



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 95 OF 2014

BANKING, INSURANCE & FINANCE UNION (KENYA) CLAIMANT

VERSUS

BARCLAYS BANK OF KENYA LTD RESPONDENT

KENYA BANKERS ASSOCIATION INTERESTED PARTY

RULING

1. On 26th May 2015, the claimant, Banking, Insurance & Finance Union (Kenya) (BIFU) filed application through Notice of Motion and seeking for orders that;

1. Spent.

2. The Court be pleased to issue interim orders restraining the respondents from unprocedural and unlawfully terminating Hillary Mwanja Munyalo who is a key witness in the main suit and eight (8) others until this application is heard and determined inter parties

3. The Court should order that the final warning letter issued to Hillary Mwanja Munyalo be withdrawn and expunged from his employment records until the trade dispute reported to the Cabinet Secretary, Social Security and Services is disposed of.

4. The Court be pleased to issue further orders restraining the respondents from terminating the services of all the unionisable employees who have already been issued with capability notices (disciplinary hearings), warning letters and final warning letters due to performance until the main suit in Cause No. 95 of 2014 pending adjudication before the Court is heard and determined.

5. The Court do issue an order prohibiting the Respondent by themselves or by their recognised agents or principles [principals] from terminating the services of unionisable employees who have already been issued with uncalled for capability interview notices (disciplinary hearings), warning letters and final warning letters due to performance development plans (PDP) until this application is heard and determined inter parties.

6. That this Court do issue an order compelling the respondents to stop the already envisaged unlawful and unfair termination, harassment and intimidation of Mr Hillary Mwanja Munyalo a key witness in this case.

7. Costs be awarded.

2. The application is supported by the annexed affidavit of David Kinyua Mbagia and on the grounds that the Respondent has harassed, intimidated the claimant's key witness and orders should be made for them to desist from such action. Hillary Mwanja Munyalo (Munyalo) joined the Respondent in 2006 and until 2015 he has never been involved in any acts of indiscipline. Munyalo testified in this case on 19th May 2015 as a workers representative at the Respondent and on the same date he was issued with a final warning letter in total violation of the CBA and warning procedures. Under the CBA there is a 1st and 2nd warning within 12 months and before termination and to thus issue Munyalo with a final warning is contrary to agreed terms. That the Respondent actions are meant to silence the witness in Court as the issue of PDP is a matter pending arbitration. The Respondent has now invited several employees to the capability interview (disciplinary hearing) despite ongoing litigation. There are several warning letters that have since been issued to unionisable employee while this case is pending, three such employees have been terminated and the witness before Court has been issued with verbal threats if he continues to give testimony in Court against this employer on the PDP.

3. Other grounds in support of the application are that the Respondent has continued to violate the CBA provisions with impunity, the Claimant has been denied presence at disciplinary hearings on the grounds that it is an internal process despite the CBA making provision for the same. Mr Munyalo, the witness before Court has now been intimidated and harassed to the extent that this may drastically affect the quality of his testimony at the next scheduled hearing. The other witness peter Chege has since been terminated as a result of victimisation. The Respondent is keen to kill the evidence and finally kill the case and the application is therefore meant to protect the witness, his employment and by extension the other witnesses and their testimony.

4. In the affidavit of David Kinyua Mbagia, he avers that as the National Chairman General of the Claimant he is aware of the CBA between the claimants and Respondent and the warning system agreed upon by the parties herein. Final warning letters have been issued to unionised employees especially the witness on the stand Mr Munyalo on 19th May 2015. The witness is the chairman of the central staff committee at the Respondent where he represents all unionisable employees. He is also the chairman of the joint negotiating council a body responsible to negotiating terms and conditions of employment of all unionisable bank employees.

5. Mr Mbagia also avers that Mr Munyalo joined the Respondent in 2006 and since has never had a disciplinary case against him until he was issued with a final warning letter on 19th May 2015 after commencing his evidence before this court. The applicable provisions of the CBA were not followed in the issuance of the warning, 3 other employees have since been terminated and this is clear affront on the claimant's case. If the Respondent is not restrained, the matter before Court shall be compromised as the witnesses are under threat and harassment. The invitations to disciplinary hearings over the PDP is a matter ongoing before Court and before a decision is made, parties should maintain status quo.

6. In opposition to the application herein, the Respondent filed Grounds of Opposition on 23rd April 2015. The Respondent states that the claimant's witness Mr Munyalo has not been harassed, intimidated or being unlawfully terminated. Prior to Mr Munyalo testifying in Court he was under investigations over staff lending (shy-locking) an offence that is contrary to the respondent's regulation vide investigations report prepared between 19th January 2015 to 30th March 2015. After investigations, Munyalo was invited to a disciplinary hearing to a charge of borrowing money from a fellow employee on 13th May 2015 an offence that is contrary to bank regulations. A hearing was conducted on 14th May 2015 at the convenience of Munyalo and the offence he had committed amounted to gross misconduct warranting summary dismissal but the Respondent opted to be lenient and issued a warning letter.

7. The Interested Party opted out in this application proceedings and noting the matter was between the Claimant and respondent.

Submissions

8. The Claimant submitted that they have a CBA with the respondent. The grievant herein and the witness

who has so far given evidence-in-chief Mr Munyalo is unionised and a permanent and pensionable employee of the respondent. He serves in the Joint Negotiating Council as a workers' representative and the chairman of the central staff committee. On 29th January 2014 the Claimant applied to the Court to stop the Respondent from disciplining the unionised employees on the ground of underperformance since the introduction and implementation of such performance ratings did not adhere to the laid down procedures in the CBA. To support the claimant's case, Mr Munyalo and Peter Chege were identified as witnesses and were in Court on 3rd March 2014. On 18th November 2014, Peter Chege was dismissed by the respondent. On 19th May 2015 Mr Munyalo testified in this case and gave emphasis to the fact that due process was not followed in the implementation of the PDP. On the same day [19th May 2015] the witness was issued with a final warning letter without copies being sent to the Claimant as under the CBA.

9. The Claimant also submitted that the witness [Munyalo] was being investigated over alleged staff-lending contrary to bank regulations but at his hearing he was accused of borrowing from a fellow employee and in gross misconduct warranting summary dismissal. The CBA between the parties has an outline at Clause No. A5 (b) with regard to procedures to apply in the event of misconduct which the Respondent failed to adhere to with regard to Munyalo. He has no previous disciplinary record and where an offence was committed and a warning was to issue, it should have been a first warning and not final warning. The proceedings against the witness is victimisation so as to frustrate the case before court. The alleged offence committed by Munyalo is not one of the stated cases warranting summary dismissal or issuance of a final warning.

10. The Claimant also submitted that the alleged offence committed by Munyalo even where there is a forensic investigation, the transfer of funds from one employee to the other does not in itself confirm borrowing as this can be done for various reasons. The transactions occurred 5 months before the Munyalo receive notice and only got it after giving evidence in court. This coupled with the dismissal of Peter Chege infer threats, intimidation, harassment and victimisation.

11. The Claimant relied on the case of **Leisure Lodges Ltd versus Benson Masinde, Civil Appeal No. 174 of 2007, William Olochike versus Kenya Commercial bank Ltd, Cause No.20 of 2010** and ILO Convection No. 135 on the Protection and Facilities to be afforded to workers representatives.

That in this case, the final warning letter issued to Munyalo should be expunged and the Respondent restrained from subjecting the grievant to further disciplinary action; the Respondent be restrained from term termination unionisable employees being;

- a) Andrew Mwaura
- b) Eva Gatwiri Bundi
- c) Japheth Kiprono Kiget
- d) Joseph Musyoka Mboya
- e) Agnes Wanjiku Karuai,
- f) Doreen Karimi Murungi, and
- g) Miriam Wairimu Wanyeki

12. All who have been issued with final warning letters and pending the hearing of this case?

13. The Respondent on their part submitted that prior to Munyalo giving evidence in this case and being issued with a warning letter he had been investigated for staff-lending, an offence contrary to bank regulations. He was invited to a hearing and heard at his convenient date. The offence committed was

found to amount to gross misconduct. The Respondent rely on **Walter Mocha Ongeri & Another versus Airside Limited (Swiss Port), Cause No.1285 of 2013**. Disciplinary proceedings are investigative to verify the allegations made against an employee. The Respondent thus exercised its administrative prerogative to have munyalo undergo fair hearing for gross acts of misconduct which cannot be stopped simply because he is a witness in this case. Where there is good cause, the employer has the right to initiate disciplinary proceedings as held in **Rebecca Ann Maina & 2 Others versus Jomo Kenyatta University of Science and Technology, Cause No. 1789 of 2013**.

14. The Respondent thus submitted that the application by the Claimant lacks merit and should be dismissed. That the Claimant has not established the basis for the grant of the orders sought.

Determination

- a) Whether the Court should retrain the respondents from terminating Hillary Mwanja Munyalo who is a key witness in the main suit and eight (8) others;
- b) Whether the final warning letter issued to Hillary Mwanja Munyalo should be withdrawn and expunged from his employment records;
- c) Whether restraining orders should issue stopping the terminating of all the unionisable employee who have already been issued with capability notices (disciplinary hearings), warning letters and final warning letters due to performance;
- d) Whether the Court should compel the respondents to stop the termination, harassment and intimidation of Mr Hillary Mwanja Munyalo a key witness in this case.

15. Most of the issues herein drawn from the claimants application are intertwined and shall be addressed singly and where appropriate jointly. I have outlined these issues as above as in the claimant's earlier **application of 29th January 2014**, similar issues arose and specific orders were issued pending the hearing and disposal of the suit herein. I note it has been now over one (1) year and above since the matter was filed and has not been concluded. To thus address some of the issue herein in the interim would be to go into the main cause.

16. Matters before this Court are unlike any other dispute filed before any Court in Kenya. In their very nature labour and employment disputes go to the core of development and industrial peace hence the unique situation of tripartite and social dialogue. What this suggests is that the employer/employee relationship needs a more substantive normative ideal than ordinary contract relationships like in sale of land, property or other commodities. This morality cannot be simply applied in an employment relationship as in other contracts. It is something more. *Dignity* will not provide the required moral ammunition if it is to be understood as merely providing a set of reason as to why humans must be protected when they meet the wheels of commerce. It requires a *labour morality*. An employment contract goes deeper than an ordinary contract of or for sale of goods.

17. In this regard therefore, section 20(2) of the Employment and Labour Relations Act, invites the Court to exercise its inherent powers and summon any witness it deem fit and necessary to call in the administration and arbitration of any dispute before it. Such a power and right to summon is to be seen within the normative ideal of the Court meeting its objectives, to ensure industrial peace and maintain fair labour relations thus;

- (2) The Court shall have power to summon witnesses, to administer oaths and affirmations and to require any person who appears to it to have special knowledge of any relevant matter, or of any of the matters to which this Act applies or any written law to which it relates to furnish, in writing or otherwise, and to confirm on oath, such expert opinion as may be relevant to any of the issues in the proceedings.

18. The law thus does envisage a scenario where parties before it do not invite any witness or a particular

witness, but the Court has the power to direct the appearance of such a witness or on its own motion to call such a witness or an expert witness. The witnesses thus called before the court, by the parties or by the Court through its own motion are crucial in the Court work and in the arbitration of any dispute before the court. Therefore under the Court Rules at Rule 14(9) and (10) parties are directed to;

(9) A party shall notify the Court when submitting a statement of claim or a response to a statement of claim under rule 4 and rule 11(1) of any witnesses a party proposes to call in support of that party's submissions and shall, at the same time notify the other party of the same.

(10) A party may, with the leave of the Court, call other witnesses.

19. In this regard, Rule 4 requires that a Claimant should set out its claim with an outline of facts, law, policy and submissions to be relied upon and at Rule 4(d) requires that;

(d) the facts and grounds for the claim specifying issues which are alleged to have been violated, infringed, breached or not observed and in the case of trade dispute the rights of the employees not granted or to be granted, any other employment benefits sought and the terms of collective bargaining agreement on which the jurisdiction of the Court is being invoked.

20. Whereas at Rule 11(1) it requires that summons be issued for any party that should appear before the court.

21. Thus, having set out its case, noting the materials to be relied upon, the laws and policy statement as well as any witness to be called and or required to be summoned. The Respondent as it were is given a clear outline of the claimant's case. Where the witnesses to be called are stated or witness summons are issued, both parties are deemed to have such knowledge.

22. To thus interfere with any of the stated witnesses or witnesses to be summoned or noted up for summon, such a party is guilty of interfering with the course of justice. Such a party should not only receive restraint from interfering with such a witness or witnesses but is in contempt of the very process of administration of justice. To move and address such contempt, a specific procedure is set out in law that must be followed as the sanction for the same is similar to what would amount to a criminal trial and the denial of the contemnor of their liberties.

23. Once a Court is therefore seized of a matter such as herein, parties are to desist, directly or indirectly from interfering with identified witnesses or potential witnesses. A party who through their own interaction with ongoing matter in Court and comes to know of any witness and with such knowledge interferes, threatens, intimidates or in any manner frustrates the attendance or the giving of evidence before court, is acting to defeat the course of justice. Once this is brought to the attention of the court, the same must be addressed as an affront to the rule of law.

24. In this case, on the question as to whether the Court should restrain the respondents from terminating Hillary Mwanja Munyalo who is a key witness in the main suit and eight (8) others, I note in particular that Munyalo has commenced his evidence-in-chief and to a large extent the Claimant at various instances sought the Court to intervene and ensure that as their witness, he was not intimidated, harassed or in any manner the trial process used against him. What is clear here is that the Court is already seized of the matter at hand, the trial is ongoing and pending. Munyalo remains a crucial witness to the proceedings herein. Other listed witnesses are also crucial to the arbitration of the matter herein. As concerns proceedings herein, preservation of the status quo to enable the witnesses identified by the Claimant to attend Court without any sense of intimidation, harassment or fear of victimisation is imperative. It cannot be overemphasised here on the need for parties to ensure that the course of justice is not directly or indirectly derailed. It is not lost to the Court that such matters as intimidation, harassment, threat or victimisation are sometimes subtle, in some cases are non-verbal, relate to perceptions but they all amount to causing anxiety, fright and justified fear especially in an employment relationship as set out above where the dignity of the employee is at stake and the potential loss of employment is eminent. In this regard recourse is the application of section 46(h) of the Employment Act thus;

46. *The following do not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty—*

...

h) an employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint is shown to be irresponsible and without foundation;

25. For an employer to proceed and terminate an employee on the basis of filing suit or undertaking proceedings to challenge the action of the employer and this is established and linked to such an action, by operation of the law, the same becomes an unfair labour practice. This was the rationale in the case cited by the Respondent **Walter Mocha Onger** case cited above, in the holding that;

Where the Court finds that such a disciplinary process is commenced with ulterior motive or one based on outright illegality, the Court should stop such a process as it would be found to be an illegality or one which is defective ab initio...

26. Hence, the matter subject of complaint by a witness or the Claimant as herein must be looked at vis-à-vis what is before Court and assessed as to qualify for the orders as sought. That of restraining the employer from undertaking disciplinary action. In this regard, the Claimant states that their key witness Munyalo and 8 other employees have been issued with final warning letters, firstly contrary to the applicable CBA and secondly as witnesses or potential witnesses herein so as to intimidate them, harass or victimise them with the purpose of killing this case. In the case of Munyalo, he was issued with notice and was heard on a case of staff-lending. This matter has since been heard and a final warning issued. Can this be said to be linked with the current proceedings?

27. The claim herein was filed way back on 29th January 2014, interim orders were sought that were specific as concerns the application of PDP. The payers in the Memorandum of Claim are clear as well as in the application and Notice of Motion filed therein. The particulars through relating to the victimisation of unionised employees and noting Munyalo and other potential witnesses, are not linked to the charge of staff-lending. This is a particular charge that Munyalo is said to have undertaken. Whether due process was followed and the CBA appropriately applied, this I find to be a matter outside and separate from the ongoing litigation. Indeed there is a **Memorandum of Claim** attached to the application dated **25th May 2015** which specifically does outline the issue in dispute as being the *unfair, unlawful and unprocedural final warning letter to Munyalo*. This dispute being that specific cannot be made part of the proceedings herein without the Claimant first amending the pleadings filed on 29th January 2014. To introduce a new claim as done under the current application is to go contrary to the set rules of procedure and practice of the Court as well as due process in introducing a new claim as the Claimant as done herein. Such a new cause of action ought to follow the laid down procedures to enable the Respondent and the Interested Party be properly served for the response in defence.

28. Therefore, on the question as to whether the final warning letter issued to Hillary Mwanja Munyalo should be withdrawn and expunged from his employment records is concerned, I find that this warning relates to a different cause of action outside the current proceedings. Whether due process has been followed and the CBA properly adhered to by the Respondent is a matter that can only be addressed in a separate suit. The effort by the Claimant to introduce a new suit as attached to the application is unprocedural, this should be extracted and filed separately where this is found necessary. However, where such a complaint as outlined against the Respondent is used to interfere with current proceedings to make it impossible for Munyalo to freely give his testimony, the court's attention should be drawn and appropriate directions shall be given. At this point no such necessity has been established.

29. That said, and as noted above, Munyalo remains a crucial witness in this matter and the need for parties to maintain the statu quo is imperative. That said, the initiation of this suit, the call of Munyalo as a witness herein is based on a specific matter and does not in any way operate as a permanent bar against any disciplinary proceedings against him or the other 8 employees issued with final warnings and are potential witnesses herein. The employer, Respondent herein retains the right to discipline its employees

as appropriate and as noted in **Walter Mocha Ongeri** Case cited above thus;

... it would be futile for the Court to involve itself in the day to day running of an employer/employee relationship which has its own governing rules. Thus, similarly this Court would be reluctant to involve itself in a disciplinary process commenced by the employer unless in an appropriate case it is established that the disciplinary process has been commenced or is continuing unfairly.

30. In this case, as concerns the charge of staff-lending, Munyalo has been subjected to a disciplinary hearing and a decision made. Misconduct of an employee must be addressed. There should be No compromise to work quality on the basis that there is ongoing litigation. Where this was an unfair process or the provisions of the CBA were not applied, recourse is within the law. This cannot be undertaken within this cause. To do so would be to lose the very essence of the claim before court.

31. With this outline, to go through the other issues identified would be to commence an analysis of the matter before court. There is no cited action that has been taken by the Respondent against the other 8 employees as outlined for Munyalo to warrant the Court to expunge the final warning letters as issued. To go into these final warning is to pre-empt the matter ongoing for hearing and the defence so far not confirmed in evidence.

32. In this regard therefore, I hasten to add that parties should maintain the *status quo* as regards matters outlined herein, there is need and rationale to ensure the witness on the stand [Munyalo] is not directly or indirectly intimidated, harassed, threatened, victimised or in any manner put in a situation that he perceives his employment is under threat due to his testimony before court. This should equally apply to all the other witnesses identified, mentioned or potentially can be called by the claimant. The 8 employees stated and outlined above are a good reference here. These potential witnesses have a right to assert their rights as herein and the Court being seized of the matter, there is good cause and basis to direct that the Respondent should not in any manner threaten their employment.

In conclusion, application by the Claimant dated 26th May 2015, shall only be allowed to the extent that;

a) Parties herein shall maintain the *statuo quo*, the employment of Hillary Mwanja Munyalo,

Andrew Mwaura

Eva Gatwiri Bundi

Japheth Kiprono Kiget

Joseph Musyoka Mboya

Agnes Wanjiku Karuai,

Doreen Karimi Murungi, and

Miriam Wairimu Wanyeki

b) Shall not be interfered with or in any manner threatened pending the hearing and determination of the matter herein;

c) Orders above shall not operate as a bar to disciplinary action undertaken by the Respondent for any misconduct outside matters raised herein;

Dated and Delivered at Nairobi this 23rd day of July, 2015.

M. Mbaru

Judge

In the presence of:

Court Assistant

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