



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 62 OF 2015

(Before Hon. Lady Justice Maureen Onyango on 10th June, 2015)

VICTOR ANAMANJIA OKUSIMBA CLAIMANT

-VERSUS-

MUMIAS SUGAR COMPANY LTD RESPONDENT

RULING

By a Memorandum of Claim dated 19th and filed on 20th February 2015 the claimant filed suit against the respondent alleging unlawful termination of claimant's employment. The claimant seeks the following reliefs:-

- a. A declaration that the termination of the claimant's services by the respondent was unlawful.
- b. An order for the unconditional reinstatement of the claimant back into the respondent's service.
- c. Only by way of an alternative to (b) above payment of Kshs 3,258,430.02.
- d. Costs of the suit plus interests.
- e. Any other or further remedy the court may deem just and expedient to grant.

On 9th March 2015 the claimant filed a notice of motion under Certificate of Urgency seeking the following orders:-

1. That for purposes of the record this application be certified urgent and heard forthwith and *ex parte*.
2. That pending the hearing and determination of this application the respondent be restrained from evicting the claimant from his company house.
3. That pending the hearing and determination of this suit this honourable court be pleased to order the respondent to reinstate the claimant back to employment.
4. That upon compliance with prayer 3 above the respondent be restrained from terminating the services of the claimant pending the hearing and determination of this suit.

5. That costs of this application be provided for.

The application is supported by the affidavit of the claimant sworn on 9th March 2015 and the following grounds:-

- a. That the respondent on 13.2.2015 unlawfully terminated the services of the claimant.
- b. That evidence has emerged that the actions of the respondent to terminate the claimant's services was due to external pressure and nothing to do with breach of contract.
- c. That the respondent now intends to evict the claimant's from the company house.
- d. In the event the respondent is not stopped the claimant shall suffer irreparable harm.

The respondent filed grounds of opposition on 17th March 2015 as follows:-

1. That the claimant/applicant has no *locus standi* to lodge the application herein. The claimant/applicant was terminated on the 13th February, 2015 after a process that involved a show cause and disciplinary hearing in which he (the applicant) participated in without any reservations. As at the 9th March, 2015, when he swore his affidavits in support of the instant application seeking injunctive orders to stop his dismissal, the applicant had already subjected himself to the respondent's internal disciplinary process and the result of which was communicated to him.
2. Without prejudice to the contents of paragraph 1 above, the respondent states that the claimant's application has been overtaken by events and the orders sought cannot legitimately be granted by this honourable court.
3. The claimant/applicant is playing the sympathy card by seeking to reverse his termination which has since crystallized and formally been communicated to him. This can only be ventilated through a full hearing.
4. The grounds upon which the application is predicated are diametrically opposed to the orders sought. The grounds allude to an unlawful termination, the substance of which will be ventilated in a full hearing. The interlocutory relief sought is not available to the applicant who has no relationship with the respondent.
5. The application as framed is incompetent, bad in law and fatally defective for want of the relevant and specific provisions of the law. The jurisdiction of this honourable court is being called into question as it has not been moved according to the clear established principles of the law.
6. The application should be dismissed with costs and the matter be allowed to proceed to full hearing in order to have all issues canvassed and the honourable court makes a final determination. Such determination is not capable of being obtained through an interlocutory process.

The application was first heard *ex parte* on 10th March 2015 and certified urgent. It was argued by the parties on 19th March 2015. Mr. Bruce Odeny appeared for the claimant and Miss Oyombe appeared for the respondent.

This application is identical to **Cause No. 77 of 2015** whose ruling I delivered on 5th June 2015. Since the respondent is the same and claimant in this case was terminated in similar circumstances as the claimant in Cause No. 77 of 2015 the ruling in the case is applicable to this one and to Cause **No. 76 and 77 of 2015** in which similar applications have been filed but not yet heard.

In **Cause No. 77 of 2015** I found that for the claimant to be entitled to the orders, he needs to certify the

threshold in **Giella**, and must go further. His claim is first to restrain the respondent from evicting him from the house he has been occupying as an employee and secondly to reinstate him back to work pending the hearing of his claim. The court would have to establish that he meets the threshold in **Giella** and further whether he would be entitled to an order for reinstatement should the court find that his employment was unlawfully or unfairly terminated by the respondent. This can only be ascertained after hearing. Section 49(3) provides for reinstatement only where the termination is found to be unfair, and all the factors in Section 49(4) have also been considered. This means that it is not automatic that the applicant would be reinstated if the court finds that he was unfairly terminated. Of special consideration would be whether it is practical to reinstate and whether there are exceptional circumstances to warrant the court to order reinstatement.

It is my opinion that it would not be possible for the court to determine whether or not the applicant is entitled to reinstatement until all evidence is taken and the court finds first, that he was unfairly terminated and secondly, that his circumstances are such that reinstatement would be the most appropriate remedy.

I further find that before reinstatement, the applicant does not have any contractual relationship with the claimant that would entitle him to retain possession and occupation of the respondent's premises. Should the court find that he is entitled to reinstatement, the court has the power to order the restoration of the premises to the applicant.

For these reasons I find that the applicant would not suffer irreparable harm as the court would be in a position to restore both his employment and his occupation of the company house should he persuade the court that he is entitled to the orders.

The result is that I find the applicant has not established that he would suffer irreparable harm. I therefore dismiss the application with no orders for costs.

Dated and delivered in Kisumu this **10th** day of **June**, 2015.

MAUREEN ONYANGO

JUDGE