



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT
AT NAIROBI

PETITION NO. 20 OF 2015

IN THE MATTER OF ARTICLES 2, 20, 21, 22, 23, 24 AND 41 OF THE CONSTITUTION

AND

IN THE MATTER OF SECTIONS 42(1) & 47(6) OF THE EMPLOYMENT ACT 2007

AND

IN THE MATTER OF CONTRAVENTION OF ARTICLES 27(1) & (2), 35(2), 41(1), 48 & 50(1) OF
THE CONSTITUTION

CHURCHILL WINSTONES OCHIENG.....PETITIONER

VERSUS

GUARANTY TRUST BANK (KENYA) LTD.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. Before me is the Petitioner's Notice of Motion application dated 20th February 2015. In it, the Petitioner seeks various reliefs against the 1st Respondent chief of which is an order quashing the 1st Respondent's letter dated 20th January 2015, restraint against the 1st Respondent issuing opinions, reports whatsoever about the Petitioner's conduct, capacity or ability as an employee. The Petitioner also sought the declaration that Sections 42(1) and 47(6) of the Employment Act be declared unconstitutional as being inconsistent with the provisions of Articles 27, 41(1), 48 and 50(1) in so far as the sections are discriminatory and purport to deny the Petitioner rights and freedoms enshrined in the Constitution. The 1st Respondent was opposed to the motion while the 2nd Respondent stayed out of the fray. The 1st Respondent filed Grounds of Opposition on 9th March 2015 and the gravamen of the grounds filed was that the application was defective and an abuse of the Court process and the Petitioner was seeking reliefs unknown to law; the Petitioner had not demonstrated any *prima facie* case to warrant the grant of injunctive relief sought; the grant of prayers will result in the 1st Respondent contravening the obligation imposed on it by Central Bank of Kenya and that the Court cannot aid an infringement of another party's obligations and that the prayers sought cannot be granted at interlocutory stage.

2. Parties opted to file submissions in support and opposition of the motion. The Petitioner filed submissions on 15th June 2015. In his submissions, he submitted that on 12th January 2015 he gave notice of intention to terminate his employment with the 1st Respondent as required by his contract of employment. He submitted that the 1st Respondent's management, namely the Managing Director and Group Head of Human Resources were hostile and disputed the notice period provided in the contract of employment. He submitted that vide a letter dated 20th January 2015 the 1st Respondent purported to terminate his services with immediate effect on grounds of alleged poor performance. He submitted that the 1st Respondent purported to terminate the Petitioner's employment unfairly and that the allegation that the Petitioner's performance was poor was just an allegation. The Petitioner submitted that the 1st Respondent had not produced any evidence of the Petitioner's poor performance for the period he was employed by the 1st Respondent. Reliance was placed on the case of **Abraham Gumba v Kenya Medical Supplies Authority [2014] eKLR** where Rika J. held that poor work performance is an allegation that should be supported by evidence of specific performance targets, appraisal of the performance with specific results. The Petitioner submitted that he did not receive any indication of poor performance and that he gave the three months' notice as required by the contract. He submitted that the purported termination was brazen violation of his rights and the principles of natural justice. The Petitioner submitted that the actions of the 1st Respondent were motivated by the act of the Petitioner tendering his resignation and were calculated to scandalize, mudsling and besmirch his professional reputation and sabotage his chances of securing alternative employment. The Petitioner submitted that the 1st Respondent's purported termination took place during the pendency of the probation period and by dint of Section 47(6) of the Employment Act 2007 he was barred from making a complaint of unfair termination and that by dint of Section 42(1) of the Employment Act 2007 the requirements of fair hearing prior to termination under Section 41 do not apply to termination during probationary periods. He thus submitted that the impugned provisions of the Employment Act 2007 are inconsistent with the Constitution, discriminatory and violate his rights under Articles 27, 31(1)(b), 41(1), 48 and 50(1). The Petitioner submitted that he had met the threshold for grant of the relief sought. The Petitioner relied on the case of **Samuel G. Momanyi v Attorney General & Another [2012] eKLR** for the proposition that the Court can declare the impugned sections of the Employment Act unconstitutional.

3. The 1st Respondent submitted that the Petitioner's application is an abuse of the Court process and that the application is brought in bad faith to impede justice and curtail the 1st Respondent from carrying out its obligations which are lawful. The 1st Respondent submitted that the Petitioner had sought declaratory orders at *inter partes* stage which this Court could only pronounce upon if it has jurisdiction *sine qua non* it cannot make the said pronouncement. The 1st Respondent submitted that more fundamentally in so far as it is intended to seek a determination as to whether any provisions of the Employment Act are inconsistent with or in contravention of the Constitution, this Court has not been clothed with jurisdiction to entertain such matters. The 1st Respondent submitted that Parliament had determined the jurisdiction of the Employment and Labour Relations Court pursuant to Article 162(4) of the Constitution and that the jurisdiction of this Court is expressly defined by Section 12 of the Industrial Court Act. That jurisdiction does not include determining the question as to whether any law is inconsistent with the Constitution. Regarding the prayers for orders of *certiorari*, the 1st Respondent submitted that the relief the Petitioner sought was under the province of writs for prerogative orders under Administrative law. It was submitted that the orders cannot be sought against a person or entity that is not exercising a judicial authority or a quasi-judicial body or discharging a public duty. It was submitted that even assuming that the order for *certiorari* can be issued against a private entity, the Petitioner must show how the process of termination of his contract could possibly be in excess of jurisdiction. Reliance was placed on the case of **Republic v Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** where the Court of Appeal held that "an order for *certiorari* will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like

reasons". On the threshold for grant of interim injunctions, the 1st Respondent cited the case of **Giella v Cassman Brown [1975] EA 358** which set the criteria as a *prima facie* case with a probability of success, demonstration that the applicant will suffer irreparable harm which cannot be compensated by an award of damages and if the Court is in doubt it should decide the application on a balance of convenience. The 1st Respondent submitted that the definition of *prima facie* case was defined by the Court of Appeal in the case of **Mrao v First American Bank Limited and 2 others [2003] KLR 125**. The 1st Respondent also relied on the cases of **Matalinga and Others v Attorney General [1972] E.A. 518**. The 1st Respondent submitted that the declarations sought by the Petitioner in the present suit are contrary to the accepted principles on which a court exercises its jurisdiction to make the declaration of rights as a declaratory judgment cannot confer rights where no such rights exist. The 1st Respondent submitted that it has obligations under Section 27 and 28 of the Banking Act which would be infringed upon by grant of the orders sought. The 1st Respondent submitted that the prayers sought in the application are premature as the grant of the prayers will permanently and finally determine the main prayers in the suit. The 1st Respondent relied on the case of **Esther Geliza Kanyaga v Rose Nyaroka Ramichi and another [2011] eKLR**. Finally, the 1st Respondent submitted that the Petitioner's application is frivolous and vexatious and relied on the case of **Trust Bank Limited v Amin Company Limited & Another [2000] KLR 164**. The 1st Respondent thus sought the dismissal of the application with costs to the 1st Respondent.

4. Regarding the competence of the Court to make pronouncements Section 12 of the Industrial Court Act 2011 was cited. Section 12 provides as follows:-

12. (1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including —

(a) disputes relating to or arising out of employment between an employer and an employee; ?

(b) disputes between an employer and a trade union; ?

(c) disputes between an employers' ?organisation organization and a trade union;

(d) disputes between trade unions; ?

(e) disputes between employer organizations; ?

(f) disputes between an employers' organisation and a trade union; ?

(g) disputes between a trade union and a member thereof;

(h) disputes between an employer's organisation or a federation and a member thereof; ?

(i) disputes concerning the registration and election of trade union officials; and ?

(j) disputes relating to the registration and enforcement of collective agreements. ?

(2) An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.

3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—

(i) interim preservation orders including injunctions in cases of urgency;

(ii) a prohibitory order;?

(iii) an order for specific performance;?

(iv) a declaratory order;

(v) an award of compensation in any circumstances contemplated under this Act or any written law;

(vi) an award of damages in any circumstances contemplated under this Act or any written law;

(vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or

(viii) any other appropriate relief as the Court may deem fit to grant. (emphasis mine)

5. Quite clearly this Court has a wide range of reliefs it can give. The Respondent makes a strong case for the argument that the orders sought are final in nature. These certainly are not light orders to make. The essence of an interlocutory application is to resolve some issues in the interim and not the suit. It would otherwise not be called interlocutory. The **Black's Law Dictionary Ninth Edition** defines **interlocutory** as follows:

(of an order, judgment, appeal, etc) interim or temporary; not constituting a final resolution of the whole controversy. Also termed medial.

6. Clearly, if the orders sought resolve the dispute there is nothing interim about them. The thrust of the Notice of Motion of 20th February 2015 is clearly to finalise the dispute between the parties. That is not an interim relief sought. In the premises I will decline to issue any orders for the Petitioner/Applicant and urge parties to list the Petition for hearing at their earliest convenience. The upshot of the foregoing is that the application fails and is dismissed with costs to the 1st Respondent.

Orders accordingly.

Dated and delivered at Nairobi this 23rd day of September 2015

Nzioki wa Makau

Judge