a new employment has to make major adjustments, including terminating a running employment contract. It cannot therefore be justifiable that such an employee could be terminated without a valid reason and without being heard.

7. I would therefore agree with the holding by **Radido J** in ***Mercy Njoki Karingithi v Emerald Hotels and Resorts Limited [2014] eKLR*** that in light of the invalidation of Section 45(3) by **Lenaola J** in ***Samuel G. Momanyi v the Attorney General & another [2012] eKLR*** employees serving probation are entitled to full protection against unfair and unlawful termination of employment.

8. That being the case, I find the Preliminary Objection by the Respondent not well taken and proceed to overrule it with costs being in the cause.

9. It is so ordered.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 23RD DAY OF SEPTEMBER 2016

LINNET NDOLO

JUDGE

Appearance:

Mr. Muumbi for Claimant

Mr. Nyoike for the Respondent