



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 970 OF 2015

(BEFORE HON. LADY JUSTICE HELLEN S. WASILWA ON 1ST SEPTEMBER, 2016)

RAJEEV ARORACLAIMANT

VERSUS

**BOARD OF DIRECTORS AFRICAN COTTON & TEXTILE INDUSTRIES FEDERATION...
RESPONDENT**

RULING

1. The Application before Court is the one dated 5/6/2015. The Applicant filed this Application through a Notice of Motion brought under Section 18(2) (c), (4) and (5) of the Employment Act 2007, Order Rule 1 and 3 of the Civil Procedure Rules, 2010 and Section 3A, of the Civil Procedure Act and all other enabling provisions of the law.

2. The Applicant sought orders:

- 1. That the application be certified urgent and the same be heard ex parte in the first instance.***
- 2. That the Honourable Court be pleased to order that pending the hearing and determination of the Claim herein the Respondent do pay the Claimant a sum of Kshs.1,576,800/= being the salary arrears for the months of February and March 2015.***
- 3. That the cost of this Application be provided for.***

3. The Application is based on the grounds below and is supported by the Supporting Affidavit of Rajeev Arora, the Applicant herein:

(a) The Respondent owes the Claimant's salary arrears for 2 months February and March a total of Kshs.1,576,800.00, which amount is mandatorily payable as per the employment regardless of any dispute between an employer and the employee.

(b) Wages or salaries shall be deemed to be due in case of an employee employed for a period exceeding one month at the end of each month. The Claimant was employed for a period of over one month and his salary of February and March was due at the end of both months respectively.

(c) Where an employee is summarily dismissed for lawful cause, the employee shall, on dismissal be paid all moneys, allowances and benefits due to him up to the date of his dismissal. This is what the law provides and the Respondent having dismissed the Claimant it was statute bound to pay his salary arrears up to the time of the dismissal.

(d) The Respondent having not made a report to the Labour Officer as required under Section 18(5) (b) of the Employment Act, there is no justification for them to continue holding onto the Claimant's salary.

(e) The Claimant is also seeking terminal benefits, notice, leave and damages for wrongful dismissal but in the interim seeks salary arrears amounting to Kshs.1,576,800/=.

(f) The Claimants have on various occasions sought audience with the Respondent in regard to the claim for their salary arrears and employment dues but the Respondent has arrogantly and contemptuously dismissed the claims.

(g) The Claimant is suffering irreparable harm and injustice since the termination of his employment was abrupt and he needs the salary arrears to assist him while he seeks alternative employment.

(h) It is in the interest of justice that the prayers sought arte granted.

4. The Applicant has averred that he was Respondent's Executive Director from 1-7-2009 until 1-4-2015 when he was summarily dismissed without justifiable cause. At the time of termination the Claimant avers that his salary was 788,400/= per month hence his claim for 1,576,800/= being outstanding salary arrears for February and March 2015 regardless of the dispute before Court.

5. The Respondent filed a replying affidavit to this Application on 4.5.2016. The affidavit was sworn by one Belinda Edmonds, the Director of Respondents Board of Directors.

6. In this affidavit the Respondents have opposed this Application. They admit employing the Applicant from 1.7.2009 as Executive Director to 1-4-2015 when he was dismissed for gross misconduct as per their Appendix 2. They contend that the dismissal of the Applicant was fair and lawful based on sufficient grounds which include:

(i) Failing to adhere to the provisions of the Employment Agreement and unlawfully varying the terms of the said Agreement without the authority and consent of the Respondent.

(ii) Willfully and knowingly misappropriating the funds of the Respondent for personal interest and gain and refusing, failing and or neglecting to account for the same despite demand to do so by the Respondent.

(iii) Abuse of office to the detriment of the Respondent and thereby exposing the Respondent to risk of collapse, sabotaging of the Respondent work and business, comprising the integrity of the Respondent and causing the Respondent to undergo irreparable loss and damage.

(iv) Betraying the Respondent's trust.

(v) Other grounds as set out in the letter of termination dated 1st April, 2015.

7. They aver that due to these reasons, the Claimant was sent on compulsory leave on 13.3.2015 to pave way for investigations but was nonetheless given an opportunity to respond to all the issues raised against him within 48 hours. Thereafter the Applicant was subjected to a disciplinary hearing on 31.3.2015. He was thereafter dismissed on 1.4.2015.

8. The Respondents contend that the Applicant owes them US Dollars 37,884.93 and that he is not owed

the unpaid salary of 1,576,800/=. They aver that this amount was appropriated to offset the amounts owed to them.

9. The Respondents further aver that the Applicant will not suffer any irreparable loss and damage as he has already secured another job as per Respondents Appendix 9.

10. Through a further affidavit deposed to on 16.6.2016 and filed in Court on 22.6.2016, the Applicant has denied the averment of the Respondents and reiterates his prayers that he be paid his salary earned prior to the dismissal.

11. By consent of the Parties, this Application was disposed of by way of written submissions. In their submissions, the Applicant avers that he is entitled to the salary arrears of 1,576,800/= which is his February and March 2015 salary earned before his dismissal. The Applicant relies on Section 18(4) of Employment Act which provides that:

“Where an employee is summarily dismissed for lawful cause, the employee shall, on dismissal be paid all moneys, allowances and benefits due to him up to the date of his dismissal”.

12. They also cited Thomas Sila Nzivo vs. Bamburi Cement Limited (2014) eKLR which held that:

“..... Section 18 [4] of the Employment Act 2007 demands that even in cases of summary dismissal, the Employee shall be paid all the monies, allowances and benefits, due to him up to the date of dismissal.

45. There are limited occasions when the Employer is allowed to withhold the salary of its Employee. Section 18[6] states: “ no wages shall be payable in respect of a period during which the Employee is detained in custody or serving a sentence imposed under any law.”

47. Section 19 of the Employment Act outlines 9 occasions when the Employer may deduct from the wages of an Employee. No provision under this law allows the Employer to deny a suspended Employee his monthly salary The salary remains protected under Part IV of the Employment Act, even during suspension. The contract of employment is still in force. The suspension without pay, offended the principles of Fair Labour Practices and Protection of Wages.

48. The Claimant is entitled to the salary and allowances for the duration he was under suspension. To uphold the Respondent’s decision in withholding these would mean that the Claimant is punished twice, over the same employment wrong”.

13. The Respondents on the other hand submitted that this Application is premature and issues raised cannot be determined at this Interlocutory stage of the proceedings as the salary of the Claimant is in contention as the Applicant abused his office and unilaterally increased his salary.

14. They also aver that the Claimant’s salary was deducted from what he owes the Respondents in accordance with Section 19(1) (d) of Employment Act which provides that:

“Section 19(1) Notwithstanding, Section 17(1), an employer may deduct from the wages of his employee:

(a) an amount equal to the amount of any shortage of money arising through the negligence or dishonesty of the employee whose contract of service provides specifically for his being entrusted with the receipt, custody and payment of money;

15. They distinguished Thomas Sila Nzivo case (supra) stating that the prayers were not granted at the Interlocutory Stage.

16. Having considered the averments and submissions of both parties, I find that the issue to determine is whether the Applicant is entitled to salary arrears for February and March 2015 as prayed at this Interlocutory Stage.

17. It is indeed true that under Section 18(4) of Employment Act an employee who is summarily dismissed whether lawfully or unlawfully is still entitled to all his moneys, allowances and benefits due to him upto the date of the said dismissal.

18. The Respondents however have contended that what is owing to the Applicant is contested as he dealt treacherously with the Respondents and increased his salary unlawfully which salary has to be offset from what he owes the Respondents.

19. The Respondents have indeed made a Counter-Claim against the Applicant in an amount of US Dollars 37,884.93.

20. In view of this Counter-Claim, it is apparent that there is evidence that needs to be adduced by either party to prove or disapprove the contention.

21. Indeed as cited by the Respondents under Section 19(1)(d) of Employment Act, an employer can deduct wages from an employee, an amount equal to an amount of any shortage of money arising through negligence or dishonesty of the employee...“.

22. This is deductible notwithstanding Section 17 of Employment Act which provides that an employee's wages should be protected.

23. Having found as above, I find the Application by the Applicant is premature given the contention in what is truly owing or owed. The prayers cannot be granted at this Interlocutory Stage. I therefore decline to grant orders as sought and direct that the main claim be set down for hearing.

24. The Applicant will have 7 days to file a response to the Counter Claim.

25. Costs in the cause.

Read in open Court this 1st day of September, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Claimant

No appearance for Respondent