



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 225 OF 2014

BETWEEN

CAPTAIN (RTD) VICTOR WANJAU KANYUIRA.....
CLAIMANT

VERSUS

KENYA KAZI SECURITY SERVICES LIMITED.....
RESPONDENT

RULING

The Claimant filed an application dated 20th January 2014, seeking the following orders against the Respondent.

- (a) The Application be certified urgent and heard *ex parte* in the first instance;
- (b) Pending *inter parte* hearing and determination of the Application, the Respondent by themselves, their agents, employees, servants, or in any manner howsoever, be restrained from retrenching, declaring redundant and or terminating the Claimant;
- (c) Pending the *inter parte* hearing and determination of this case, the Respondent by themselves, their agents, employees, servants or in any manner howsoever be restrained from retrenching, declaring redundant and or terminating the Claimant.
- (d) The Claimant (?) bears the costs of this Application.

The Application is based on the Affidavit of the Claimant, sworn on 28th January 2014. The Respondent filed a Replying Affidavit, and a Notice of Preliminary objection stating that the Application is fatally defective, as it invokes Order 40 and 51 of the Civil Procedure Rules 2010. The Application was heard on 6th March 2014.

The Claimant's position is that he was employed by the Respondent Security Firm as a Management Trainee on 7th May 2012. He rose to become the Operations Manager based in Malawi. He reported back to Kenya on 10th October 2013. He asked for some days off duty to enable him resettle in Kenya, and was allowed 5 days off.

During this period, he fractured his left arm and was hospitalized for 3 days. He was granted sick off of 30 days.

When he returned at the end of the 30 days, the Respondent declined to deploy or assign him any duties. The Respondent instead, attempted to terminate the Claimant's contract of employment by retrenching him, alleging it is undertaking a restructuring exercise. No other employee is affected in the alleged exercise. The claimant submits the intended decision to terminate his contract of service, is based on his service - incurred injury.

The Respondent argues Order 40 Rules 1 and 2, and Order 51 Rule 1 of the Civil Procedure Rules 2010, presuppose the existence of a Suit, before an Application can be filed and heard. The Claimant has not filed a Suit, just a plain Application. The Orders have been overtaken by events, termination having taken effect from 1st March 2014.

The Court Finds and orders:-

1. The Respondent has deponed it initiated termination of the Claimant's contract of employment, which decision took effect on 1st March 2014. If this is the case, the orders sought by the Claimant would be in the nature of interim reinstatement. The Court does not see this as a proper provisional measure, irrespective of the means adopted by the Respondent in justifying its decision.
2. The Claimant ought to pursue the substantive claim, and if necessary, the remedy of reinstatement. He is not prejudiced as the Court may, on being shown evidence that termination was unfair, grant an order for reinstatement and back salaries. By granting interim reinstatement however, the Court would be making a statement on the propriety of the Respondent's decision, even before giving the Respondent an opportunity to show that termination was for valid reasons, and carried out fairly, as required under section 43 and 45 of the Employment Act 2007. The Respondent has not even been granted the opportunity to file its Statement of Response, to assist the Court in assessing if the Respondent has *prima facie* justifiable grounds in terminating the Claimant's contract.
3. On the technical objection raised by the Respondent, the Court observes that the Claimant has filed a Statement of Claim at the time of presenting the Application. The Respondent had not received or had misplaced its copy of this Statement, and made this objection for lack of information. The Orders cited under the Civil Procedure Rules are irrelevant to the proceedings of this Court. The Claimant however cured this hitch by broadly invoking the Employment Act and the Industrial Court (Procedure) Court Rules 2010. There is no reason why the Application should fail on mere technicality.
4.
 - (a) ***The Application dated 20th January 2014 is rejected.***
 - (b) ***The Claimant shall endeavor to schedule his Main Claim for hearing on a priority basis, at the Registry.***
 - (c) ***Costs of the Application be borne by the Claimant as sought in prayer No. 4 of the Notice of Motion.***

Dated and delivered at Nairobi this 31st day of March 2014

James Rika

Judge