



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 25 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 12th March 2015)

STEPHEN CHASE KISAKACLAIMANT

VERSUS

EMIRATES AIRLINE LIMITEDRESPONDENT

RULING

1. The application before court is the one dated 14/1/2015. The application was filed by the Claimant herein under Certificate of Urgency and brought through a Notice of Motion filed through his Advocates Musyoka Murambi and Associates. The Notice of Motion was filed under Articles 23, 47 and 159 of the Constitution, 2010, Section 49 (3) and 50 of the Employment Act 2007 Cap 226 and all enabling statutes and law.

2. The Applicant seeks order that:

“(1). THAT this application be certified urgent and heard exparte in the first instance.

(2). THAT pending inter parties hearing and determination of this application the Respondent by itself its agents, servants and or employees be restrained from advertising, recruiting and or in any way filing up the position of Sales Manager Kenya.

(3). THAT pending the hearing and determination of this Claim the Respondent by itself its agents, servants and or

employees be restrained from advertising, recruiting and or in any way filing up the position of Sales Manager Kenya.

(4). Costs of this application and the entire proceedings”.

3. The application is based on the annexed affidavit of Stephen Chase Kisaka the Applicant herein and on the grounds that:

“1. That the Claimant was the Sales and Marketing Manager of the Respondent.

2. That on 27th October 2014 the Respondent, terminated the Claimant’s contract of employment.

3. That termination of the said contract of employment was preceded by a disciplinary hearing chaired by one Anita Kongson, the Respondent's Kenya Country Manager.

4. That the complaint as against the Claimant had been raised by the said Anita Kongson.

5. That despite protests by the Claimant in objection to the said Anita Kongson sitting on the disciplinary hearing, she rejected the said objections and indeed chaired the disciplinary hearing on 1st October, 2014.

6. That the said Anita Kongson has gone ahead to terminate the Claimant's contract of employment.

7. That the Respondent has advertised and is now in the process of replacing the Claimant as its Sales and Marketing Manager.

8. That unless this application is heard on priority basis, the subject matter of this suit, which is reinstatement to the position of Sales and Marketing Manager of the Respondent will be rendered nugatory as a consequence of being filled”.

4. It is the Applicants assertion that on 13/1/2006 he was employed by the Respondent as its Head Office in Dubai as Flight Analysis Superintendent. On 19/9/2007, the Respondent transferred him to the Respondents Nairobi Office as Sales Manager in-charge of Kenya, Chad, Democratic Republic of Congo, Malawi, South Sudan, Central Africa Republic, Congo Brazzaville, Equatorial Guinea and Gabon. **Annexure SCK 2** is a copy of the said letter of appointment.

5. On 26/8/2014 he received a letter of suspension from the Respondent's Country manager to facilitate what she termed as 'Objective' investigation for undisclosed investigations against the Claimant (**SCK-3**).

On 10/9/2014 the Claimant further received a letter from Respondent in which it was detailed that an investigation conducted against him in which allegations of negligence non-disclosure of conflict of interest breach of trust and non-disclosure of pertinent information were made out (**Annexure SCK-4**). The primary complainant was the Respondent's Country Manager.

6. Concerned about the general nature of the letter of preliminary investigation, he requested the Respondent to furnish him with copies and full particulars of the full allegations made out against him (**Annexure SCK-5**). However on 22/9/2014, the Respondent's Country Manager declined to give him the alleged investigation report that formed the substratum of the accusations. The Respondent however expected the Applicant to defend himself against accusations contained in the said 'confidential' investigation report (**SCK 6**).

7. On 23/9/2014, the Respondent (through the primary complainant) set up a disciplinary hearing date for the Claimant on 1/10/2014 as per (**Appendix SCK7**). The primary complainant – Anita Kongson – the Country Manager also nominated herself to sit on the disciplinary hearing which drew the Claimant's objection. The claimant asked for recusal of the said Anita from the disciplinary hearing panel (**SCK -8**) vide a letter dated 29/9/2014 but she refused to recuse herself and sat as an accuser, prosecutor and judge in her own cause (**SCK -9**).

8. The Applicant contends that the Respondents refusal to avail to him the investigation report was in breach of its own internal requirements that the full nature of the misconduct be given in writing.

SCK-10 is the disciplinary hearing manual. The Claimant contends that on the basis of these flawed proceedings the Claimant was dismissed on 27/10/2014 on the grounds of gross negligence regarding failure to escalate or officially report an allegation against a member of sales staff for alleged impropriety and failure to report to the Country Manager alleged conflict of interest touching on two members of staff. (**Annexure SCK 11** is a true copy of the letter of summary dismissal).

9. The Applicant avers that this dismissal was unfair, irregular and malicious for various reasons he lays out in his affidavit including failure to disclose the accusations against him, and failure to follow the disciplinary processes and procedures.

The Applicant now seeks orders he has sought in particular now prayer 3 which is now the prayer pending, prayer 1 and 2 having been granted at the interim stage.

10. The Respondent opposed this application. They filed their replying affidavit sworn on 27/1/2015 by one Anita Kingson, the Respondent's Country Manager herein. She avers in her affidavit that she was the Country Manager of Respondent and overall boss of Respondent's activities in Kenya and hence the allegation and suggestion by the complainant that she was a complainant is a folly.

She avers that indeed the Applicant served Respondent from 2006 January. But in the course of executing her supervisory duties, it became apparent that certain conduct by the Claimant were in breach of the aforesaid undertaking and contractual obligation.

11. It is the Respondents averment that the discovery necessitated an informal internal investigation which were conducted by the Investigative Department under the Human Resource Department, Dubai the Respondent's Headquarters. These revealed a number of conduct that would amount to misconduct as defined by the Respondent's Employment Regulations and the Memo of Agreement (b) the Respondents and the Claimants Union (**Appendix AK-3**) and **Appendix AK-4**.

The misconduct related to the Claimant's negligent performance of his duties, an omission to disclose an existing conflict of interest of an employee as the Line Manager, breach of trust and non-disclosure of pertinent information.

12. It is the Respondents averment that in line with the Respondents' Employment Regulations, the Respondent commended disciplinary proceedings accordingly and issued a notice of suspension followed by a notice of preliminary investigation. **Appendix AK -5** are copies of the said notices. That the Claimant was duly informed of the allegations against him and the Respondent denies the averment that the allegations were not disclosed. This is as per **Annexure AK -6**.

Disciplinary proceedings were thereafter conducted against the claimant as per the governing employment Regulations and the memo with the Claimant's Union. The hearing was also attended by the Claimant and his duly elected shop floor representative as per the manual.

13. The deponent further avers that the disciplinary hearing was chaired by Respondent's HR Representative Emma Weeks in her presence as County manager and Mr. Iqbal Mohammed as an observer. She therefore denies she sat as a judge in the aforesaid proceedings.

After the disciplinary hearing the Respondent decided that the Claimant was not suitable to continue serving and was found guilty of gross misconduct. He was thus summarily dismissed vide a letter **AK-7**.

The Respondent avers that they followed the law and their manual in dismissing the Applicant and did not breach the Applicant's Constitutional Rights as alleged. Upon this dismissal, the Respondent avers that they calculated the Claimant's dues and paid him accordingly as per **Appendix AK -8**.

The Respondents want the court to deny the Applicant the orders sought arguing that this court cannot interfere with the internal operation and management of employer nor stop the Respondents from filling vacant positions on the basis of termination of services.

The Respondents argue that the orders sought by the Applicant would greatly prejudice the Respondent as this would interfere with its internal affairs.

Issues for determination

14. In determining whether the orders sought can be granted or not the Applicant has established the threshold of law in grant of an Injunction. The law is as established in the case of **Giella vs Casman Brown** where the court set out the principles to be considered before the grant of an injunction. The court rendered itself thus:

“(i). An Applicant must show a prima facie case with a probability of success.

(ii). An Injunction will not normally be granted unless the Applicant shall otherwise suffer irreparable injury.

(iii). When the court is in doubt it will decide the application as the balance of convenience”.

15. This same principal has over time been restated in various authorities (see **Waithaka vs Industrial and Commercial Development Corporation (2001) KLR 374** – by Ringera J and **Suleiman vs Amboseli Resort Limited (2004) 2 KLR 589**). In both cases the issue of adequacy of damages was considered and Ringera J rendered himself as follows;

“I would for those reasons allow accede to the Plaintiff’s prayer for Interlocutory Injunction in respect of the two properties on the grounds that the 1st and 2nd Plaintiffs have a very strong prima facie case with a probability of success. I would not be deterred by any argument that the national Bank would compensate them in damages if it failed at the trial. In my opinion no party should be allowed to rise rough shoulder on the statutory rights of another simply because it could pay damages”.

16. On the issue of balancing the convenience Ojwang J in the case of **Suleiman vs Amboseli Resort Limited** (supra) held:

“the court in responding to prayer of Interlocutory Injunctions relief should always opt for the lower rather than the higher risk of injustice”.

17. In the case before court, the submission by the Applicant is that he was subjected to a flawed disciplinary process and that for this reason he has a prima facie case with a probability of success. On the face of it, the Applicant was subjected to a disciplinary process but from the submissions of Applicant, he has a prima facie case with a probability of success.

The Respondents contend that he can still be awarded damages if he succeeds in this case but that alone will not be a bar to this court from denying him orders sought based on the holding of Judge Ringera (as he then was) in **Suleiman vs Amboseli Resort Limited (2004) 2 KLR 589** cited above.

It is the Applicant’s contention that one of the prayers he seeks is reinstatement and if the position is filled, then he would not be able to benefit from the fruit of his judgment if the court decides in his favour.

18. The Respondents have also not established before this court that granting of the order sought will cause them any prejudice. Their only submission is that the applicant can be compensated by damages.

19. This submission in my view misses the view that the fact that a Respondent is moneyed enough should not be a panacea to flout the law simply because he is able to compensate by damages. To take this narrow view is to agree that the poor can never get justice.

20. It is therefore this court’s finding that the application has established their case and I allow the application in term of prayer 1, 2, 3 and 4.

The case may be set down for hearing and be given a priority hearing date.

Read in open Court this 12th day of March, 2015

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Kigera holding brief for Simiyu for Claimant

No appearance for Respondent