



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 2012 OF 2014

EZEKIEL OTIENDE.....1ST CLAIMANT

MOSES OKOTH OLOO.....2ND CLAIMANT

HUMPHREY MARETE.....3RD CLAIMANT

VERSUS

THE PRINCIPAL SECRETARY,

MINISTRY OF INTERIOR AND COORDINATION OF

NATIONAL GOVERNMENT.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. By a motion dated 12th November, 2014 brought under certificate of urgency, the applicants seek orders among others that pending the hearing and determination of the claim filed concurrent with the application, the 1st respondent be ordered to immediately start paying the claimants all their benefits including salaries.
2. The application was brought on among other grounds that the 1st respondent dismissed the claimants from service on 30th July, 2014 without conducting any investigation into the allegations and without making any reference whatsoever to the information and evidence supplied to it by the claimants and without affording the claimants an opportunity to cross-examine the witnesses from the Ethics and Anti-Corruption Commission (EACC) on whose evidence alone the 1st respondent relied on in dismissing the claimants.
3. In support of the application Mr. Ezekiel Otiende on behalf of the rest deponed in the main as follows:-
 - (a) That all the claimants were at all material times employees of the Ministry of Interior and Co-ordination of National Government serving as immigration officers within the department of Immigration and registrations of persons and were attached to the Lunga Lunga border point at the coastal region of Kenya.

(b) That vide their letter all dated 24/1/2014, but received by them on 13/3/2014, after the 21 days within which they were required to respond had lapsed, the 1st Respondent, the principal Secretary in the Ministry of Interior and Co-ordination of National Government (Immigration and Registration of Persons) informed them of the Ministry's decision to interdict them from office on ground of gross misconduct during which period they would be drawing (1/2) of our basic salary and reporting to their immediate supervisor once per week until the case was finalized.

(c) That the letter further stated that the Ministry was contemplating dismissing them from service on account of gross misconduct and then were therefore requested vide the same letters to make representation within a period of 21 days.

(d) That the alleged gross misconduct was that on 28/11/2013, 25/11/2013 and 26/11/2013, 1st, 2nd and 3rd claimant respectively being the duty officers on the various dates stated attended to undercover officers from the Ethics and Anti-Corruption Commission (EACC) who were reportedly assigned the duties of undertaking integrity test at Lunga Lunga Border Control Point.

(e) That the 1st Respondent alleged that while they were attending to the said undercover officers, they requested the officers to hand to them their National Identity Card and Kshs.500/= which they allegedly received but did not issue a Government receipt for the Kshs.500/= paid.

(f) That the letters of interdiction stated that the alleged failure by them to issue a receipt to the said undercover officers for the money paid 'amounted to stealing by servant which was punishable under Criminal Procedure Code in a Court of law.'

(g) That the letters of interdiction were copied to the Secretary/CEO Ethics and Anti-Corruption Commission with the following note: (Your letter Ref No. EACC/6/21/2/(117 dated 20th January, 2014 is relevant. We are requesting that you arrange to forward Audio/Video recording which captured this incident together with all the material and information evidence that is in your possession to enable us finalize the administrative charge (s) which have been preferred against the officer).

(h) That the note to the CEO EACC was proof that by the time of making the decision to interdict them, the 1st Respondent did not have evidence to demonstrate that they were involved in the alleged misconduct.

(i) That he stated in his letter that he was at work on 25/11/2013 and 26/11/2013 until 2000hours when he handed over to another colleague for the night shift before he sought and obtained permission from the officer in charge and left for Nairobi where he stayed until 2/12/2013 and resumed duty on 3/12/2013.

(j) That on 17/3/2014, the Chief Immigration Officer in charge of Lunga Lunga Border Post, one Edwin Ronoh wrote to the Senior Assistant Director of Immigration Service Coast Region where he stated among other things that all of them, the three claimants herein, were not at work on the diverse dates when the misconduct complained of was allegedly committed and also explained why the claimants did not respond within the 21 days stated in the letter of interdiction.

(k) That vide a letter dated 30/7/2014 the 1st Respondent communicated to them, the claimants the decision of their dismissal from the service with effect from 27/1/2014 on account of gross misconduct with the right to appeal within 42 days from the date of the dismissal letter.

(l) That they appealed against the decision to terminate them but to date the appeals had not been determined.

(m) That he reasonably believed that to the extent that the 1st Respondent interdicted them before it obtained evidence to enable it formulate charges against them and it had to request to be

furnished with evidence after interdiction rendered the interdiction unfair and unprocedural.

(n) That to the extent that they were advised to appeal against the dismissal without any recorded proceedings of a disciplinary committee being availed to them to enable them formulate grounds of appeal, the dismissal was procedurally unfair and was undertaken without adherence to the rules of natural justice.

(p) That to the extent that the 1st Respondent relied solely on purported video evidence prepared by purported undercover officer, and to the extent that they were not given an opportunity to listen to or watch the video and to cross-examine the said officer/s, the 1st Respondent denied them the right to a fair hearing and the rules of natural justice were therefore breached to their detriment.

4. The respondents in response to the application filed a replying affidavit through a Mr. Johnstone Kahindi who deponed in the main as follows:-

That the factual and sequential particularization concerning the dismissal of the Claimant were as follows:-

The 1st Claimant

(i) On 28th November, 2013, an undercover Officer from Ethics and Anti-Corruption Commission, posed as a trans-border traveler and approached a man at Lunga-Lunga Border control point. He made inquiries on how he could be issued with a temporary permit to enable him cross the border from Kenya to Tanzania.

(ii) A man directed him to the Immigration Office where the undercover officer produced his National Identity Card and Kshs.500,00 to facilitate the processing of his temporary permit to Tanga in Tanzania.

(iii) The 1st claimant processed the temporary permit on receiving the Kshs.500.00 but failed to issue an official receipt or a balance of Kshs.200.

(iv) The undercover officer upon crossing the border from Tanzania to Kenya at 0405 hours the 1st claimant took back the temporary permit issued.

(v) Arising from these developments the 1st claimant was referred to the relevant provisions of the Employment Act which he had contravened and charged with gross misconduct and was requested to submit his representations for consideration within a period of twenty one (21) days, failure to which his case would be finalized without any further reference to him.

(iv) The 1st claimant disputed the charges against him in his letter dated 13th March, 2014 stating:-

(a) That he was not on duty on 28th November, 2013 as alleged as he had worked on 25th and 26 November, 2013 until 20000 hours when he handed over to Mr. Julius Maore for the night shift before leaving for Nairobi to attend to family matters.

(b) that he stayed in Nairobi until 2nd December, 2013 and resumed duties on 3rd December 2013 as he had been granted permission by the officer in-charge; and

(c) It was, therefore, impracticable that he served the Undercover Officer while he was away from his duty station. He attached copies of the Occurrence Book (OB) and PISCES productivity Report for verification to confirm that he was not on duty on the material day and requested that the contemplated action to dismiss him from the service be set aside.

(vii) Upon consultations, the Director of Immigration Services stated the following in regard to the 1st claimant case:-

(a) That the attached PISCES productivity Report contained the names of passengers who were cleared to cross the border to Tanzania in accordance with the laid down Rules and Regulations. However, it was important to note that one could selectively generate data from the PISCES information of interest for a particular time leaving out the rest. In this case, the PISCES productivity Report he attached could not exonerate the charged officer from the charges.

(b) That an examination of the Occurrence Book (OB) revealed that the charged officer was not on duty on the day he was alleged to have committed this offence. However, it may be noted that the book was always available to any officer in the duty office and one could not rule out, or establish the level of manipulation to serve a particular situation of interest:

(c) That it is not known whether it was by coincidence, or default that the charged officer together with his co-accused officers were all out of the duty station on the day each was accused of having committed their respective offence(s). This appeared to have been a well calculated move in their defense to defeat the cause of justice. She added that the Ethics and Anti-Corruption Commission could not have made a mistake in the Report as all these incidents were Audio/Video recorded which indicated very clearly the date and time when the offences were committed: and

(d) That it was evident that the charged officer contravened the laid down rules and regulations governing the issuance of temporary permits and his acts of failing to issue an official receipt for the amount received on behalf of the Government amounted to stealing by servant. He was therefore, an officer with no integrity and could not be entrusted with a public office. In this regard. She recommended that the 1st claimant be summarily dismissed from the service on account of gross misconduct.

(viii) That following the comments and recommendations, the case against the 1st claimant was discussed in the Ministerial Human Resource Management Advisory Committee meeting held on 4th May, 2014, and after deliberations, it was recommended that 1st claimant be dismissed from the service with effect from 27th January, 2014 on account of gross misconduct.

(ix) That the minutes of this meeting were confirmed on 26th May, 2014 and subsequently approved by the Authorized Officer. This decision was conveyed to the 1st claimant vide a letter dated 30th July, 2014 and he was informed of the right of Appeal against this decision to the commission through this Ministry within a period of forty (42) days.

(x) The 1st claimant submitted his Appeal against dismissal from the service vide a letter dated 19th August, 2014 which appeal was dismissed by the Public Service Commission.

(ix) The claimant was yet to file an application for review as advised in the letter dated 24th November, 2014, hence the administrative processes was yet to be exhausted.

The 2nd Claimant

(a) On 25th November, 2013, an Undercover Officer from EACC carried an Integrity Test at Luna Lungu Border Control Point in which the officer sought to be issued with a temporary permit to enable her cross the Kenya Border to Tanzania.

(b) The 2nd claimant who was stationed at the Desk of issuing the temporary permits issued the Undercover Officer from Ethics and Ant-Corruption commission with a temporary permit in which she was charged Kshs.500.00 as opposed to legal fee of Kshs.300,000 but the 2nd claimant failed to issue her with an official receipt. This incident was Audio/Video recorded, hence the officer

failed the integrity test.

(c) Arising from these developments he was consequently, charged with gross misconduct, and requested to submit his representations for consideration within a period of twenty one (21) days, failure to which this case would be finalized without any further reference to him.

(d) The 2nd claimant disputed the charges in his letter dated 13th March, 2014, stating as follows:-

(i) That he was not on duty on 25th November, 2013 when he was alleged to have issued a temporary permit to undercover officer pocketing Kshs.500.00 without issuing an official receipt leading of a loss of Kshs.300.00 due to the Government. He attached copies of the PISCES productivity Report and Occurrence book to support his allegations that he was not on duty on the material day: and

(ii) As he was not on duty, it was difficult to explain what happened on the material day as he had retired to his house for a rest after working on 24th November, 2013.

(iii) Following these comments and recommendations, the case against the charged officer was discussed in the Ministerial Human Resource Management Advisory Committee meeting held on 4th May, 2014 and after deliberations, it was recommended that 2nd claimant be dismissed from the service with effect from 27th January, 2014 on account of gross misconduct.

(iv) The 2nd claimant submitted an Appeal against dismissal from the service a letter dated 19th August, 2014 which appeal was still pending at the Public Service Commission hence the administrative processes and avenues in respect of the case were yet to be fully exhausted.

The 3rd Claimant

(a) The 3rd claimant was interdicted from performing the functions and duties of his public office with effect from 27th January, 2014, after it was established that on 26th November, 2013, an Undercover Officer from Ethic and Anti-Corruption Commission approached the 3rd claimant at Lunga Lunga Border Control Point with a view to apply for a temporary permit to enable him cross the border to Tanzania although his principal objective was to carry Integrity Test at the station.

(b) The Integrity Officer was issued with a temporary permit after producing his National Identity Card and payment of Kshs.500.00 which Mr. Marete took but failed to issue a receipt for the amount received on behalf of the Government.

(c) The 3rd claimant was as a consequence charged with gross misconduct for contravening the provisions of the Employment Act, 2007 and requested to submit his representations for consideration within a period of twenty one (21) days failure to which this case would be finalized without any further reference to him.

(d) The 3rd claimant disputed the charges in his letter dated 13th March 2014 and stated as follows:-

(i) That he was not on duty on 26th November, 2013 when he was alleged to have issued a temporary pass irregularly to an Undercover Officer from Ethics and Anti-Corruption Commission: and

(ii) That triplicates of the issued temporary permits on the material day could further confirm that he did not issue any temporary permit to anybody.

(iii) He attached copies of the PISCES productivity Report and occurrence Book from the

station to confirm that he was not on duty and could therefore, not have issued the said permit to the Undercover Officer.

(a) Following these comments and recommendations, the case against the charged officer was discussed in the Ministerial Human Resource Management Advisory Committee meeting held on 14th May, 2014 and after deliberations, it was recommended that Mr. Marete be dismissed from the service with effect from 27th January, 2014 on account of gross misconduct.

(b) The 3rd claimant submitted his Appeal against dismissal from the service vide a letter dated 2nd September, 2014 which appeal was still pending with the Public Service Commission hence the administrative processes were yet to be exhausted.

(c) That the claimants herein were bound by the Public Office Ethics Act, 2003 to maintain the integrity of the office they held and not to improperly enrich themselves, no matter how meagre the amount appears to be.

(d) That from the above averments, it was clear that the claimants herein were all dismissed for warranted reasons and were all granted a fair hearing as they were granted a chance to make their representations in accordance with section 41 of the Employment Act, 2007, thereby making the claimants dismissals procedural.

5. In his submissions before Court, Counsel for the claimants Mr. Wambola submitted that the letter of interdiction to the claimants was issued prior to seeing or receiving the audio/video recording by undercover EACC officers since it asked for copies of such recording in order to complete the administrative process. This according to counsel, flouted due process. According to counsel, the claimants had ably demonstrated that they were not at work on the dates they allegedly committed the offences charged. This averment according to counsel was confirmed by Regional Manager at Lunga Lunga who wrote refuting the allegations against the claimants since they were not at work on the dates alleged.

6. Counsel further submitted that the dismissal letters to the claimants made no reference to their defences which meant the respondent never considered them hence the decision was arrived at without careful consideration of evidence. According to counsel, the evidence, the basis of the allegations must be made available at the time the decision to dismiss is being considered and not in Court.

7. As a result of the breaches of law and procedure, counsel submitted that a prima facie case had been made out to merit the grant of the orders sought.

8. Ms. Mumo for the respondent on her part submitted that the claimants had not established a prima facie case to warrant the granting of the orders sought. According to her, the replying affidavit of Mr. Kahindi itemised the disciplinary process of all the claimants and from the minutes their defences were considered.

9. According to counsel, the Immigration Department reviewed the video recording and decided to dismiss the claimants. Counsel further submitted that PISCES only showed passengers that came in and out of the border point and that the claimants could have produced only those reports that favoured them and further the OB only recorded special occurrences.

10. Ms. Mumo further submitted that the letter alleged to have been from Regional Immigration Officer exonerating the claimants was not signed. According to counsel, the respondents complied with article 236(b) of the Constitution and that an order for payment of salaries was tantamount to reinstatement and would amount to determining the claim before it was heard on merit.

11. This is an interlocutory injunction application. The considerations thereof are governed by the principles set out in **Giella v. Cassman Brown case** and further elaborated in the **American Cynamid v.**

Ethicon case.

12. The principles set out in **Giella v. Cassman Brown** are that for an applicant to be entitled to an injunction he must first of all demonstrate that there is a prima facie case with probability of success. Once this is met, the next test is to satisfy the Court that damages would not be an adequate remedy if the claim ultimately succeeds. However if the Court is in doubt about the issue of prima facie case and or adequacy of damages, the issue will be decided on a balance of convenience.

13. In order to satisfy itself on the issue of prima facie case, the Court will make an attempt to carry out some measure of evidentiary and factual analysis of the case. This is a very delicate balancing act because being an interlocutory application, the Court must be careful not to delve too deep into the merits and demerits of the issues in controversy.

14. The claimants herein are disputing their dismissal from employment on the grounds that in dismissing them the respondent did not follow due process. That is to say they complain that they were never availed an opportunity to cross-examine the EACC undercover officers whose video clip seemed to have been relied on by the respondent in dismissing them. They further complain that their letters of dismissal from service never made reference to their defences meaning they were never taken into account.

15. Section 45 of the Employment Act prohibits unfair termination of employment and a termination shall be considered unfair if the employer fails to prove that the reason for termination is valid and it is fair reason and further that a fair procedure was followed in carrying out the termination. Whereas proof is a matter to be dealt with at the main trial of the action, prima facie the allegations by the claimants are serious and constitute triable issues. They therefore pass the prima facie case test. There is however the question of inadequacy of damages if the claimants ultimately prove to be successful. In the memorandum of claim herein, the claimants seek a declaration that the dismissal was unfair unlawful and unconstitutional hence null and void. They further seek an order of reinstatement to employment. In the alternative they ask the Court to grant them any other relief the Court may deem fit and appropriate to grant to meet the ends of justice.

16. Where the Court reaches the decision that the dismissal of an employee is unlawful and or unfair, the Court has power to order compensation as provided in the Employment Act. Further, the claimants seek a declaration that their dismissal was unconstitutional. If the Court after hearing evidence is convinced that the dismissal was in violation of the claimants' constitutional rights, the Court is empowered by article 23 of the Constitution to order among others, compensation.

17. Employment relationship is a personal relationship more often between the animate person, the employee and the inanimate employer more often a corporate personality or government. The traditional view has always been that in such a relationship it would be awkward to compel two unwilling parties to continue in it but that is not to say a Court of law in a proper case cannot issue injunction against termination of employment.

18. Once employed, an employee has a legitimate expectation that while observing the terms of the contract and employment law generally, his employment will not be unfairly or wrongfully terminated. Further, loss of employment more often occasions financial as well as social disruption of the personal circumstances of the affected employee as well as his dependants. The Court will therefore in a proper case grant an injunction where it is merited. Lord Denning MR in the case of **Hill v. Parsons (1972) chD 305** while granting an injunction in an employment dispute observed that in awarding such a remedy the Court would have to be satisfied that trust and confidence still existed between the parties and that damages would not be an adequate remedy. In this particular case the Court is not persuaded that if the claimants turn out to be successful in the main claim, damages would not be an adequate remedy. The Court will for that reason decline to issue any interlocutory injunction.

19. Further the claimants were dismissed from service on 27th January 2014 but received communication of their dismissal on 30th July, 2014 under circumstances they considered unfair and in violation of their constitutional rights. This application together with this claim were filed on 12th November, 2014 over

three months after dismissal. No reason was offered for this inordinate delay considering the nature of their grievances. Injunction is an equitable remedy and will be granted to a party who exercises due diligence. The circumstance of this matter made it incumbent upon the claimants to act with speed to preserve their rights if any, which they feared was being infringed or threatened with infringement. It did not matter that they had an internal right of appeal against the dismissal. The Court's jurisdiction to grant an injunction or conservatory order was not ousted by the internal appeal process. In any event the 2nd and 3rd claimant came to Court before knowing the outcome of their appeals which meant there was no inhibition in bringing this application earlier.

20. In conclusion, the Court declines to grant the orders sought in the application and dismisses the same with costs.

21. It is so ordered.

Dated at Nairobi this 13th day of March 2015

Abuodha J. N.

Judge

Delivered this 13th day of March 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge