



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 925 OF 2016

DAVID OWEN MBOYA.....CLAIMANT

VERSUS

UCHUMI SUPERMARKETS LIMITED.....RESPONDENT

RULING

1. This ruling relates to the Claimant's application brought by Notice of Motion dated 17th May 2016 seeking the following orders:

- a. That operation of show cause letter dated 13th May 2016 be stayed;
- b. That the said letter of 13th May 2016 be declared null and void and the Claimant be reinstated in his employment;
- c. That the Respondent be compelled to follow the correct, honest and fair procedure in its intention to terminate the Claimant's employment.

2. The application, which is supported by the Claimant's affidavit sworn on 17th June 2016 is based on the following grounds:

- a. The show cause letter dated 13th May 2016 is a cover up motivated by ill will and malice and has suspended the Claimant without a just reason;
- b. The Respondent is acting dishonestly and unfairly as not only is the notice too short but is based on false evidence;
- c. The Claimant's professional reputation must be protected by correct and honest procedure in employment and termination process.

3. In his supporting affidavit sworn on 17th June 2016, the Claimant depones that by letter dated 13th May 2016 which was delivered to him at 12.00 Noon of the same day, he was required to show cause why his employment should not be terminated by 5.00 pm on 16th May 2016.

4. The Claimant's request for more time to respond and to access his office laptop was turned down. He adds that in his effort to collect material to support his response, he stumbled upon evidence indicating that the Respondent had in fact already written a letter dismissing him hence the show cause letter was a cover up of the Respondent's real intention.

5. It is the Claimant's case that the Respondent has denied him the opportunity to respond to an adverse report by the Respondent's External Auditors,

KPMG. He avers that the Respondent's instructions that he hands over his office amounts to a suspension without reasonable cause.

6. In a replying affidavit sworn by the Respondent's Human Resource Business Partner, Peris Mwangi on 7th June 2016 it is deponed that a Forensic Audit Report prepared by KPMG had revealed serious flaws and weaknesses in the Internal Audit function which was headed by the Claimant. She adds that these weaknesses showed negligence and incompetence on the part of the Claimant as the Head of Internal Audit.

7. Mwangi further depones that the weaknesses and massive losses incurred by the Respondent while the Claimant served as Internal Audit Manager was *prima facie* proof of his incompetence which required an explanation.

Pursuant to a decision by the Respondent's Board, the Claimant was issued with a show cause letter.

8. With regard to the issue of time, Mwangi avers that the period given to the Claimant to respond to the show cause letter was sufficient as all issues raised were within his knowledge.

9. The issue for determination before the Court is whether the Claimant has proved a case for orders staying the disciplinary process initiated by letter to show cause dated 13th May 2016. The letter states as follows:

"Dear Sir

***RE: NOTICE TO SHOW CAUSE WHY YOUR SERVICES SHOULD NOT
BE TERMINATED***

As you are aware, the Company is undergoing difficult economic times resulting from mismanagement and or lack of proper administration of its business and is presently threatened with being wound up.

You were employed as an Internal Audit Manager and it is apparent that had you managed the audit functions properly, the business of the Company would have significantly avoided the circumstances faced today.

A Forensic Audit was conducted by M/s KPMG found serious gaps in the Audit functions which were under your docket (sic).

We are enclosing herewith and excerpt (sic) of the KPMG Forensic Audit Report which details weaknesses in the Audit Department for your perusal.

Your engagement as the Internal Audit Manager has not been beneficial to the Company.

*In terms of **Clause 13** Letter of Appointment, either party reserves the right to terminate the Contract of Service.*

You are hereby required to show cause why your services should not be terminated and or why you should not be dismissed for negligence/incompetence based on among others the findings in the KPMG Forensic Report.

*Your written response should reach me by **5.00 pm on Monday, 16th May, 2016.***

You are also required to hand over your duties and office properties to Raphael Kimili and proceed on paid leave while your case is being considered.

The Company will comply with all the provisions of the Employment Act, 2007 while dealing with your case to ensure fairness.

Yours faithfully,

Uchumi Supermarkets Ltd.

Julius Kipngetich

Chief Executive Officer

10. Upon receipt of this letter, the Claimant sent an electronic mail on 13th May 2016 addressed to Peris W. Mwangi (pwmwangi@UCHUMI.com) with a copy to Julius Kipngetich (jkipngetich@UCHUMI.com) among others acknowledging receipt of the show cause letter while stating that he required to go through specific reports before submitting his response. He asked for extension of time up to 30th May 2016 to respond to the show cause letter.

11. Peris Mwangi wrote back to the Claimant stating that the Respondent had been advised by its lawyers that the time given within which the Claimant was to respond was adequate. She also asked the Claimant to return the company laptop and tablet by the following Monday.

12. The orders sought by the Claimant are within the ambit of an interlocutory injunction. Counsel for the Respondent referred the Court to the well known case of ***Giella v Cassman Brown & Co. Ltd [1973] E.A 358*** where the conditions for grant of an interlocutory injunction were stated as follows:

- a. That an applicant must show a *prima facie* case with a probability of success;
- b. That if the order sought is not granted the applicant will suffer irreparable injury which would not be adequately compensated by an award of damages;
- c. That if the Court is in doubt, it will decide the application on the balance of convenience.

13. The Claimant's case in this application is not that he is innocent of the allegations made against him; it is that he was not afforded adequate opportunity to respond to the show cause letter dated 13th May 2016.

14. In defining a *prima facie* case, the Court of Appeal in ***Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] KLR 125*** stated as follows:

“So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

15. Regarding the other two conditions for granting of an interlocutory injunction, I have this to say. A disciplinary process initiated by an employer against an employee ranks high among what is commonly known as

‘management prerogatives’. The Court will therefore not normally interfere with such a process unless there is evidence that the procedural fairness requirements set out in law are being violated. And even where the Court interferes, it cannot be to halt the disciplinary process but to put things right.

16. Section 41 of the Employment Act, 2007 sets the threshold for procedural fairness in internal disciplinary cases. In *Rebecca Ann Maina and 2 Others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR* this Court rendered itself as follows:

“In order for an employee to respond to allegations made against them, the charges must be clear and the employee must be afforded sufficient time to prepare their defence. The employee is also entitled to documents in the possession of the employer which would assist them in preparing their defence.”

17. Moreover Article 35 (1)(b) of the Constitution confers the right to information held by another person which is required for the protection of a right or fundamental freedom. In my view, this would include an employee facing disciplinary action.

18. The Claimant made a specific request for extension of time by approximately two (2) weeks and for access to certain documents. The Court was unable to understand why the Respondent declined the Claimant’s request which in the assessment of the Court was reasonable.

19. Additionally, a reading of the show cause letter issued to the Claimant did not disclose any specific charges leveled against the Claimant. The letter contains general accusations and the Court could not even tell whether the Claimant was being accused of misconduct or poor performance.

20. I have already stated that the Court will not issue a blanket bar to internal disciplinary proceedings. However, in pursuing these proceedings, the employer must comply with the law. Consequently and in view of the foregoing findings I make the following orders:

- a. The Respondent is directed to re-issue the show cause letter setting out the specific charges to which the Claimant is to respond;
- b. The Respondent shall allow the Claimant not less than two (2) weeks from the date of receipt of the show cause letter within which to respond;
- c. The Respondent shall allow the Claimant reasonable access to documents required by him for his defence;
- d. In the intervening period, the Respondent must not act in any manner that may be construed as harassment to the Claimant.

21. The costs of this application will be in the cause.

22. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 4TH DAY OF NOVEMBER 2016

LINNET NDOLO

JUDGE

Appearance:

Mr. Khamati for the Claimant

Mr. Lutta for the Respondent