



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT KISUMU
CAUSE NO. 268 OF 2014

(Before Hon. Lady Justice Maureen Onyango on 27th February, 2015)

RISPER OTIENO MTULA CLAIMANT

-VERSUS-

MUMIAS SUGAR CO. LTD RESPONDENT

RULING

The application before me for determination is the claimant's Notice of Motion dated 24th December 2014. The application is brought under Order 40 Rule 2(1) and (2), Order 51 Rule 1, 3, 4 and 8, Articles 23, 25(a) and (c), 27, 28, 29, 31, 35(1)(b) and (2), 41(1) and (2), 47, 50(2) (a) (b) and (c) of the Constitution and High Court Vacation Rules. The applicant seeks the following orders:-

1. **That the court be pleased to hear the Notice of Motion during vacation.**
2. **That notice to the respondent be dispensed with and this application be heard *ex-parte* in the first instance.**
3. **That pending the hearing of this application *inter partes* a temporary injunction be granted by the court against the respondent, its servants or agents to restrain them from terminating the applicants' employment as the termination is unlawful and irreparable harm will be caused to the applicant and her family and interfere with her rights under the Constitution of Kenya 2010 particularly the rights under Article 41(1) & (2) of the said Constitution.**
4. **That pending the hearing and determination of the suit a temporary injunction be granted against the respondent, its servants and/or its agents from terminating the employment of the plaintiff or in any other way interfering with her said employment, including but not limited to her right to peace, quiet and human dignity.**
5. **That further the respondent be restrained from inventing nefarious criminal claims against her clearly designed to intimidate and/or embarrass her.**
6. **That in furtherance of 4 hereof Mumias Criminal Case Number 918 of 2014 by the respondent herein against the claimant be stayed pending the final determination of this suit.**

7. That this application be heard *inter parte* on a date the court will order.

8. That costs be provided for.

The application is grounded on the supporting affidavit of Risper Otieno Mtula and on the following grounds:-

- i. The letter of termination is unlawful and without any legal basis and upon other grounds to be added at the hearing of this motion and affidavit of the applicant.**
- ii. That post the unlawful termination of the plaintiff's employment the respondent has taken to making and prosecuting all manner of criminal claims against the plaintiff.**

In the affidavit in support of the application the applicant depones that the respondent issued her with a letter dated 18th December 2014 unjustly and illegally suspending her from employment. That the contents of the letter were word for word similar to the charges in Mumias Criminal Case No. 918 of 2014 which was pending in court. The applicant further stated in the affidavit that she was dishonorably suspended without being granted an opportunity to defend herself. She further stated that she is married with 2 children and their education would be disrupted by the unlawful act of the respondent. She stated that demanding that she be investigated a second time and that she comments over matters before the court exposed her to self incrimination. She further stated that the action of the respondent bordered on contempt of this court's order, and that she will suffer irreparable harm and financial hardship should the application not be granted. She also deponed that she has a constitutional right to fair labour and administrative practices.

In response the respondent filed a replying affidavit of Diana Barasa Amuhaya, the Legal Services Manager opposing the application. She stated that the application is bad in law, frivolous, incompetent, irregular and an abuse of court process. She deponed that the applicant filed a notice of motion dated 27th September 2014 seeking *inter alia* temporary injunction against the termination of her employment by the respondent. The court in its ruling on 3rd December 2014 did not grant the injunction but directed that since the applicant never acknowledged the letter of termination as part of completing the dismissal process her dismissal did not take effect. That the ruling allowed the respondent to subject the applicant to proper administrative and disciplinary procedure before any decision is taken against her, if the respondent so wished.

Ms. Amuhaya further deponed that the respondent reinstated the applicant back to employment and a cheque was prepared for her salary and other dues upto 13th August 2014 as directed by this court. That it is after the reinstatement that the respondent issued the applicant with a fresh suspension letter in accordance with the provisions of the law.

Ms. Amuhaya further deponed that the application dated 24th December 2014 is similar to the applicant's application dated 27th December 2014 which the court had already determined. She further stated in the affidavit that criminal proceedings are distinct from civil proceedings and the applicant cannot be prejudiced by the disciplinary proceedings as alleged in her affidavit. She prayed that the application be dismissed in the interest of justice.

The application was argued in court on 23rd January 2015. Mr. Ochieng Nyamogo appeared for the claimant while Mr. Mwaura appeared for the respondent.

Mr. Nyamogo relied on the grounds on the application, the applicant's affidavit in support thereof as well as the affidavit sworn by Diana Barasa Amuhaya on behalf of the respondent. He stated that the ruling of the court required the respondent to exercise proper administrative and disciplinary procedures. That the applicant's complaint is based on the manner in which her letter was addressed as "Notice of suspension/show cause". That if the letter was for suspension only or show cause only, the claimant would have had no ground to complain as the respondent would be acting in compliance with the court's ruling. That the letter constituted disciplinary action as the claimant was being subjected to discipline

without being given an opportunity to be heard. That the proper administrative action should constitute a complaint which the applicant should be required to answer. That it is only if the respondent was not satisfied by the answer that it should suspend the applicant. After the suspension the applicant would still have the right to be heard before other action is taken.

Mr. Nyamogo submitted that the claimant came to court under Article 23 for the court to protect her fundamental rights and to declare illegal that which has been done.

Mr. Nyamogo submitted that the applicant also prayed for orders that the respondent be restrained from interfering with the claimant's employment. That part of the orders of this court were that dues of the claimant be paid and the claimant be reinstated. That the dues were to continue to be paid. That there is no evidence that the applicant's dues have been paid as the respondent did not submit any proof that the cheque attached to the replying affidavit has been handed over to the claimant. That this is proof of cruelty by the respondent in treatment of the claimant.

With reference to the authority of ***Giella V Cassman Brown***, Mr. Nyamogo submitted that it is not applicable in the advent of the Bill of Rights. He argued further that this application is filed in a pending suit and this court had already found that the claimant had made a *prima facie* case.

Mr. Nyamogo relied on the following authorities; **Musindarwezo V Africna Women's Development and Communication Network (FEMNET) [2012] eKLR, Cause No. 1040 of 2012; Nairobi County Branch of KUPPET V Lawrence Njoroge & 5 Others; and Cause No. 268 of 2014; Risper Atieno Mtula V Mumias Sugar Company Ltd.**

Mr. Mwaura for the respondent opposed the application. He relied on the respondent's replying affidavit sworn by Diana Barasa Amuhaya on 21st January 2015. He submitted that the provisions under which the application was grounded are wrong, that the application being in the Industrial Court is governed by rules of the court and the provisions cited in the application are not applicable. He further submitted that prayers 4, 5, 6 and 7 are similar word for word with the prayers in the applicant's application dated 27th September 2014 which the court heard and made a determination on 3rd December 2014. That in compliance with the court order the applicant was reinstated and payment made to her.

Mr. Mwaura further submitted that following the ruling that the respondent can subject the applicant to a fresh administrative procedure, the respondent issued to her a notice to show cause explaining that a complaint had been launched against her indicating the time of complaint and the particular of the complaint and that this is in line with Section 45 of the Employment Act. He further submitted that the notice to show cause gives the applicant an opportunity to respond to the complaint and that it is after her response that the respondent will conduct a disciplinary hearing where the applicant will be called upon to explain her case. Mr. Mwaura further submitted that there is nothing wrong with issuing a suspension notice. He further submitted that the applicant gave a general response stating that the matter is before court. That this does not infringe on the applicant's Bill of Rights. That the applicant has not proved a *prima facie* case which is a core principle in granting temporary injunctions. He further submitted that there is nothing to prove that the respondent has exposed the claimant to self incrimination. That the complaint is in regard to unprocedurally removing company property from where they are supposed to be and taking them to the applicant's premises. That the applicant is supposed to respond so that the respondent can make a decision to carry on with the disciplinary hearing.

Relating to prayer 6 in the application to the effect that this court stays criminal proceedings in Mumias Criminal Case No. 918 of 2014, Mr. Mwaura submitted that no submissions have been made in support thereof.

Mr. Mwaura prayed that the application be dismissed and orders made on 31st December 2014 be discharged.

I have considered the application together with the grounds and affidavit in support thereof. I have also considered the replying affidavit, the cases cited and the oral submissions made on behalf of both the

applicant and the respondent.

To put this matter into perspective I will give a brief summary of the facts.

The claimant was first suspended from duty on 30th July 2014. On 12th August 2014 she was dismissed from employment. On 25th September 2014 she was charged in Mumias Criminal Case No. 918 of 2014 with the offence of stealing by servant contrary to Section 281 of the Penal Code.. On 29th September 2014 she filed the claim herein seeking the following orders:-

- a. **A declaration that the purported termination flies in the face of The Constitution of Kenya 2010, a particularly Article 41 thereof, and that the claimant is entitled to redress.**
- b. **A declaration that the claimant was not due to retire yet and ipso facto is entitled to her monthly pay from the time of the purported termination until her lawful retirement age including her full pensionable benefits.**
- c. **A declaration that the termination was unlawful, unjust, capricious, untimely and an order that the claimant be paid her dues and benefits.**
- d. **General damages.**
- e. **Costs of the claim and interest on b, c and d above.**
- f. **Any other or further order that this Honourable Court may deem fit to grant.**

Together with the Memorandum of Claim the applicant filed a Notice of Motion seeking the following orders:-

1. **That this Notice to the respondent be dispensed with and this application be heard *ex parte* in the first instance.**
2. **That pending the hearing of this application *inter partes* a temporary injunction be granted by the court against the respondent, its servants or agents to restrain them from terminating the applicants' employment as the termination is unlawful and irreparable harm will be caused to the applicant and her family and interfere with her rights under the Constitution of Kenya 2010 particularly the rights under Article 41(1) & (2) of the said Constitution.**
3. **That pending the hearing and determination of the suit a temporary injunction be granted against the respondent, its servants and/or its agents from terminating the employment of the plaintiff or in any other way interfering with her said employment, including but not limited to her right to peace, quiet and human dignity.**
4. **That further the respondent be restrained from inventing nefarious criminal claims against her clearly designed to intimidate and/or embarrass her.**
5. **That in furtherance of 4 hereof Mumias Criminal Case Number 918 of 2014 by the respondent herein against the claimant be stayed pending the final determination of this suit.**
6. **That this application be heard *inter parte* on a date the court will order.**
7. **That costs be provided for.**

The Notice of Motion was heard and a ruling delivered by **Wasilwa J** on 3rd December 2012 as follows:-

"I find that the application has merit and I find for the applicant. Since she has not

acknowledged the termination letter as part of completing the dismissal process, she stands not dismissed.

I therefore order that she be treated as not dismissed and be reinstated to the position she occupied before 13.8.2014. She should be paid all pending salaries since then to-date. The respondents if they so wish may subject her to proper administrative and disciplinary procedures before any other decision is taken against her. The order will remain in force until the disciplinary process (if any) or the final determination of this case whichever comes earlier."

On 18th December 2014 the respondent issued a letter of suspension/show cause to the applicant. The letter required her to explain why she removed 13 wooden chairs from the Guest house where she worked as Club and Guest House Manager and used her personal vehicle to transport them to her house within the managerial estate. The letter further stated that she did not account for other company property under her custody as the Club and Guest House Manager. The letter alleged that she intended to convert the property to her personal use without authority. She was required to show cause within 48 hours why her services should not be dispensed with. She was also forbidden from visiting the work place unless specifically required or sent for by the company.

The applicant responded to the letter on 22nd December 2014. She referred to the searches at her official residence and rural home which yielded nothing. She further stated she was not aware of any company property that she failed to account for. She also stated that she would offer no further/other comment because the charges were the same as those she had been charged with in court. In the letter the applicant also sought particulars of the "reasonable grounds" that informed the basis for the respondent's suspicion that she intended to convert any company property to her personal use. In the same letter she raised concern why she was being punished before she was given an opportunity to be heard.

On 24th December 2014 the applicant filed the application now before me for determination.

The issues I have to determine are the following:-

- 1. Whether the suspension/show cause letter issued to the applicant is unlawful and without legal basis.**
- 2. Whether the suspension/show cause letter would subject the applicant to self incrimination.**
- 3. Whether the claimant is entitled to the prayers sought.**

Section 45(C) of the Employment Act requires that termination of employment be in accordance with fair procedure. Section 12 of the Act provides that employers specify disciplinary rules applicable to employees or refer the employee to the provisions of a document which is reasonably accessible to the employee that specifies the rules. It has not been stated by either party whether there are any disciplinary rules of the respondent.

Counsel for the applicant submitted that if the letter was a show cause only or a suspension only, then the applicant would have had no reason to complain. He further submitted that by being suspended the applicant was being punished without a hearing. My understanding of the notice of suspension/show cause is that it required the applicant to stay away from office while at the same time requiring her to respond to the charges against her. She indeed responded to the same and sought further information in her letter dated 22nd December 2014.

Suspension in my understanding is resorted to during investigations where it would be inappropriate or inconvenient to carry out the investigations in the presence of the employee or where the employee is likely to interfere with investigations. If the employee is vindicated by the investigations, the employee is allowed to go back to work and does not suffer in any other way. Counsel for the applicant did not explain how the suspension was unlawful or without legal basis. I therefore do not agree with the applicant's counsel's submissions that by being suspended and required to show cause the applicant was

being punished without being given a hearing. I do not find the suspension letter unlawful or without legal basis.

It was also submitted for the applicant that the suspension/show cause letter would subject her to self incrimination. The applicant's counsel did not explain how requiring her to show cause would amount to self incrimination. Requiring the applicant to clear herself of charges against her cannot amount to self incrimination. In my opinion it would have the opposite effect. I also agree with the argument made on behalf of the respondent that the disciplinary process is in the sphere of civil matters while the case pending in Mumias Court referred to by the applicant is a criminal case. The claimant cannot refuse to respond to a show cause letter from her employer on grounds of self incrimination in a criminal case as these are separate and independent proceedings. Both proceedings are governed by different procedures which have to be complied with.

I therefore find that the suspension/show cause letter does not subject the applicant to self incrimination.

Is the applicant entitled to the prayers sought?

The applicant prayed for a temporary injunction to restrain the respondent, its servants or agents from terminating the employment of the applicant or in any other way interfering with her employment. She further prayed for an order restraining the respondent from exposing her to self incrimination and for orders staying proceedings in Mumias Criminal Case No. 918 of 2014. The arguments made by the parties are however against the issuance of the suspension/show cause letter dated 18th December 2014. There is therefore variance between the orders sought and the arguments made by the applicant.

I have already dealt with the issue of self incrimination. On the issue of temporary injunction, the applicant has not proved that the disciplinary process against her is unlawful. The law grants employers powers to discipline employees and if found guilty, to terminate their employment. The fact that the suspension and show cause were included in the same letter does not make the process unlawful. The orders prayed for would curtail the respondent's right to discipline and to terminate the employment of its employees after subjecting them to due process. In the ruling delivered by this court on 3rd December 2014, the court recognized this right of the employer and granted the respondent the leave to subject the applicant to proper administrative and disciplinary process before taking any decision against her. Granting the orders prayed for which were also prayed for in the application considered by **Wasilwa J** would amount to reviewing her decision. Having failed to persuade me that action taken by the respondent was unlawful, I decline to grant the injunction. Bringing the same prayers before me amount to abuse of court process.

On the prayer to stay proceedings in Mumias Criminal Case No. 918 of 2014, no submissions were made in support thereof. I therefore find it not proved and dismiss the same.

The upshot is that the application dated 24th December 2014 is dismissed and the orders granted to the applicant on 30th December 2014 are discharged. There will be no orders for costs.

MAUREEN ONYANGO

JUDGE

27/2/2015

Appearances:-

N/A for both parties

CC. Wamache