



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1947 OF 2014

RUTH NJERI MBUGUA.....CLAIMANT

VERSUS

NAIROBI CONSUMERS CO-OPERATIVE UNION LT.....1ST RESPONDENT

DUNCAN MUTISO KIOLI.....2ND RESPONDENT

JACOB ODUNDO.....3RD RESPONDENT

STEPHEN KOECH.....4TH RESPONDENT

RULING

1. The applicant herein by a motion dated 27th November, 2014 seeks a fleet of orders but the main ones which this Court will consider in this ruling are:-

(a) That the this Honourable Court do grant an interim order restraining the respondents either by themselves or through their agents and employees from harassing, intimidating and generally claiming from the claimant in any manner any money pending the hearing and determination of this application.

(b) That this Honourable Court do grant an interim order restraining the respondents either by themselves or through their agents and employees from harassing, intimidating and generally claiming from the claimant any money pending the hearing and determination of this claim.

(c) That the Court do order investigation and attempted extortion by the 2nd, 3rd, and 4th respondent.

2. The application was supported by the affidavits of Ruth Njeru Mbugua, the applicant, who deponed on the main that:-

(a) That she was employed by the respondent in the year April 1999 as a Messenger cum cleaner with a basic salary of Kshs.3,500/=.

(b) That in the month of June, 2008 the respondent's manager left employment upon

which she filled the position as acting manager with a salary of 12,000 for a period of one year.

(c) That upon assuming the duties of manager she in effect took on the duties of caretaker, manager, book keeper and messenger all rolled into one with a salary of Kshs.19,715.

(e) That the respondent always conducts audits as done by the ministry of industrialization which is confirmed/adapted in annual general meetings.

(f) That the last audit was registered in 26th August, 2014 and read to the members who in turn adopted it on 24th September 2014.

(g) That on the 6th of October, 2014 the treasurers and the Secretary came to the office with individuals who introduced themselves as C.I.D. officers and they informed me that I was under arrest.

(h) That she was not informed of any offences committed until she arrived at Kamukunji Police Station.

(i) That upon reaching Kamukunji the officers in collusion with the 2nd, 3rd, and 4th respondents demanded for surety before being released which they ideally stated should be able to cover the amounts in question.

(j) That she was advised to place a Title Deed as the surety upon which her brother deposited his late father's Title Deed to ensure that she did not spend the night in prison.

(k) That they later without their consent instructed her to deposit the Title with their lawyer after she protested in the manner they were handling her.

(l) That the following day she went to Ali & Company Advocates where the respondents sought to have her deposit an alternative Title Deed and signed but not filled out cheques (Co-operative Bank of Kenya cheques folios 000001 to 000012).

(m) That it was at Kamukunji that the 2nd and 3rd respondents alleged that there was some money that was lost.

(n) That she was not aware of any money lost.

(o) That it was worth noting that the allegations were not accompanied by any audit from a certified auditor and thus at best it could be termed as an imaginary figure created by the respondents to defraud her and dismiss her from employment.

3. The respondents in opposing the application swore an affidavit through the 2nd respondent who stated he was the chairman of the respondent. He deposed in the main that:-

(a) That he was advised by their aforesaid Advocate on record which information he verily believed to be true that, the claimant's application and the suit hereof are a non-starter, incompetent and an abuse of the Court process and shall be raising a preliminary objection on point of law and shall be applying for the same to be struck out with costs for the following reasons:-

(i) The applicant has not been dismissed from employment but only suspended and that her salary has not been stopped and as such this suit and application thereof praying for reinstatement are premature before the honourable Court.

(ii) The Applicant is estopped by record and conduct from avoiding the commitment in writing she made on 17/9/2014 to pay moneys she embezzled and as such the application and suit thereof are an abuse of Court process.

(iii) That any matter before the police for investigation is in realm of the police and the respondents cannot direct the police what to do or not do in the circumstance.

(b) That in reply to paragraph 10, 11 and 12 of the Applicant's Supporting Affidavit, I do aver that Minute No. AGM/11/2014/AOB of the 1st Respondents 34th Annual General Meeting of 24th September 2014 relates to issues of finance which the Manager was required to respond to and she cannot purport to gloss over the issue with her baseless claim that since the 1st respondents audit was adopted, she cannot be questioned over issues she had made admissions in writing (Claimant) and she had been asked to explain.

(c) That subsequent to the Annual General Meeting, discrepancies on accounts had been noted and the Manager was queried and she gave in writing a tabulation of sums of money she used without authority of her employer and she also made written commitment on 17/9/2014 to pay any monies that she would not have been able to account for.

(d) That as an organization we have done an internal audit which provides the figures embezzled by the claimant to be Kshs.914,110/=.

(e) That the external auditor has been engaged to work on a forensic audit and the reason for suspending the claimant was to allow the Auditor not to be obstructed in doing his work.

(f) That the loss and/or theft of the 1st respondent's property (money which is an issue the Sacco officials are answerable to members and in any case the matter had to be reported and recorded at a police station which the police in their statutory right arrested the claimant to aid in investigations and as a consequence his brother and also the brother in law intervened to have the matter settled out of Court.

(g) That it is also important to note that the claimant provided postdated cheques which she executed her part before our Advocate s further security for amounts that she embezzled which were to await the report of external audit before the figures were to be inserted.

(h) That it is imperative to note that the audit report by the Ministry of Industrialization and Enterprise Development was read under Min. No. AGM/6/2014/Auditors Report, which was not adopted or seconded by any member and as such the claimant is mischievous and wants to misdirect the Court to the effect that it was adopted as the 1st respondent's AGM.

(i) That I do aver that after noticing discrepancies on the records, the claimant voluntarily admitted of using some money of the 1st respondent without authority partly for the office and she made a tabulation of the same.

(j) That after the Annual General Meeting the Executive Committee of the 1st respondent sat and resolved that the claimant do pay the amount she disclosed to have embezzled.

(a) From her calculation in her own handwriting the amount she purports to have embezzled is Kshs.128,240 for year 2012/2013 and Kshs.159,820/= for year 2013/2014.

(b) From our internal audit the amount embezzled is Kshs.914,110/=.

(k) That I do aver that the suit and application herein by the claimant are calculated to delay and/or forestall any criminal action if instituted against her for stealing by servant which this

honourable Court has no jurisdiction to deal with criminal actions and hence an abuse of Court process.

(l) That for record purposes the claimant has not been terminated but suspended awaiting a forensic audit to confirm the extent of any loss if at all and only then, when the 1st respondent can take any labour action as may be provided by law.

4. The Court has reviewed the motion, the supporting affidavit as well as the documents in support thereof. The Court has further considered the replying affidavits by the respondent and is of the view that it cannot intervene to prevent the respondent from taking internal disciplinary action against the applicant/claimant as well as report to authorities on any allegation of financial embezzlement. However both procedures have to be conducted in accordance with respondent's internal disciplinary processes, Employment Act and rules of natural justice.

5. Regarding prosecution, the respondent is within its right in law to make a report to authorities concerning complaints of embezzlement but must not use criminal justice to extract admission of the alleged offence and recovery of the alleged funds from the applicant.

6. Our Constitution presumes a party innocent until proved guilty in a Court of law or pleads so, voluntarily. The authorities must be left to carry out independent investigations against the applicant, gather evidence including but not limited to those in possession of the respondent and if satisfied that there is sufficient evidence arraign the claimant in Court to face trial.

7. Further, if the respondent has proof necessary in civil cases that the applicant embezzled the alleged funds, the best approach is to sue for the recovery of the same.

8. The Court therefore frowns upon the approach adopted by the respondent in using the criminal justice system as a double barrel for recovery of the alleged embezzled funds as well as a prosecution for the same. In the circumstances the Court declares null and void the admission of liability for the embezzled funds made under threat of prosecution and declares any securities or arrangements made for liquidation thereof unprocedural and a violation of the applicant's constitutional right to fair administrative process and hearing.

9. For avoidance of doubt, the Court makes no order prohibiting the respondent from initiating disciplinary as well as criminal prosecution of the applicant provided they are conducted in accordance with the law and the Constitution.

10. It is so ordered.

Dated at Nairobi this 17th day of July 2015

Abuodha J. N.

Judge

Delivered this 17th day of July 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge