



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 229/2013

(Before Hon. Justice Hellen Wasilwa on 14th March, 2014)

LAWRENCE ANGOLO OMUHAKA CLAIMANT

-VERSUS-

MUMIAS SUGAR COMPANY LTD RESPONDENTS

R U L I N G

There are 2 applications before court. First is the application dated 12.8.2013. The application was filed by the applicant claimant herein under certificate of urgency. It is filed under Article 41(1) of the Constitution of Kenya and the applicant seeks orders as follows:-

1. **That this matter be certified as urgent and service in the first instance thereof be dispensed with.**
2. **That pending the *inter partes* hearing of this application, the applicant be reinstated to his position in the respondent company with all the attendant benefits thereof.**
3. **That pending the *inter partes* hearing of this application, the respondent company be restrained from evicting the applicant and his family from his house within the premises of the respondent company, or in any way harassing the claimant and his family.**
4. **That pending the final determination of this application, the applicant be reinstated to his position in the respondent company with all the attendant benefits thereof.**
5. **That pending the final determination of this application, the respondent company be restrained from evicting the applicant and his family from his house within the premises of the respondent company, or in any way harassing the claimant and his family.**
6. **That costs be provided for.**

The application is based upon the affidavit of the applicant and on the following grounds:-

1. **That the respondent company through its Managing Director, suspended the applicant from his position in the respondent company as the Talent Manager, Human Resource Department.**
2. **That the applicant was never issued with a show cause notice before suspension.**
3. **That the notice of suspension served upon the applicant calling upon him to respond to the allegations therein is short on the details surrounding the accusations.**
4. **That the respondent company has declined to furnish the applicant with further and better particulars necessary to enable him respond fully to the allegations.**
5. **That in purporting to suspend the applicant, the respondent company did not observe principles governing the rules of natural justice and its own regulations in respect of disciplinary issues.**

6. That the suspension of the applicant is patently illegal and unfair.

The other application is the one dated 4.11.2013 and filed by the respondents. This application is filed under Order 3, rule 15 of the Civil Procedure Rules, 2010, Section 1A, 1B & 3A of Civil Procedure Act and all other enabling provisions of the law and powers of the court.

The applicant respondents seeks order;

- 1. That the claimant's suit herein is premature and ought not to have been filed in the first place.**
- 2. That the claimant's suit herein is frivolous, vexatious and otherwise an abuse of the court process.**
- 3. That the claimant's suit be dismissed as it discloses no reasonable cause of action.**
- 4. That the costs of this application be in the cause.**

The application is based on the grounds that:-

- (a) That the prayers sought are premature and incapable of being granted since the claimant is still in employment by the respondent and his prayer for reinstatement as an employee of the respondent/applicant company cannot be granted before his services are terminated.**
- (b) That the claimant/respondent's claim for damages is misconceived and incapable of being granted since it is trite law that a claim for general damages does not lie in employment cases arising from unlawful termination/dismissal.**
- (c) That it is trite law that parties are bound to the letter by their pleadings and a claim for special damages must be specifically proved.**
- (d) That the claimant's employment has not been terminated and he still enjoys the full benefits and privileges from the respondent that accrues by virtue of his employment.**
- (e) That this suit stands to prematurely tear down the mutual trust and confidence between the claimant and the respondent whose working relationship is still governed by the terms and conditions of the mutually signed employment contract.**

and based on the annexed affidavit of Emily Kadenyi Otieno herein.

Both applications came up for hearing on 25.2.2014 and the court directed that the 2 applications be heard together. When the applications came up for hearing, the applicants relied on their submission dated 16.12.2013 and on their replying affidavit dated 16.12.2013. The brief facts from the applicants point of view is that the applicant claimant was served with a notice of suspension dated 30.7.2013 on allegations stated therein. According to the applicant the manner of his suspension was not in line with the respondents policies on disciplinary issues since he was never served with a show cause notice before action could be taken against him. The applicant exhibited the respondents Human Resource Manual at Section 10 which deals with discipline and which provides for a show cause notice first to be issued to an employee facing serious allegations. The applicant further avers that rules regarding principles of natural justice were flouted as he was condemned unheard. Further the applicants position is that the Managing Director has no powers to issue any show cause notice as per the company's human discipline manual.

Thus it is the applicant's contention that the procedure leading to his suspension was arbitrary and unfair and therefore the applicant seeks prayers as sought above.

In relation to the application filed by the respondents herein, their contention is that the application by the claimant was a non starter and premature and does not disclose any cause of action. They contend that the holding in the case of ***Geylla VS Cassman Brown*** has not been fulfilled to warrant injunctive orders. That the orders applicant seeks in main claim are futuristic in nature as they are anticipatory in nature

seeking a reinstatement in the event of termination.

Having heard both parties, the issues for determination are:-

1. **Whether the disciplinary procedures for suspension were adhered to before the claimant applicant was suspended.**
2. **Whether the claim discloses any reasonable cause of action.**
3. **Whether the parties are entitled to the prayers sought.**

On the 1st issue, the guiding principle on suspension of respondent employees are found in the respondents Discipline and Grievance Handling Procedures. Article 10.1.3 deals with suspension and states as follows:-

“10.1.3.1 Suspension is to be imposed only in those disciplinary cases where evidence of the offence is incomplete and where further investigation is required.

10.1.3.2 Investigation shall be carried out by the relevant department in collaboration with the Human Resource Department.

10.1.3.3 Non management employees shall be paid ½ of the basic salary of their salary.

10.1.3.4 Employees in management shall be suspended for a period not exceeding one (1) month.

10.1.3.4

10.1.3.5

10.1.3.6

10.1.3.6.” ---”

However, before this suspension is effected, what is envisaged in a show cause letter provided under Article 10.1.2 of the same manual which states:-

“Show cause letter;

shall be given to an employee whose offence requires a written response in the opinion of the line manager. For non – management employees reference shall be made to the CBA in force.”

The rules of natural justice also demand that a man should not be condemned unheard. The respondent have argued that they had not exhausted the disciplinary procedures when the claimant rushed to court. The letter served on the applicant claimant is entitled: **NOTICE OF SUSPENSION**.

It reads in part:-

“Pending investigations into the above allegations, you are hereby suspended from duty with effect from 30th July 2013. you are required to submit your defence within 48 hours on receipt of this letter showing cause why the company cannot discipline with your services altogether for the above mentioned misconduct---”

The letter was signed by the respondents Managing Director. The letter is definitely a suspension letter and not a notice to show cause letter as envisaged in the grievance handling procedures of the respondents company. The respondents indeed erred in sending the claimant on suspension without giving him a hearing through a show cause letter. Despite the fact that the letter envisages some investigations to follow, the wording shows it was a definite suspension letter and therefore in breach of the rules

envisaged.

It is also envisaged from the discipline and grievance handling procedures of the respondents that these investigations will be handled by the department of the applicant in collaboration with the Human Resource Department. In this case however the letter indicating investigations are underway is from the Managing Director which in itself is an intimidation to the applicant giving that his peers are the one to investigate him before the proceedings are taken to a superior disciplinary forum. It is therefore my findings that the disciplinary procedures were not adhered to before the applicant was suspended.

The next issue relate to the claim filed by the applicant claimant herein. The claimant asked court to order the respondents;

“for reinstatement as an employee of the respondents company or in the event that his employment is terminated, damages for unlawful termination ---”

The orders being sought are definitely pre-emptive and speculative in nature. This is because the applicant has not been dismissed from employment yet and this court cannot give anticipatory orders for events that have not occurred. That being the case, though I have made a finding of the illegality of the respondents in suspending the claimant without due process, the claim as it stands does not disclose any reasonable cause of action.

What remedies then can this court grant? From my analysis above, I grant the following orders:-

- 1. The action of suspending the claimant applicant from his employment without due process is unfair and unjustified and therefore null and void.**
- 2. Whereas the respondents cannot be prevented from disciplining an employee, due process must be followed and the claimant remains an employee of the respondents with all benefits and rights until this case is heard and determined.**
- 3. The memo of claim herein is speculative in nature and should therefore be amended forthwith to reflect the correct position failure of which it stands struck out within 15 days from the date of this judgment.**
- 4. Costs of the application to claimant applicant.**

HELLEN WASILWA

JUDGE

14/3/2014

Appearances:-

K. N. Wesutsa for claimant absent

Indimuli for respondents present

CC. Wamache