



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT KISUMU**  
**CAUSE NO. 77 OF 2015**

(Before Hon. Lady Justice Maureen Onyango on 5<sup>th</sup> June, 2015)

**DOROTHY VIVIAN ATIENO OGUTU C/O BRUCE ADVOCATES .....CLAIMANT**

**-VERSUS-**

**MUMIAS SUGAR COMPANY LTD ..... RESPONDENT**

**RULING**

Dorothy Vivian Atieno Ogutu filed this application on 9th March 2015 under Certificate of Urgency seeking the following orders:-

1. That for purposes of the record this application be certified urgent and be 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 the costs of this application be provided for.

The application is made under Section 12(3)(i) and (vii) of the Industrial Court Act and Sections 1A & B, 3A and 63(e) of the Civil Procedure Act. The application is grounded on the affidavit of DOROTHY VIVIAN OGUTU sworn on 9th March 2015 and on 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) 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 application first came before me *ex parte* on 10th March 2015 when I certified it urgent and directed that the application be heard on 19th March 2015.

On 19th March 2015 when the application came up for *inter partes* hearing it was deferred to 7th April 2015 by consent of the parties.

The respondent filed a replying affidavit of Boniface Shikuku Makhandia and grounds of opposition on 1st April 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 letter to the applicant which she made a response to and a disciplinary hearing in which she (the applicant) participated in without any reservation. As at the 9th March, 2015, when she swore the affidavit in support of the instant application seeking injunctive orders the applicant had already subjected herself to the respondent's internal disciplinary process and such process had yielded her termination.
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. By her own admission, the applicant has demonstrated that the respondent undertook a process which resulted in her termination. Such termination cannot be undone or reversed via an interlocutory process.
3. The grounds upon which the application is predicated are diametrically opposed to the orders sought as the grounds set forth what is purportedly a flawed process. The orders, then should ordinarily have sought to stop the flawed process not the result of the process. Ultimately, the honourable court, rather than stop the process, which is an academic exercise now, should interrogate the result of such process and give a finding therein a full hearing.
4. 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 cannot extend to micro - managing the operations of the respondent.
5. 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.
6. The application as presented does not;
  - On the face of it establish a *prima facie* case with a probability of success as no material exhibited shows that the respondent's action was actuated by external pressure, neither does she demonstrate that reasons assigned in her termination letter are not well founded;
  - Demonstrate such irreparable harm/damage the applicant is likely to suffer if she is evicted from the respondent's house or if she is not reinstated and whether such harm/damage cannot be compensated in the event that her application is allowed in its entirety.

The application was heard on 7th April 2015. The applicant was represented by Mr. Bruce Odeny instructed by Bruce Odeny & Company Advocates while the respondent was represented by Dickens M. Ouma Advocate, instructed by Federation of Kenya Employers.

Mr. Odeny submitted that the applicant was employed by the respondent as a field supervisor in the nucleus estate owned by the respondent. On 10th December 2014 she was suspended from duty by letter signed by the CEO on allegations that she irregularly terminated farmers plots in the system occasioning financial losses to the company. The letter of suspension required her to give her defence within 48 hours

showing cause why her services should not be dispensed with. She responded on 15th December 2014, denying terminating any field and further explaining that termination of fields was the responsibility of the administration supervisor on advise of either sector manager and/or OPM who would thus be responsible for losses if any. The claimant appeared before the disciplinary committee on 5th February 2015 in a process that lasted only 2 minutes. She received her letter of termination on 13th February 2015. The ground for termination was that the claimant irregularly terminated Plot No. 100/800/2 on 8th October 2013 in breach of the ISO procedure.

It was submitted that the Director of Human Resources (HR) had vindicated the claimant in a letter dated 9th February 2015 where he indicated that it is not possible to terminate nucleus plots. Mr. Odeny further submitted that the claimant had information that the termination of her employment was decided upon by external sources. He referred to an email of 5th February 2015 and further email correspondence of 11th February 2015 relating to draft termination letters which confirmed that the termination was based on a PWC report outside the respondent's control. Mr. Odeny further submitted that the disciplinary procedure was a mere formality, the membership was wrong and the whole process was flawed. That these facts amounted to special circumstances in which the court can order reinstatement of the applicant, that the court has jurisdiction to reinstate the applicant.

Mr. Odeny prayed that the claimant should not be evicted from the staff house she occupies as she would suffer irreparable loss as there is a shortage of staff houses, that the claimant has demonstrated she has a *prima facie* case and the balance of convenience is in her favour. He further submitted that the law protects the weaker party and in this case the applicant is the weaker party. He prayed that the application be allowed as prayed.

Mr. Ouma for the respondent submitted that the application by the applicant is for both a prohibitory injunction and a mandatory injunction and must meet the threshold in **Giella V Cassman Brown**. That the application was filed after a delay of 30 days from date of termination, thus the horse had bolted, and the court is left with only one option which is to interrogate the process leading to the termination. That this is the philosophy in **Dennis Nyagaka Ratemo V Kenya Film Corporation & Another** [2014] eKLR and **Alfred Nyungu Kimungui V Bomas of Kenya** [2013] eKLR. He submitted that the court has no business looking at the day-to-day operations of an entity. That where a wrong has been committed the court will open up the matter and look at the process. That after termination of her employment the applicant has no contractual relationship with the respondent to entitle her to continue staying in the respondent's premises.

Mr. Ouma submitted that the prayer for reinstatement can not be granted at interlocutory stage. The facts alleged by either party in affidavits must be subjected to evidence. That an order of reinstatement finally determines the case before a court.

On the correspondence in the email, Mr. Ouma submitted that apart from it being privileged communication, there is no reference to the applicant and that there were more than 40 employees involved. He further submitted that the applicant's allegation that she was heard for only 2 minutes at the disciplinary committee is not borne by the proceedings of the disciplinary committee.

Mr. Ouma questioned the *locus standi* of the applicant and the provisions of the law under which the court has been moved. He submitted that the application is fatally defective. He urged the court to dismiss the application.

I have considered the application and the affidavit and grounds in support thereof as well as the annexures thereto. I have also considered the grounds of objection, replying affidavit and submissions by both parties as well as authorities cited by the claimant.

From the foregoing it is my opinion that the issues for determination are the following:-

1. Whether the application is fatally defective.

2. Whether the application falls under the purview of **Giella V Cassman Brown** and whether the applicant has failed to prove the threshold thereof.

3. Whether the applicant is entitled to the prayers sought.

The respondent submitted that the application by the applicant is fatally defective for reasons that it is brought under the wrong provisions of the law, want of relevance. Citing of a wrong provision of law under which an application is made is a matter of procedure. Article 169 and Section - of the Industrial Court Act both enjoin the court to dispense justice without undue regard to technicality. Striking out a matter for want of procedure should be a matter of last resort and only to be resorted to where undue prejudice would be occasioned to the adversarial party and only where it is not possible to cure the matter by amendment or other action permitted by law. In the present case no prejudice has been occasioned to the respondent by the reference to the Civil Procedure Act and Rules instead of the relevant provisions of the Industrial Court Act or Industrial Court (procedure) Rules. This being the case, I find that the mistake does not render the application fatally defective.

On the second issue the respondent argues that the application is in actual fact an application for both a mandatory and prohibitive injunction and that the applicant has not satisfied the principles set out in **Giella V Cassman Brown**. The applicant on the other hand argues that the claimant has demonstrated that she would suffer irreparable loss as there is a shortage of staff houses and that there is no evidence of loss, and that the balance of convenience favours the applicant as she is the weaker party whom the labour laws are intended to protect.

For the claimant to be entitled to the orders, she need not only certify the threshold in *Giella*, but must go further. Her claim is first to restrain the respondent from evicting her from the house she has been occupying as an employee and secondly to reinstate her back to work pending the hearing of her claim. The court would have to establish not just if she meets the threshold but whether she would be entitled to an order for reinstatement. 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 she 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. Reinstating an employee means that the employee is treated in all respects as if she/he did not leave work at all.

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 she was unfairly terminated and secondly, that her 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 her to retain possession and occupation of the respondent's premises. Should the court find that she is entitled to reinstatement, the court has the power to order the restoration of the premises to the applicant.

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

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

Dated, delivered and signed in open court in Kisumu this **5th** day of **June**, 2015.

**MAUREEN ONYANGO**

**JUDGE**

**Appearances:-**

..... for the claimant(s)

..... for the respondent(s)

CC. Wamache