



REPUBLIC OF KENYA

IN THE EMPLOYMENT LABOUR AND RELATIONS COURT AT MOMBASA

CAUSE NO.793 OF 2015

FADHIL JUMA KISUA1st CLAIMANT

BERNARD CHITIAVI BULINDA.....2nd CLAIMANT

VERSUS

KENYA PORTS AUTHORITY.....RESPONDENT

RULING

Introduction

1. The claimants herein were employed by the respondent on permanent and pensionable terms until they were summarily dismissed on 6.10.2015 and 29.9.2015 respectively. The reason cited for their dismissal is that they presented forged documents to the respondent for purpose of securing employment or promotion. The first claimant brought this suit on 23.10.2015 while the second claimant brought his suit number ELRCC 801 of 2015 on 28.10.2015. Both claimants are accusing the respondent of unfair termination of their employment and ordering them to vacate the staff quarters within 7 days of their dismissal. The claimants are seeking reinstatement to their former employment and in the alternative they are seeking payment of their terminal dues plus compensation for unfair termination.

2. Simultaneously with their suits the claimants filed notice of motion dated 22.10.2015 and 28.10.2015 respectively seeking reinstatement to their employment and injunction to restrain the respondent and or her agents from evicting them from staff quarters. The motions are supported by affidavits sworn by the claimants on 22.10.2015 and 28.10.2015 respectively. The motions were opposed by grounds of oppositions filed by the respondents on 16.11.2015. The motions were consolidated and argued together on 17.11.2015 by the counsel for the two sides.

Applicant's Case

3. Mr Shamaka, learned counsel for the claimants relied on the supporting affidavits sworn by the claimants to urge the court to grant the orders sought by the motions. He submitted that the court has jurisdiction to grant the orders under section 12 (3) of the Employment and Labour Relations Court Act (ELRCA) and Rule 16 of the Industrial Court Procedure Rules (ICPRs). That the court has the power to order reinstatement provided that it is done within 3 years after termination. That in this case three years have not lapsed from the date of termination and as such urged the court to reinstate the claimants pending the hearing and determination of the suit. The reason for dismissing the claimants is that they presented forged academic certificates to the respondent for purposes of securing employment or promotion. A second reason cited for dismissing the 1st claimant is that he failed to respond to the show cause letter dated 28.7.2015 within 72 hours. That the claimants have denied the alleged presentation of

forged academic certificates and failure to respond to the show cause letter. That the 1st claimant responded to the show cause letter on 3.8.2015.

4. As regards injunction against eviction, Mr Shamaka submitted that under section 30 of the EA, the employer has an obligation of providing his employees with housing. He urged the court to restrain the respondent from evicting the claimants pending the hearing and determination of the suit. He submitted that a 7 days' notice to vacate the staff houses was served through the dismissal letter. He contended that the dispute before the court was about employer-employee contract brought under section 12 (3) of the ELRCA.

Respondent's Case

5. Mr Kongere, learned counsel for the respondent relied on the grounds of opposition filed on 16.11.2015 to oppose the motions on grounds of law. First he submitted that under rule 16 (3) of ICPRs the court can only grant interlocutory injunction in a suit where permanent injunction is being sought. That the suits herein do not seek permanent injunction. That injunction being an equitable remedy should not be granted in this case because equity follows the law. That likewise, the right to housing under section 30 of the EA is available only when there exists a valid employment relationship. That in this case the right to housing has lapsed after the termination of the claimant's employment and as such the equitable remedy of injunction should not issue.

6. The counsel submitted further that the dispute has since shifted from the jurisdiction of this court under section 12 of the ELRCA to Article 162 (2) (b) of the Constitution and section 13 (2) of the Environment and land court Act (ELCA). That the dismissal letter allowed the claimants 7 days to vacate the staff houses and as such they became trespassers after the lapse of the 7 days' notice. That this court lacks jurisdiction to deal with occupation and use of land. That there is nothing to be enjoined because the employment contract has already been terminated. He relied on ***Eric V.J. Makhokha & 4 others – -vs- Lawrence Sagimi & 2 others (1994) e KLR*** where the court of Appeal held that injunction cannot issue where the action has already taken place and that once employment is terminated the right to fringe benefits including subsidized housing goes with it. Lastly in this issue the counsel observed that the claimants have quantified their claims and as such they will not suffer irreparable loss.

7. As regards the order reinstatement to employment, Mr Kongere submitted that the same cannot be ordered in this case. That the said order can only issue on very exceptional cases after the end of the trial. He relied on ***ELRCC No. 620 of 2013 Alfred Nyungu Kimungui vs- Bomas of Kenya (2013) e KLR, Gurumau Ltd -vs- Jau Bonde Nelson & 20 others (2014) e KLR and Gladys Boss Shollei -vs- Judicial Service Commission (2013) e KLR*** where this court differently constituted declined to order reinstatement. In conclusion the counsel submitted that the claimants have not provided any compelling reason to warrant their reinstatement to work. He therefore prayed for the motions to be dismissed.

Rejoinder by Claimants

8. Mr Shimaka, learned counsel for the claimants maintained that rule 16(3) ICPRs gives this court the jurisdiction to grant injunction. That section 13 of the ELCA does not apply in this case because the dispute herein is not about title, occupation and use of land but enjoyment of the housing by the claimants as employees under section 30 of the EA.

That in the ***Alfred Nyungu Kimungui case***, Rika J held in page 26 that reinstatement can be ordered where the employers' actions were malicious. That in this case, the employer was malicious because he raised the issue of forgery of certificates after the claimants had worked for many years. He concluded by submitting that the balance of convenience favours the claimants as respondent will suffer no loss if the claimants are reinstated.

Analysis and Determination.

9. There is no dispute that the claimants were employed by the respondent until 6.10.2015 and 29.9.2015

respectively when they were dismissed for alleged misconduct. There is further no dispute that during their services the claimants were allocated houses within the respondent's staff Quarters of which they were ordered by the respondent to vacate within 7 days from date of dismissal. There is further no dispute that the claimants are still in occupation of their respective staff houses. The issue for determination are whether the court should reinstate the claimants to their employment and restrain the respondent from evicting them from the staff houses pending the hearing and determination of their suits.

Reinstatement

10. Under section 12 (3) of the ELRCA, this court has a generously wide jurisdiction to make any orders that it may deem fit to meet the ends of justice. However rule 16 (7) (a) of the ICPRs has barred the court from making ex parte orders that reinstated any employee who has already been terminated. Such orders should ordinarily therefore be ordered after hearing the employer on the merits of the reason for termination and the procedure followed in terminating the services of employees.

However this court's view is that after inter parties hearing of an application for reinstatement pending trial, the court can still reinstate an employee if it is within 3 years after termination, the reason for termination is unfair within provisions of section 46 of EA, or where the appointment has a statutory underpinning. An appointment has statutory underpinning if the employee is protected from termination by the Constitution or a statute before approval from a certain authority.

11. In the present case, the claimants' appointment does not have any statutory underpinning and the reasons cited for their dismissal is not one of the unfair reasons under section 46 of the EA. They do not therefore qualify for reinstatement pending trial. It is only during the trial when the claimants can prove that the dismissal was unfair and also where the employer will have the chance to justify the reason for and the procedure for the termination. If after the trial the dismissal is proved to be unfair and the respondent fails to justify it, the court will make a decision whether to reinstate the claimants or award them damages.

Interlocutory Injunction

12. The claimants are urging the court to injunct the respondent from evicting them from the staff houses pending trial of their suits. That under section 31 of the EA, an employer has the obligation to either house the employee or pay him house Allowance. The question that begs for answer is whether the claimants have met the threshold for granting interlocutory injunction. The threshold for interlocutory injunction was established by the *Giella vs Caseman Brown*. First the applicant must prove that he has a prima facie case with probability of success. Secondly the applicant must demonstrate that if injunction is withheld, he will suffer irreparable harm or loss which cannot adequately be compensated by damages. Thirdly, if the court is in doubt, the application shall be decided on a balance of convenience. In this case the claimants have admitted that they are no longer employees of the respondent but they want to continue occupying the staff houses while challenging their dismissal in their suits. That they have no source of livelihoods and if the respondent evicts them from the staff houses, they will not afford to rent alternative housing. That sounds like a very strong moral ground for grant interlocutory injunction.

13. As it was correctly submitted by the defence counsel, an order of injunction is an equitable remedy and that equity follows the law. The right to housing of an employee under section 31 of EA is only available as long as the employment relationship between the parties exist. Such right is either enjoyed in form of a physical shelter or paid monthly allowance. It cannot therefore continue after termination of the employment contract unless the employer permits the former employee to continue using the house on humanitarian consideration. That position was settled by the court of Appeal in **Erick V.J Makhokha & 4 others vs Lawrence Sagini & 2 others (1994) e KRL** when it held that:

“The contract of employment having gone, the fringe benefits of subsidized housing went with it”

14. The foregoing decision is binding upon this court and this court will obviously follow it to find and

hold that the claimants' right of housing went with their employment after they were dismissed. For that reason, just as an employee who receives Housing Allowance cannot continue holding his former employer liable to pay the same after separation, the employee who is housed by the employer cannot demand to continue being housed after separation.

Consequently the court finds and holds on a balance of probability that the claimants have not proved a prima facie case with probability of success. A prima facie case is an arguable case related to a breach of the applicant's legal right. In this case, the claimants have not demonstrated that the respondent has breached their legal right to housing under section 31 of the EA.

15. Even if there was such breach of legal right, which has not been proved, the application would still fail because the applicant have not proved that they will suffer irreparable loss if injunction is denied. The reason for the foregoing view is that if after the trial the court reinstates the claimants to their employment, they will also be awarded damages for the loss suffered including House Allowance. The court is not in any doubt that the motions must fail for want of merits.

16. In addition to the foregoing, the court agrees with the submissions and the objection raised by the defence that injunction should not issue because the main suit has not sought permanent injunction. Under rule 16 (3) of the ICPRs, the court can only grant interlocutory injunction in suit where the claimant has sought for permanent injunction. The court has severally declared similar motions incompetent on the same ground. No reason has been shown why the court should make any different decision. Consequently the court once again declares that, even if the applicants had met the threshold for the grant of interlocutory injunctions, the order would not issue because that would offend rule 16 (3) of the ICPRs.

Disposition

17. For the reasons stated above the claimants Notice of Motion dated 22.10.2015 and 28.10.2015 are **dismissed**. Costs in the cause.

Signed, Dated and Delivered at Mombasa this 27th day of November 2015.

ONESMUS MAKAU

JUDGE