



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1012 OF 2014

JAQUELINE KANJA CLAIMANT

VERSUS

VISA CEMEA HOLDINGS LIMITED RESPONDENT

Mr. Mr. Ahmed Nassir for the Claimant

M/S Otaba for the Respondent

RULING

1. The Claimant/Applicant Jaqueline Kanja brought this application against her employer, Visa Cemea Holdings limited seeking for orders inter alia;
2. That, pending the hearing and determination of this application inter-partes the Honourable Court be pleased to order that the Respondent reinstates the Claimant forthwith to her job, with all the attendant rights, benefits and privileges.
3. The matter was certified urgent and interim orders granted accordingly.
4. The Application is based on grounds set out from 1 to 9 in the Notice of Motion and reiterated in the Supporting Affidavit of the Claimants/Applicant deposed to on 18th June, 2014.

5. Brief Facts

The nub of the Applicant's case is that the Applicant was employed by the Respondent as a Marketing Manager Sub-Saharan Africa and worked at the Respondent's South African Office for one year. The terms of employment are set out in the letter of appointment dated the 21st April, 2011 and signed by the Applicant on 22nd April, 2011. The letter of appointment incorporates Section A of the staff handbook as constituting terms of the Employment Contract.

6. In 2012, the Applicant relocated to Kenya at the request of the Respondent and was employed in the Respondent's Nairobi office, in the position of a Marketing Manager for Southern & East Africa vide a

letter of appointment dated 15th February, 2013.

7. It is the Applicant's case that during the employment with the Respondent, she performed her duties well and had good performance reviews and had received a certificate annexed to the application and marked 'JK3' in recognition of her hard work and dedication.

8. That on or about the month of October, 2013, the Respondent human resource director put up an internal and external advertisement for the job the Applicant held under a different title of Marketing Business Leader. When the Applicant inquired about the advertisement, the human resource director apologised to her stating that they were just testing the market to see the caliber of people they would get. The Advert and the ensuing correspondence are attached to the Application and marked 'JK4'.

9. The Applicant deposes, that on April, 2014 the Respondent summarily dismissed her from employment on grounds of gross misconduct without giving her a formal hearing. The letter of summary dismissal is not attached to the application.

10. However, the Applicant attached correspondence marked 'JK5' showing that the Respondent had declined the request to reconsider the dismissal and put her through a formal disciplinary process as per the terms and conditions of service.

11. The applicant states that she was targeted for victimization and unnecessarily put on Performance Improvement Plan (PIP) for no good cause at all. She had objected to the moves by the Respondent. It is her believe that this objection led to the termination of her services.

12. The Respondent served the Claimant with a voluntary separation agreement attached to the application and marked 'JK7' dated 24th April, 2014. In terms thereof, the Applicant was offered the following exit packages;

1. Four weeks' Notice period in the sum of Ksh.771,073.26
2. An exgratia payment of Ksh.1,842,633
3. Payment in lieu of leave in the sum of Kshs.273,420.

13. These were payable through the May payroll run.

14. The offer was made on condition that, if the same was not accepted it would lapse and the Applicant would be put through a disciplinary process.

15. The Applicant declined to accept the voluntary exit offer upon advice from her lawyer.

16. She was requested to attend a disciplinary hearing on 25th April, 2014 in the Boardroom at Nairobi.

17. The Applicant was informed that she would have opportunity to make her representations and would be given a hearing.

18. That she would be entitled to be represented at the meeting by a fellow employee or her registered trade union representative (if applicable).

19. The panel would consist of three named colleagues and a decision would be made within 5 days of the hearing.

20. Thereafter, the Applicant would be entitled to appeal the decision by submitting a written appeal to Human Resource within five (5) days of the receipt of the decision.

21. An Appeals Manager for the purpose was appointed. That if the Appeals Manager required further information he would convene an appeal meeting.
22. That the decision of the Appeals Manager is final and no further appeals would be entertained.
23. The Applicant was suspended from work pending the outcome of the disciplinary process.
24. The Applicant was warned that, if she was found guilty, her employment at the company would be terminated summarily without notice or payment in lieu thereof.
25. The Applicant was served with a Notice of Disciplinary meeting dated 23rd April, 2014. She was charged with the offence of gross misconduct in that;

“On 9th April, 2014, your manager instructed you to manage the first registration process for marketing promotion on behalf of the Visa clients in your geography. In three separate emails, you repeatedly stated that you would not perform this task. In a subsequent conversation with your manager on 14th April, 2014 you again stated that you would not perform the task. In an e-mail to your manager on 14th April, 2014, you documented your continued refusal to obey the lawful and proper instruction from your manager.”

26. A letter by the Advocate to reschedule the hearing marked ‘JK10’ was not received by the Respondent. The meeting proceeded in her absence and the Respondent wrote to the Applicant a letter dated 25th April, 2014, in which she was informed to send written summons on the allegations made against her. The applicant complied by writing a response to the allegations dated 28th April, 2014 marked ‘JK12’.

27. The Respondent wrote a letter dated 6th May, to the Applicant informing her that the panel had found her guilty of gross misconduct and that she had opportunity to appeal the decision. The letter is marked ‘JK13’.

28. The Advocate wrote a request to the Respondent dated 7th May, 2014, to revisit the disciplinary hearing marked ‘JK14’ which request was declined.

29. The Applicant submits that her dismissal was premeditated and patently unfair as evidenced by the correspondence between herself and CEMEA, Vice President marked ‘JK15’ on the existing issues between herself and one Jodie Schorn.

30. That she believes that the termination was patently unfair and unlawful and is entitled to the remedies sought which at this point would be reinstatement to her job pending the hearing and determination of the pending claim.

31. At the ex-parte stage the court granted an interim order restraining the Respondent from hiring a replacement.

32. **Respondent’s Case**

The Respondent filed a replying Affidavit on 17th July, 2014 deposed to by Mandy Lamb on 7th July, 2014.

33. The deponent is the Acting Group Manager (GCM) for Sub-Saharan Africa(SSA) of the Respondent which is a wholly-owned subsidiary of Visa International Service Association, a global payments technology company.

34. The Respondent admits all the employment particulars of the Claimant/Applicant.

35. That beginning in October, 2013, the Claimant/Applicant in her role as Marketing Manager Sub-Saharan Africa reported to Jode Schorn who was at the time Acting Head of Marketing Sub - Saharan Africa.
36. The Respondent denies that the claimant worked diligently, had good performance reviews, was hardworking and/or dedicated to the Respondent. Indeed, the Respondent denies it issued the claimant the certificate as alleged in her Supporting Affidavit sworn to on 18th June, 2014. That the 'Visa Go Beyond' certificates are not and have never been part of the appraisal process of visa employees and do not reflect the employees performance. That annual performance reviews are conducted for that purpose.
37. That the Claimant/Applicant performed her tasks in a manner that the Respondent's management considered below the standards required of a person in the position of the Marketing Manager Sub-Saharan Africa.
38. That the claimant's poor performance and poor execution of her duties were discussed with her during several internal meetings with her direct supervisor Jode Schorn and in her annual performance review for 2013. Particulars of poor performance included inter alia, her unsatisfactory managerial and leadership skills, late delivery of campaigns and her interaction with external agencies and her visa colleagues, among other issues. The annual review for the year 2012 to 2013 conducted by Rajiv Kapoor, the Vice President of Marketing is annexed to the replying Affidavit and marked 'MK2'
39. The review captures her failure to carry out tasks and duties allocated to her as well as her lack of co-operation with other colleagues as captured in the emails attached to the Affidavit and marked 'ML3'.
40. For example annexure 'ML4' is a complaint from Eco Entertainment dated 29th January, 2014 regarding challenges the Agency had experienced with the Claimant.
41. As a result of the various challenges faced by the Claimant a decision was made to place the Claimant on a Performance Improvement Plan (PIP) for a period of 30 days with a view to assisting her to improve her performance.
42. The PIP was duly discussed with the claimant following which a copy of the PIP was forwarded to her on 26th February, 2014.
43. The Claimant was placed on a PIP of 60 days upon her request to be put on a longer PIP period. The Respondent denies the allegations made by the claimant in her Affidavit on PIP.
44. In October, 2013 Yvonne Maraja who was the Respondents Marketing Manager at the time and who reported firstly to the Claimant in the Nairobi office and assisted the Claimant in her marketing role, resigned.
45. In an effort to improve the quality and structure of marketing support given to the SEA team, the Respondent considered upgrading the position previously held by Yvonne Maraja. This was because the claimant had severally stated that she felt overwhelmed by the role and that more support was needed for the SEA business.
46. The proposed structure is attached as 'ML6' which shows there would be a Client Marketing Support Manager working alongside the Claimant.
47. Before implementing a new structure, the Respondent put out an advertisement to get a feel of the kind of talent in the market and whether it would be able to recruit people with the requisite skills and expertise for a more senior role. This is clearly explained in the emails annexed as exhibit 'JK4' to the Claimant's Supporting Affidavit sworn on 18th June, 2014.

48. The Respondent denies the allegation that it had tried to get rid of claimant as alleged in paragraph 5 of the claimant's Supporting Affidavit.

49. The Respondent admits that the Respondent summarily dismissed the claimant on account of gross misconduct and the correct set of events are set out in paragraphs 45 to 55.

50. The Respondent demonstrates therein the disciplinary procedure followed by the Respondent prior to the summary dismissal of the Claimant. The Respondent concludes at paragraph II that the entire disciplinary procedure was done completely above board and devoid of any premeditation, malice, bias or racial prejudices.

51. The Respondent states that the letter by Ahmed Nassir Abdullahi the Advocate for the Claimant dated 25th April, 2014, seeking postponement of the disciplinary process was received after the disciplinary meeting had been held and a report on the same prepared and sent to the Claimant on or about 6.00 p.m. on 25th April, 2014. The Respondent therefore disputes the allegation contained in the letter dated 29th April, 2014, written by the Advocate for the claimant which is exhibit 'ML14' to the Claimant Supporting Affidavit.

52. In any event, the Respondent considered the submissions made by the claimant in her defence dated 28th April, 2014 before reaching the final decision to dismiss her from employment.

53. The Claimant was provided with reasons for the decision to dismiss her and was given the opportunity to appeal the panel's decision. Instead, the claimant through her Advocate by a letter dated 7th May, 2014 marked 'ML17' demanded inter alia that the Respondent convene another disciplinary hearing and that the Claimant be allowed to have an advocate present.

54. The Respondent declined this request and hence the claimant declined to appeal the disciplinary panel's decision that the Claimant had committed gross misconduct hence the decision was upheld.

55. **Conclusions of Fact**

Upon considering this presentation by the Claimant and those by the Respondent, it is clear that;

- (1) The Claimant had been dismissed from her employment by the time she approached court.
- (2) A disciplinary process preceded the Respondent's decision to dismiss the Claimant from her employment.
- (3) The Claimant through her Advocate requested a repeat of the disciplinary process which request was declined by the Respondent.
- (4) The claimant was informed of the right to Appeal the decision of the disciplinary panel but did not exercise her right of appeal.
- (5) It is in dispute whether the Advertisement placed by the Respondent was for the position held by the Claimant or was part of the recruitment process which excluded the position held by the Claimant at the time.

56. **The Law**

The Claimant/Applicant seeks a temporary mandatory injunction to reinstate her to her previous position at the Respondent's company pending the hearing and determination of the main suit.

57. The Claimant/Applicant further seeks a temporary injunction stopping the Respondent from filling the position previously held by the Claimant/Applicant.

58. The Claimant/Applicant relies on the provisions of Industrial Court Act, Cap. 234 Laws of Kenya Section 12(3) (i) and (viii) which reads;

“(3) In exercise of its jurisdiction under the Act, the court shall have power to make any of the following orders;

(vii) An order for reinstatement of any employee within three years of dismissal subject to such conditions as the court thinks fit to impose under circumstances contemplated under any written law;”

59. The claimant further cites Section 49(a) and 50 as the written law under which the court may reinstate an employee.

60. Section 49 as whole provides remedies for wrongful dismissal and unfair termination and the matters the court ought to take into account in granting the remedies set out therein which remedies include reinstatement of the employee and treat the employee in all respects as if the employee's employment had not been terminated or re-engage the employee in work comparable to that in which the employee was employed prior to his/her dismissal, or other reasonably suitable work, as the same wage.

61. The question the court must answer is whether the law contemplates that these remedies may be granted to an employee who has been dismissed as an interim measure pending the hearing and determination of the main suit or not.

62. In the Industrial Cause No. 1200 of 2012, at Nairobi, Professor Gitile versus Multimedia University College & Anor (2013] eKLR, the court relied on the case of Giela V. Cassman Brown Ltd [1975] EA 358 as follows;

For a Claimant/Applicant to be granted interim orders he/she must satisfy the following requirements;

- (a) The Applicant must establish a prima facie case with a probability of success;
- (b) The Applicant must demonstrate that he/she will suffer irreparable harm which cannot be adequately compensated by an award of damages; and
- (c) If the court is in doubt it should decide the application on the balance of convenience.

63. The court further cited the Court of Appeal in Mrao V. First American Limited and 2 Others, (2003) eKLR where a *prima facie* case was defined to mean;

“..... A case which on the material presented to 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....”

64. In Professor Gitile's case, the Claimant/Applicant, was still in the employment of the Respondent but had been stripped of a leadership position of Deputy Vice Chancellor, Administration and an acting appointment had been made by the Respondent to replace the Claimant/Applicant while his contract with the Respondent was in place. The court upon considering the peculiar facts in the case held;

“The Claimant has therefore established a prima facie case with a probability of success that there exists a right which has apparently been infringed by the Respondent....”

The fact of the matter is that he has been stripped of a leadership position and therefore has been effectively demoted. His career progression has been negatively affected in a manner that is not capable of correction by way of damages. In this regard, I have equally no doubt in my mind that prudence and convenience dictate that the Respondent await a bit longer to replace, if at all, the claimant from the position he holds by virtue of his unspent contract and the provisions of the

65. The court distinguishes the facts of Professor Gitile’s case and the present one as follows;

(a) The Claimant in in this case unlike in the former case has been charged and undergone a disciplinary process for gross misconduct. In this respect, the court has taken into consideration the fact that, the Claimant/Applicant, did not attend the disciplinary hearing though she had been duly notified to attend the same. She was then offered opportunity to make written representations which she proceeded to do prior to the making of the decision to dismiss her from employment by the Respondent.

66. In the Industrial Court of Swaziland, Case No. 4 of 2011, Princess Nomcibo Dlamini V. Executive Financial Consultant, Group D. Mazibuko J. stated;

“The amount of time required by an employee to prepare for a disciplinary hearing varies from one case to another. The underlining principle is that the employer must act fairly towards the employee. Fairness in this case requires that the employee must be given sufficient time to study the charges, consult the records, examine the witnesses, consider the exhibits and analyse the evidence that is likely to be adduced against him. The employee must be given an opportunity to give a representative of his choice a complete brief on the pending hearing. A complete brief will not be possible where the employee has been denied sufficient time to prepare himself.”

67. Counsel for the Applicant relies on the aforesaid authority for the proposition that the disciplinary process was flawed and unfair to the Claimant/Applicant.

68. The Respondent on the other hand, states that it had given the Claimant/Applicant sufficient time to prepare for the hearing but the Claimant/Applicant opted not to attend the hearing.

69. The Respondent adds that, the extended time came too late as the disciplinary hearing had already taken place.

70. Whether or not the disciplinary process impugned by the Claimant/Applicant was lawful and fair is a matter that can only be determined upon hearing all the facts of the case and not at this stage of the trial.

71. The Claimant/Applicant has been dismissed from the employment of the Respondent and the employer/employee relationship between the parties has effectively been severed pending the hearing and determination of this case.

72. In the case of Mary Ariviza & Okoth Mondoh V. Attorney General of Kenya and Secretary General of East Africa Community, EACJ Application No. 3 of 2010 EALS 2005-2001 P.1. (Busingye, PJ, Arach – Amollo, DPJ, Mukwawa, Butasi & Kubo J) while declining to issue interim relief to the Applicant stated as follows at p.4;

“In light of the aforestated general principles, we now turn to the facts of the present case. Having regard to what stands out clearly from the Applicant’s affidavits in support of the Reference, the replying affidavits of the Respondents and the oral submissions of the learned counsel representing the parties, we find that the totality of the facts disclose bona fide serious issues to be investigated by the court. In other words, there is an arguable case.” (See American Cynamid Co. V. Ethcon Ltd [1975] All ER 504).”

73. This court as in the Mary Ariviza case, supra, finds that there exists a *prima facie* case with a probability of success or using the test in American Cynamid case, there is an arguable case. However, the court is of the view that the Claimant/Applicant approached court after the horse and bolted as it were, in that the disciplinary process had been concluded and the Claimant/Applicant dismissed from employment.

74. Further, the Claimant/Applicant in terms of Section 12(3) (vii) of the Industrial Court Act, as read with Section 49 and 50 of the Employment Act, may upon conclusion of the main suit be reinstated to her former position. In the alternative, the Claimant/Applicant is entitled to an award of compensation and/or damages if she succeeds in the main suit.

75. In this regard, the Claimant has not met, the 2nd requirement in Giella's case in that she has not demonstrated that she would suffer irreparable injury, which would not adequately be compensated by an award of damages if the main suit is eventually determined in her favour.

76. In fact, the main relief of reinstatement is still available to her within three (3) years from the date of dismissal.

77. Furthermore, the balance of convenience dictates in this claim, that the Respondent is not unduly hindered from effectively conducting its core function of marketing Visa products within the region by employing a suitable employee for the purpose. The balance of convenience is guided by common sense and prudence based on the facts of the case.

78. At this stage the court must refrain from making any determination on the merits of the main suit. This must await the substantive consideration of the facts and applicable law after full hearing of the claim. See Mary Ariviza case, supra.

79. Consequently, interim relief is declined and the main suit to take its normal course.

Dated and Delivered at Nairobi this 28th day of January, 2015.

MATHEWS N. NDUMA

PRINCIPAL JUDGE