



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1766 OF 2016

SAMUEL MWINAMI.....CLAIMANT

VERSUS

SOCIAL SERVICE LEAGUE

M.P. SHAH HOSPITAL.....RESPONDENT

RULING

1. The respondent, by application and Notice of Motion filed on 24th October 2016, brought under the provisions of articles 30 and 41 of the constitution, section 12(3)(viii), 16 and 20 of the Industrial Court Act [Employment and Labour Relations Court Act], Rule 16(8) (a) & (b), rule (1) (g) and Rule 32 of the Industrial Court (Procedure) Rules {Employment and Labour Relations Court (Procedure) Rules, 2016}, order 45 and Rule 36 of the Civil Procedure Rules and seeking for orders that;

1. ...

2. *Pending the hearing and determination of this application, the Court be pleased to set aside the orders issued on 31st August 2016;*

3. *This Court be pleased to issue such further orders as it may deem fit to do so;*

4. *Costs of this application be provided for.*

2. The application is supported by the annexed affidavit of Gicheru K Gicheru and on the grounds that the orders issued on 31st August 2016 which in essence required parties to maintain the *status quo* and further restrained the Respondent from effecting the decision to terminate the Claimant on the grounds of redundancy was in effect reinstating the Claimant to the position of Physiotherapist Assistant with full pay and without loss of benefits. This also was to lift of the redundancy notice of 26th July 2016.

The status quo at the time of issuance of the orders of 31st October 2016 was that the Respondent had issued a redundancy notice dated 26th July 2016 and the Claimant had been terminated from his employment with the Respondent on the grounds of redundancy.

3. Further grounds in support of the application are that the orders issued on 31st August 2016 contradict themselves to the extent that they provide for the maintenance of status quo on the one hand and change the status quo by reinstating the Claimant by lifting the redundancy notice of 26th July 2016 on the other hand. These orders were made ex parte and determined the outcome of the suit at the interlocutory stage

without giving both parties to a hearing contrary to rule 16(8)(a) of the Court Rules that ex parte order should not issue reinstating an employee at the exported stage.

4. The orders of 31st July 2016 impose the claimant's services on the Respondent without due consideration of the factors of redundancy and abolition of office held by the claimant; economic interest of the respondent; the sensitive nature of business of the respondent; and casting the employer into servitude which is contrary to the provisions of article 30 of the constitution and against public policy.

5. Further grounds are that the Claimant has not demonstrated that he cannot be compensated adequately in damages if the Respondent is found to have been wrong in terminating him on the grounds of redundancy and the orders of reinstating the Claimant into office that has been abolished does not exist and will be at a cost not recoverable to the respondent. The Claimant has no known means of income and may not be in a position to make restitution to the Respondent in the event the Court determines the case in favour of the respondent. The Respondent is willing to abide by any orders of the Court as to security.

6. In the affidavit of Mr Gicheru, he avers that as the Senior Human Resource Officer of the respondent, he has authority to reply herein. That the position held by the Claimant of physiotherapist at the Respondent hospital has been abolished and a redundancy notice issued on 26th July 2016. In compliance with the Court order of 31st August 2016, the Respondent has reinstated the Claimant but been forced to send him on leave as there are no duties to allocate to him and there is no vacancy in the hospital that he is qualified to fill. The Respondent has complied with the provisions of section 40 of the Employment Act, and the CBA in force in the payment of terminal dues. Keeping the Claimant is not sustainable as there are no duties for him to undertake and the orders of the Court effectively offend provisions of article 30 of the constitution on servitude and article 41 on fair labour practices as the Respondent is made to pay the Claimant for services not rendered due to abolition of office.

7. Mr Gicheru also avers that the orders of 31st August 2016 were made ex parte before the Respondent was given a hearing; such orders determine the suit before the Respondent is heard; the orders contradict themselves by ordering status quo be maintained and reinstating the claimant; the orders have adverse effects on the Respondent as they cannot recover salaries paid to the claimant; and the Respondent is willing to deposit security.

8. That redundancy is defined in law and section 43 of the Employment Act allow an employer to terminate employment on good grounds that are lawful and justified and in this case there is a redundancy declared. The order of reinstatement should be set aside. The Respondent rely on the case of **Kenya Airways Limited versus Aviation & Allied Workers Union & 3 Others, Civil Appeal No.46 of 201;** where the Court held that where a genuine redundancy exists employment can be terminated and compensation due paid. In **Alfred Nyungu Kiungui versus Bomas of Kenya, Cause No.620 of 2013;** the Court held that the protections set by the Employment Act are not impose employees on an employer particularly to order a reinstatement at the interlocutory stage.

9. In view of the applicable law and the Rules of the court, the orders sought should issue as prayed.

10. In reply, the Claimant filed his Repaying Affidavit on 1st November 2016. He avers that he has been employed by the Respondent since 1985 as a Physiotherapist assistant until 29th August 2016 when he was chased away without a justifiable cause. The Respondent had issued a notice to KUDHEIHA union to take effect on 31st August 2016 and when the orders herein were issued, the Respondent was served on 1st September 2016. The Claimant was then reinstated and directed to take his annual leave.

11. The Claimant also avers that there is work for him to do at the Respondent business and the redundancy is not justified as alleged and section 40 of the Employment Act was not complied with. His department had 8 employees and the Claimant was the only one affected. The Claimant would serve on average 6 patients in a day and the purpose of abolishing his position was to silence his union activities where he is the shop steward and has attended reconciliation meetings at the labour office between KUDHEIHA and the respondent. the termination is also meant to eliminate the Claimant as his salary is

higher compared to that of the Physiotherapist in charge but this is due to the number of years served and the negotiated increments.

12. The Court orders were issued while the Claimant was in employment and therefore valid. The Respondent has failed to disclose the true reasons as to why they do not want the Claimant in office and that is due to his unionisation and union activities.

Both parties also made their oral submissions in court.

Determination

Whether the orders of 31st August 2016 should be set aside Whether there exists grounds to set aside ex parte orders herein

13. The essence of Court issuing ex parte orders is to ensure the preservation of the subject matter in question. Before issuing the injunction, the Court must have been satisfied that it is necessary to grant the same. If it were not satisfied, the Court would not have issued the injunction in the first place. However, if the injunction is obtained by concealing facts which if put to the judge in first instance would have affected judgment on whether or not to give the injunction, then a Court can be inclined to vary or vacate the injunction in light of the new facts. See **Filista Chamaiyo Sosten versus Samson Mutai (2012) eKLR**.

14. On 31st August 2016, the Claimant moved the Court and the impugned orders issued and in their substance the Court directed parties to maintain the status quo and lifted the redundancy notice of 26th July 2016. The Respondent be served and to file a reply for hearing on 8th September 2016.

15. The orders of 31st August 2016 were thus issued upon good ground and upon the Court being satisfied that indeed there existed good reasons, grounds and justifiable cause to stop the termination of the Claimant on the grounds of redundancy.

The Court was well apprised of these facts before the grant of the ex parte orders on 31st August 2016. Before going into the merits of the application and the main suit, the Court at the first instance was satisfied that there existed a *prima facie* case that warranted the issuance of interim orders.

16. Should these orders be set aside, varied or changed in any manner?

17. The Respondent has relied on the provisions of Rule 16 of the Court Rules. With the publication of new Court Rules in 2016; Rule 17(7) provides that once an injunctive order is issued, a party can apply for the same to be discharged, varied or set aside. As held in **Enock O Kinara versus Postal Corporation of Kenya, Cause No.2202 of 2016**;

Rule 17(7) [of the Employment and Labour Relations Court (Procedure) Rules, 2016] can be read together with Order 40(7) of the Civil Procedure Rules, 2010. Such orders of discharge, variation, or setting aside can only be issued on good and sufficient grounds and upon application by a respondents for being dissatisfied with the same. The reasons for such dissatisfaction must be set out by an applicant for the Court to vary, discharge or set aside existing orders.

18. What then is the dissatisfaction of the respondent? The respondent's case is that the Claimant's employment was terminated by the redundancy notice of 26th July 2016 and his position as Physiotherapist assistant does not exist anymore. That the Respondent is now forced into a position of slavery and servitude by being made to employ the Claimant for duties that do not exist.

19. The Respondent admit that the notice issued on 26th July 2016 was to terminate the claimant's employment on 31 August 2016. The Claimant approached the Court just before such termination took effect and noting the matters set out in the application and the Memorandum of Claim, the interim orders

issued were on the basis that the employment was still subsisting and had thus not lapsed for the application of Rule 17(7) of the Employment and Labour Relations Court (Procedure) Rules stopping reinstatement at the ex parte stage. Context should also not be lost that Rules of procedure do not supersede the provisions of the substantive legislation giving the Court power to issue interim orders as appropriate and based on the merits of each case and in accordance with Section 12 of the Employment and Labour Relations Court Act.

20. There is no reinstatement of the claimant. Employment did not cease as the termination notice on account of redundancy was lifted and parties directed to maintain the status quo as at the date the orders were issued. With that, employment is continuing. The employment thus preserved, the Court directed the parties to exchange their pleadings so as to hear both parties at the earliest. The right to be heard was secured even with the ex parte orders issued in their form and character.

21. In this regard therefore, the Court and noting the interim orders gave a hearing date within a short time for 8th September 2016. On the due date the Respondent though served had not replied and the Court gave 7 days for the Respondent to be able to reply to the claimant's application. Such a time lapsed and no reply was filed.

On 5th October 2016, parties agreed to file their written submissions with regard to the claimant's application and mention date issued for 28th November 2016. Before such date, on 25th October 2016, the Respondent moved the Court under Certificate of urgency as herein and seeking to have the orders of 31st August 2016 set aside.

22. in **Kenya Plantation & Agricultural Workers Union versus P. J. Dave Flowers Ltd, Cause No.101 of 2015(Nakuru)**, the Court held that before filing counter-applications, a Respondent should address the pending application and that;

The natural and legal consequence of an inter parties hearing at an interlocutory stage will seek the orders granted ex parte either confirmed or vacated after hearing both sides. It serves no useful legal purpose to file a counter application(s).

23. The Court in the **Enock Kinara case**, cited above quoted **Mobile Kitale Service Station versus Mobil Oil Kenya Limited & Another (2004) eKLR**; where the Court held that the rationale of issuing interlocutory orders is that;

An interlocutory injunction is given on the court's understanding that the defendant is trampling on the rights of the plaintiff. An interlocutory injunction, being an equitable remedy, would be taken away (discharged) where is shown that the person's conduct with respect to matters pertinent to the suit does not meet the approval of the Court which granted the orders which is the subject matter.

The orders of injunction cannot be used to intimidate and oppress another party. It is a weapon only meant for a specific purpose – to shield the party against violation of his rights or threatened violation of the legal rights of the person seeking it.

24. Without going into the merits of the main suit as the Respondent has invited the Court to do, such is not the essence of interlocutory proceedings. At the first instance, the Court must be satisfied that there exists good grounds for grant the orders sought by an applicant and where a Respondent is to seek for the setting aside of the same, good and satisfactory grounds must be established. The merits and demerits of the defence will be given a chance at the due time. To file a counter-application as the Respondent has done is just to stall the hearing of the claimant's application and cause for the extension of the challenged interim orders.

25. Where the Respondent is keen to have application filed by the Claimant heard, a reply setting out matters now addressed in the counter-application seeking stay should suffice. To move the Court as

herein is stalling the hearing and disposal of the application dated 31st August 2016.

In conclusion therefore, based on the orders sought and grounds thereto in application dated 24th October 2016, the same is declined, interim orders with regard to the claimant's application of 31st August 2016 shall remain in force pending the parties abiding by the directions of 5th October 2016. As the mention date therein has since lapsed, the Claimant has since filed his written submissions, the Respondent has 7 days to file written submissions. Parties shall be allocated a mention date at the registrar.

Delivered in open court at Nairobi this 8th day of December 2016.

M. MBARU JUDGE

In the presence of:

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