



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATION CURT AT KISUMU

CAUSE NO. 365 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

PETER ROESER-OTT.....CLAIMANT

VERSUS

DIOCESE OF KAKAMEGA (REGISTERED TRUSTEES).....RESPONDENT

R U L I N G

The Claimant herein filed suit by Memorandum of Claim seeking compensation for unfair termination of his employment and staying of notice to vacate a residential house occupied by the Claimant in the course of employment issued to him on 24th September, 2015.

Simultaneously with the Memorandum of Claim filed on 30th September, 2015, the Claimant filed a notice of motion under certificate of urgency seeking stay of the notice to vacate the residential premises pending the hearing and determination of the suit. He further sought orders of temporary injunction restraining the Respondent from replacing, removing or interfering with his employment pending the hearing and determination of the suit.

On 1st October, 2015 after hearing Mr. Obillo, Counsel for the Claimant ex-parte, I granted temporary stay of the vacation notice and fixed the application for inter partes hearing on 13th October, 2015 .

On 4th November, 2015 the Respondent filed a replying affidavit of Fr. Rev.Bede Marandu sworn on 4th November, 2015 opposing the application. The application was argued before me on 23rd November, 2015.

Background to the suit.

The background to the suit as may be discerned from the pleadings is that the Claimant a Medical doctor was employed by the Respondent, the Catholic Diocese of Kakamega, as a Diocesan Medical Coordination on a five year fixed term contract commencing 15th August, 2013 and expiring on 15th July, 2018. His contract provided that he would be responsible for among other duties, coordinating all medical activities of the Dioceses, including running its two hospitals, the St. Elizabeth Mukumu Hospital and St. Mary's Hospital, Mumias, the school of Nursing in St. Elizabeth Hospital Mukumu and the school of Clinical Medicine in St. Mary's Hospital Mumias. His responsibilities are set out in detail in paragraph 4 of the contract of employment.

The contract provides for the Claimant's entitlement as follows.

- i) Salary of Kshs.160,000/= per month

- ii) Office room in the pastoral office
- iii) Means of transport and all that pertains to transport
- Iv) House in which to live
- v) Holiday or leave will be discussed with the employer

Pursuant to the employment contract the claimant entered into a rental contract with St. Elizabeth Hospital Mukumu which provided for rent of Shs.8,000/= per month to be paid in kind. The Claimant was to furnish the house and the furniture would become part of the hospital property upon the expiry of his stay in Kenya. The rental agreement was to be in force from 1st September, 2013 to 31st August, 2018. The rental contract contains specifications of size and condition of the house and renovations to be carried out by the Claimant.

On 29th July, 2015 the Respondent issued the Claimant a letter of termination of contract effective 1st August, 2015. On 24th September, 2015 the Claimant received a letter requiring him to vacate the Mukumu Hospital house not later than Friday 2nd October, 2015. This prompted the Claimant to file the present suit and the application before me for determination.

In his affidavit in support of the application the Claimant states that he received the letter of termination on 17th August, 2015 while on leave more than two weeks after the date of the letter. The leave was for the months of July and August, 2015 and was approved.

The Claimant avers in the affidavit that he has expended Shs.1,853,362 on the residential house and Shs.106,110 on repair and fuelling of the vehicle given to him by the Respondent. He states he was never given an opportunity to defend himself.

At the hearing Mr. Obillo submitted that the Claimant has demonstrated a prima facie case. He submitted that the costs of furniture and repairs to the Residential premises cannot be recovered as they were subject to the Claimant occupying the premises till 31st August, 2018.

In the Replying affidavit Fr. Marandu confirms the existence of the contract of employment of the Claimant but avers that paragraph 8 thereof allows either party to terminate the contract without giving reasons. He deposes that the Respondent terminated the Claimant's contract pursuant to the said clause. He further deposes that the Claimant's salary of Shs.160,000 was all inclusive, that he was allocated a residential house No. 27 which he refused to occupy and opted to rent a house from St. Elizabeth Hospital Mukumu. That the Claimant has not paid rent for the residential house, that the house was allocated to the Claimant because of the employment relationship and cannot survive the termination of the employment contract.

Fr. Marandu deposes that the renovations to the house was at the luxury of the Claimant without the Respondent's consent, that the Respondent is under no duty to refund the same and that the renovations were set off against the unpaid rent, that the renovations were made by the Claimant to accommodate his extended family including his non Kenyan mother in law whom he is currently accommodating.

Fr. Marandu deposes that the Claimant's position has not been filled by the Respondent as it is not a necessity, that the Claimant was paid his full salary, provided with an office and transport at the expense of Respondent and that the averments in his supporting affidavit are false and calculated to mislead the court.

At the hearing of the application, Counsel for the Respondent Mr. Minishi submitted that following the termination of the Claimant's employment the right to housing was extinguished as the right to housing does not survive termination. He relied on the case of *Rosabel Wagicugu v Karuturi Ltd & 2 others [2015] eKLR* where Rika J held that the right to housing does not survive termination, irrespective of whether the termination is unfair or wrongful.

On the prayer for stay of termination Mr. Minishi submitted that such order would amount to interfering with a decision made by management within its discretion. He relied on the decision of Rika J in *Joab Mehta Oudia v Coffee Development Board of Trustees [2014] eKLR* where he held that the court cannot stay termination as that would amount to the court unduly interfering with a decision already made by the management within its discretion.

Mr. Minishi submitted that the reliefs sought by the applicant are not available and further that the applicant has not met the threshold to warrant a grant of injunction accordance with the principles in *Giella vs Cassman Brown*, as he has not shown he will suffer irreparable harm that cannot be compensated.

Determination

There are two separate issues for determination in the Claimant's application. The first is stay of termination of his employment and the second is stay of orders to vacate the residential premises he occupies.

I agree with the Respondent's contention in respect of stay of termination of employment but for different reasons. The termination of employment was effected by letter dated 29th July, 2015 although there is contention of the effective date of the letter as the Respondent refers to 1st August, 2015 while the Claimant states he was served with the letter on 17th August, 2015 during his authorised leave. In my opinion the prayers sought by the Claimant would amount to reinstatement as the termination of his employment crystallised upon his receipt of the letter. It is therefore too late in the day to stay the termination and parties will have to ventilate the case before the court can determine whether or not the Claimant is entitled to such orders or to damages for unfair termination if at all.

On the second issue the Respondent's position is that housing does not survive employment and that the right to housing was extinguished at the time of termination.

I do agree that in cases where housing is given as part of the terms of employment, the right to housing is extinguished upon the coming to an end of the employment contract irrespective of whether the termination was unfair or unlawful as was held by this court in the case *Rosabel Wagicugu Nyamu v Karutuni & 2 Others* as well as in the case of *Joab Mehta Oudia v Coffee Development Board of Trustees*. I however find the cases distinguishable from the present case where there was a separate and distinct tenancy agreement with specific terms. The tenancy agreement has a fixed term from 1st September 2013 to 31st August, 2018. The terms thereof provided for the Claimant to pay in kind for his tenancy. There was a legitimate

expectation on the part of the Claimant that having complied by his obligations under the tenancy agreement by carrying out repairs and furnishing the house as specified in tenancy agreement, the Respondent would give him peaceful and quiet possession of the premises until the expiry of the term thereof. The Claimant alleges he has expended a substantial amount in the sum of Shs.1,853,362 pursuant to the tenancy agreement. The Respondent does not deny this, but states that he did so for his own luxury and comfort and in excess of what was agreed in the tenancy agreement. These are matters of fact that must be subjected to hearing.

Having expended a substantial amount in the renovations and the furniture, the Claimant stands to suffer substantial loss if he is forced to vacate the premises in accordance with the notice served upon him by the Respondent.

By its promises contained in the tenancy agreement, the Respondent is estopped from denying the contents of the tenancy agreement by way of promissory estoppel. The Respondent is also bound by equitable estoppel as the Claimant has on the Respondent's promise expended substantial amounts of money to make the premises suitable and comfortable for his occupation on the understanding that he will occupy the premises for the period agreed.

I find that the Claimant has demonstrated that he is likely to suffer substantial loss should orders of injunction restraining the Respondent from interfering with Claimants occupation of the material premises not be granted pending the hearing and determination of his claim.

For the foregoing reasons I hereby make the following orders:-

1. A temporary injunction be and is hereby issued restraining the Respondents by themselves, their agents or persons claiming through them, from interfering with the Claimant's occupation of Residential house No. 40 within the St. Elizabeth Hospital Mukumu pending the hearing and determination of this suit.
2. The costs of this application shall be in the cause.

Dated signed and delivered this 11th day of December, 2015

MAUREEN ONYANGO

JUDGE