



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1644 OF 2013

PHILLYSTANCE NZAROCLAIMANT/APPLICANT

-VERSUS-

KENYA AIRWAYS LTD.RESPONDENT

Mr. Ochola for Claimant.

Mrs. Oduor for Respondent.

RULING

The Claimant in this cause filed an interlocutory application on a certificate of urgency dated 18th October, 2013, seeking;

“2. *An order of mandatory injunction be and is hereby issued against the Respondent herein to furnish this Honourable Court and indeed the applicant with a copy of the notice of the accident and all documents lodged by the Respondent with the Director of Occupational Health & Safety in respect to the injuries sustained by the applicant whilst in employment of the Respondent.*

3. *An order of mandatory injunction be issued as against the Respondent reinstate the applicant back to her former position of employment with payment of unpaid salary and allowances in the sum of Kshs.1,421,007.00 or such equivalence in compensation for loss of salary pending the hearing and determination of the suit.*

4. *An order of mandatory injunction be issued as against the Respondent to forthwith make payments to the applicant in the sum of Kshs.11,368.-32/= being just compensation under the Work Injury Benefits Act or such other sums as the court may direct to enable her access medical services and for subsistence pending the hearing and determination of the suit herein or until such further orders.*

5. *The Honourable Court do make, issue and give such further, other and consequential orders, and directions as it may consider appropriate in the circumstances.*

6. *That the costs of this application be provided for.”*

The application is supported by an affidavit of the Applicant **Phillystance Nzaro** and grounds set out and numbered (a) to (m) in the Notice of Motion.

The matter was certified urgent and the Respondent filed a Replying Affidavit deposed to by **Lucy Muhiu**, the Head of Employee Relations of the Respondent. There in is detailed extensive grounds in opposition to the relief sought.

The matter was heard on 2nd December, 2013 and the court has delineated the following issues for determination;

1. Whether the subject of the matter before court is *res judicata*.
2. Whether the Claimant/Applicant has satisfied the legal requirements for granting a mandatory injunction sought in prayer 2, 3 and 4 of the Notice of Motion dated 18th October, 2013.
3. What relief if at all should be granted the Claimant/Applicant?

Issue I.

It is the Respondent's contention that the issue of Applicant's redundancy was determined by the court in Industrial Court Cause No. 616 of 2012 and in respect of which there is a pending appeal to the Court of Appeal *to wit* **Court of Appeal at Nairobi Civil Appeal No. 46 of 2013, Kenya Airways Limited vs. Aviation and Allied Workers Union.**

The parties in the Industrial Court of Kenya at Nairobi Cause Number 1616 of 2012 and the subsequent appeal aforesaid is the **Aviation & Allied Workers Union (K)** being the Applicant in the court *aquo* and the Respondent in the Court of Appeal versus **Kenya Airways Limited** the 1st Respondent, the Minister for Transport, the 2nd Respondent, the Minister for Labour and Human Resource Development 3rd Respondent and the Attorney General, 4th Respondent.

It is therefore clear on the face of the record that the parties in this matter and the ones in the other matter are distinct and different, the only common party being Kenya Airways Limited.

The main prayers sought in Cause No. 1616 of 2012 are;

- i. A declaration that the members of the Claimant have suffered unfair wrongful redundancy exercise in the first instance;
- ii. An order for reinstatement of the affected employees to their employment and position without any loss of benefit and/or seniority.

It is common cause that these prayers were granted by the court *aquo* hence the appeal to the Court of Appeal and an order for stay of execution of the orders of the court *aquo* pending the hearing and determination of the appeal. The appeal is still pending determination.

It is common cause that the Applicant in Cause No. 1644 of 2013 was one of the members of the Applicants in Cause No. 166 of 2012 in whose favour the orders of the court *aquo* were made.

It is not in dispute that Cause No. 1644 of 2013 was first instituted at the High Court of Kenya at Nairobi as Civil Case No. 593 of 2010 between the same parties. The cause of action arose from alleged injuries sustained by the Plaintiff on or about the 28th July, 2005 in the cause of employment with the Defendant.

It was alleged that the injuries suffered by the Plaintiff are of a permanent nature and she will have to live with them for the rest of her life.

That as a result of the injuries, the Plaintiff was recommended by various doctors to retire from employment on medical grounds.

The Claimant claimed the following reliefs *inter alia*;

- a. Salary and allowance at Kshs.119,000/= for 27 years being what the Plaintiff could have earned upon the attainment of the age of 60 years. She was at the time 33 years old and;
- b. General damages for pain and suffering due to injuries sustained.

When the matter was referred to the Industrial Court, the claim was amended with leave of court to include the following;

- a. Compensation under the provisions of the Work Injury Benefits Act 2007;
- b. Medical expenses particulars of which are to be given at the hearing;
- c. General damages for pain and suffering;
- d. A mandatory injunction directing the Defendant to reinstate the Plaintiff to her former position and retire her procedurally with compensation as tabulated in the Statement of claim.
- e. A mandatory injunction directing the Defendant to provide the Plaintiff with the notice of injury and other information submitted to the Director of Occupational Health and Safety regarding the Plaintiff's injuries and various declarations regarding alleged violation of constitutional rights of the Plaintiff by the Defendant.

It is the Claimant's contention that this suit was brought to court before Cause No. 1616 of 2012 and the issues in dispute are distinct from those determined under the said case which is now pending at the Court of Appeal.

That of primary concern to the Applicant is provision of money without any further delay to attend to her injuries pending the hearing and determination of this suit and to be lawfully retired, issues which will not be resolved by the suit pending before the Court of Appeal regardless of which way the decision goes.

The court notes that if the orders of the court *aquo* are upheld by the Court of Appeal, the Claimant/applicant will be reinstated to her previous employment and would be in a position to then pursue the issue of early retirement on medical grounds in this suit. If the court finds in favour of the Appellant, then the claim for retirement on medical grounds will be rendered nugatory.

However, whichever way the outcome of the appeal goes, the claim for compensation for injuries sustained will not be affected at all.

To this extent, the issue of compensation for injuries sustained in the course of employment and the issue for early retirement on medical grounds were not considered at all under Cause No. 1616 of 2012 and therefore the matter is not *res judicata*.

Furthermore, since this suit was filed prior to Cause No. 1616 of 2012, the claimant/applicant is at liberty to seek the reliefs for compensation for injuries sustained and early retirement on medical grounds aforesaid. See **Karshe v. Uganda Transport Co. Ltd, [1967] EA p. 774**. Wherein it was held”

“The present plaintiff was not precluded from bringing this action by estoppel by *res judicata* because the issue of the loss or damage suffered by the present plaintiff was never enquired into by the court in the previous suit.”

Issue II

In **Petition No. 39 of 2013 Gladys Boss Shollei v. Judicial Service Commission** citing **Mary Alividza & Okoth Mondoh v. Attorney General of Kenya and Secretary General of East African Community, Application No. 3 of 2010, EALS, Law Digest 295 – 2011 pg. 1**, I indicated that the principles of granting interim injunction are well settled in East Africa as follows;

Firstly, the granting or refusal of a temporary injunction which is an interlocutory order is an exercise of judicial discretion which must be exercised judiciously. Two, the purpose of a temporary injunction is to preserve the *status quo* and three, the conditions for the grant of an interlocutory injunction are;

- a. An applicant must show a *prima facie* case with a probability of success;
- b. An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages; and
- c. If the court is in doubt, it will decide an application on the balance of convenience.

See **Giela v. Cassman Brown (1970) EA 358**.

In the present case, various mandatory interim injunctions are sought which in effect are not seeking maintenance of *status quo* but seek the court to place the Applicant in a better place than she is presently in.

In this regard, the court is of the view that, the requirement to show a *prima facie* case with a probability of success is more onerous as compared to a situation where it is only sought to maintain, that which already pertains.

In the court's view, a court must be very slow to elevate an Applicant to a desired position than that she or she is presently in before the full hearing of the suit. In other words, a clear right to the relief sought must be established for a mandatory injunction to be granted.

In this regard, there is a dispute of fact, whether or not the Applicant sustained injuries in the course of her employment. The extent of the injuries suffered by the Applicant is also in dispute.

It is also in dispute whether the Respondent lodged any notice of accident and other documentation with the Director of Occupational Health and Safety.

Furthermore, whether or not the Applicant is entitled to retirement on medical grounds is dependent firstly on the resolution of the dispute surrounding the cause of her injuries and the extent, matters which are hotly contested thus far. Secondly, the reinstatement is also predicated on the outcome of the pending appeal before the Court of Appeal in that if the appeal is not successful, she will automatically revert to her job. Whether or not she is fit to work is an issue which will then be determined in the present suit.

It is also common cause that, unlike in the **Industrial Court Petition No. 21 of 2013, Julius Chacha Mwita v. Kenya Airways Limited** wherein this court ordered payment of uncontested portion of the assessed damages under the Work Injury Benefits Act, 2007, in the present case no such assessment has been done and in fact it is in dispute if any injury was reported in terms of the Act or not.

Consequently, the facts before court do not disclose a *prima facie* case, with a probability of success at this stage to warrant the grant of a mandatory injunction in the terms sought in this application.

The court will not therefore delve into the 2nd and 3rd requirements for grant of an interim injunction the Applicant having failed the first threshold.

The court however recommends an expedient resolution of the main suit given the circumstances of the Applicant disclosed in the suit.

Dated and delivered at Nairobi this 28th day January, of 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE