



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT KISUMU
CAUSE NO. 194 OF 2014
(Before Hon. Lady Justice Maureen Onyango)

BENSON OMWALA ODUORCLAIMANT

VERSUS

THE SEC, BOG EQUATOR SPECIAL SCHOOL.....RESPONDENT

R U L I N G

On 27th November, 2014 the Claimant filed a Notice of Motion under certificate of urgency seeking the following orders:-

1. The Application be certified as urgent and be heard ex-parte in the first instance despised within the first instance.
2. the Honourable Court be pleased to grant temporary injunction restraining the Respondent his Servant, Agents, Employees or any person duly authorized by to act on their behalf from replacing, removing and/or interfering with the Claimant employment in any manner whatsoever until this application is heard and determined.
3. This Honourable Court be pleased to grant orders of temporary injunction restraining Respondent, their servant agents, employees or any person duly authorised by to act on their behalf from replacing, removing and/or interfering with the Claimant employment in any manner whatsoever until this application is heard and determined.
4. This Honourable Court to pleased to grant a mandatory injunction compelling the Respondents to reinstate the Applicant back to work unconditionally pending the hearing and determination of he reference.
5. The Respondent herein to show cause why he should not be cited for the offence of utterance of false documents and/or impersonation contrary to sections 353 and 383 of the Penal Code respectively in relation to the prosecution of the above suit.

The application was supported by the Claimant's affidavit sworn on 24th November, 2014 and on the following grounds on the face of the application:-

1. The Respondent had failed to confirm the Claimant as permanent and pensionable employee having worked for over ten (10) years.
2. The Respondent is terminating the Applicants employment on the grounds of redundancy while

the applicant is only fifty seven (57) years far from the required age of retirement which is sixty (60) years, nonetheless, has not proved beyond the balance of probability that the skills, ability and reliability of the Applicant is wanting.

3. It is a trite and noble equitable maxim having the force of law that he who comes to equity should do so with clean hands hence the Respondent by conducting himself in the manner aforesaid has soiled his own hands, abused the very process of the Court he sought to evoke and even disparaged the noble judicial institution from his culpable conduct.

4. That the actions of the Respondent terminating the Employment of the Applicant are a move to harass and destabilise the Applicant.

5. That no prejudice shall be accessioned to either party if this Application is allowed.

The Claimant appeared before my sister Hon. H. Wasilwa J ex parte on 27th November, 2014 and was granted the following orders :-

1. This application is certified as urgent and heard ex-parte in the first instance.

2. A temporary injunction do issue and is hereby issued restraining the Respondent, his Servants, Agents, Employees or any other person duly authorised by or on their behalf from replacing, removing and / or interfering with the Claimant's employment in any manner whatsoever until this application is heard and determined.

3. This application be heard inter-parties on the 3rd day of December, 2014.

The Respondent filed a replying affidavit of Francis Ouma Manyala the Principal of the Respondent in which he deposes that following losses of school property in unexplained circumstances from February 2013 the Respondents Board decided to outsource Security Services to a security firm. As an immediate stop-gap measure the Respondent recruited Mr. Daniel Oloho to work with the Claimant who until then was the only night security guard at the Respondent's premises. The issue was discussed at Board meetings held on 8th May, 2013, 24th October, 2013 and 9th May, 2014. The Respondent floated tenders for the services and signed a contract for security services with Frontmac Holdings Ltd. The security firm was to deploy one day guard and two night guards at the Respondent's premises effective 1st December, 2014.

This necessitated the redundancy of the Claimant and he was accordingly notified by letter dated 27th October, 2014. The letter was copied to Labour Officer Siaya. Daniel Oloho, the other guard was also issued with notification of redundancy at the same time as the Claimant.

Mr. Manyala denied any bad intentions in declaring the Claimant redundant. He stated that the Respondent will face legal challenges if it failed to enforce the security contract signed with Frontmac Holdings Limited.

On 10th June, 2015 when the application came up for hearing Mr. Muthanga representing the Respondent and Mr. Ingosi for the Claimant agreed to proceed with the application by way of written submissions. The parties thereafter filed and exchanged written submissions.

In the claimants submissions filed on 20th July, 2015 it is submitted that he has a valid claim which raises weighty issues that should be canvassed at the hearing of the main suit and setting aside injunctive orders would greatly prejudice him.

It is further submitted for the Claimant that the reason for termination of his employment which is that property was being lost, has not been proved, as the Respondent did not report to the police or charge the Claimant. It is further submitted that the validity of the contract attached to the replying affidavit is doubtful as it does not have a commencement date. It is also submitted that all issues raised in the

replying affidavit are issues of evidence that can only be ventilated at the hearing of the main suit.

Finally it was submitted for the Claimant that the Respondent has not demonstrated that it is likely to suffer prejudice, loss or injury in case the temporary injunction is granted.

The Respondent filed its submissions on 17th July, 2015. In the submissions, the Respondent avers that the prayer for reinstatement of the Claimant is in conflict with Rule 16(8) of the Industrial Court (Procedure) Rules which provides that the court shall not grant an ex parte order that reinstates into employment an employee whose services have been terminated.

The Respondent submits that the application by the Claimant is bad in law, irregular and unprocedural as it is not supported by the prayers in the Memorandum of Claim. The Respondent further submits that restraining the Respondent from declaring the Claimant redundant is interference with the Respondent's freedom enshrined in Article 24(1)(d) of the Constitution which provides for:-

"The need to ensure that the employment of the rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others."

The Respondent submitted that the court order stopping redundancy of the Claimant has interfered with the Respondent's enjoyment of its rights.

The Respondent further submitted that it complied with the requirements of Section 40 in declaring the Claimant redundant as deponed in the Replying Affidavit of Mr. Francis Ouma Manyala dated 10th December, 2014. It was submitted that the Claimant refused to accept his terminal benefits while his colleague Mr. Daniel Oloho collected his benefits as demonstrated in appendix 5 of the replying affidavit. The Respondent submitted that the Claimant has not come to court with clean hands and does not deserve equity.

The Respondent prayed that the application be dismissed.

Redundancy is provided for under Section 40 of the Employment Act as follows:-

(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—

(a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

(b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

(c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

(d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

(e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

(f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

(g) *the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.*

The Claimant has not given any reasons in the grounds supporting the application, the affidavit or the written submissions to justify the stoppage of the redundancy. The only reasons given by the Claimant in the application and supporting affidavit are that the termination of his employment was clouded with secrecy, that the Respondent is recruiting employees to replace him and that the termination of his employment is to cover up fraudulent activities of the Respondent, matters that are not supported by evidence. The issues raised in the submissions and the further affidavit filed on 16th January, 2015 are completely irrelevant to the application which relates to redundancy. The prayers in the Claimant's application which is to restrain the Claimant from declaring him redundant is not related to the prayers in the main claim which prays for underpayments, overtime and payment for extra duties. The prayers in the claim can therefore be pursued even when the Claimant is not in Respondent's employment as they are not dependent on his remaining in the employment of the Respondent. His averment that he is 57 years and has not reached retirement age is also irrelevant to redundancy.

It is worth noting that the claimant received the Respondent's submissions before filing his yet did not respond to any of the pertinent issues raised in the Respondent's submissions.

For the foregoing reasons, I find no merit in the Claimant's application, dismiss the same and discharge the orders granted on 22nd November, 2014. Each party shall bear its costs for the application.

I have however noted from the documents filed with the Respondent's replying affidavit, specifically exhibit 5 and 6 that the severance pay for Daniel Oloho were based on one months salary per year worked while the Claimant's severance pay be has been calculated at half a month's salary per year worked. This constitutes discrimination which is prohibited both by the Constitution and the Employment Act. I therefore order that the Claimant's severance pay be recomputed based on one months salary per year worked as was done for Daniel Oloho. For this reason his redundancy benefits should be as follows:-

(i)	One months salary in lieu of notice	Shs. 6,880
(ii)	Leave accrued	Shs. 4,816
(iii)	Severance pay (10 years service)	<u>Shs.68,800</u>
	Total	Shs.80,496

The Claimant should in addition be issued with a certificate of service.

As advised in the redundancy notice, the Claimant should go and clear with the Respondent in exchange for payment of the redundancy benefits. The claimant should therefore set down the main claim for hearing.

Dated Signed and delivered this 4th day of November, 2015

MAUREEN ONYANGO

JUDGE