REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1957 OF 2013

KEPHA MORENO BOSIRE……..……..……..……**CLAIMANT/APPLICANT**

VERSUS

TITUS NAIKUNI……..……..……..**1ST RESPONDENT**

KENYA AIRWAYS LIMITED……..……..**2ND RESPONDENT**

RULING

1. What is before the Court is a Notice of Motion Application dated 14th March 2014 by the Claimant Applicant under Certificate of Urgency. It is expressed to be brought under Article 31 of the Constitution, Rule 16(1) of the Industrial Court (Procedure) Rules 2010, Sections 1A and 3A of the Civil Procedure Act, Sections 8 and 9 of the Law Reform Act cap 26 Laws of Kenya and Section 250 of the Penal Code. It has grounds on the face of it and is supported by the Affidavit of the Claimant Kepha Bosire. In it the Claimant/Applicant seeks various reliefs the main. The ones falling for determination were prayers 4, 5, 6, 7, 8 and 9. Prayer 4 was the mirror of prayer 5 and it sought that pending the hearing and determination this Application an order of stay do issue suspending the removal of the Claimant from employment by and/or with the 2nd Respondent. Prayer 5 sought the same order pending the hearing and determination of the Claim. Prayer 6 sought that pending the hearing and determination of this Application a temporary injunction do issue restraining the Respondent's either by themselves or acting through their agents, servants and or employees from howsoever terminating or causing to be terminated the Claimant from employment with the 2nd Respondent until further orders of this Honourable Court. Prayer 7 was a mirror of 6 save the order sought was until hearing and determination of the Claim in place of the Application. Prayer 8 sought that the hearing date for the main suit be reviewed and/or be moved nearer and fixed on a priority basis so as to be heard and determined possibly before the 1st Respondent relinquishes his position or employment with the 2nd Respondent.

2. Mr. Mogaka urged the Application and sought that the proposed amendment Statement of Claim be admitted. He submitted that prayer 4 seeks that Claimant be allowed back to work if the Court can stay the letter of 7th October 2013 and if he is reinstated the Claimant seeks prayer 6 so that he is not subjected to the work environment he was subjected to. He submitted that the Claimant was and is or should still be an employee of the 2nd Respondent under a contract of service copy whereof was annexed as exhibit 1 in the Supporting Affidavit. He stated that contract at paragraph 21 expressly provides for how it should be determined. He submitted the Claimant was before court because the manner in which the contract was purportedly terminated

was not according to paragraph 21 of that contract. On the face of it there was a requirement of 3 months notice by either party. He submitted that what we have is a purported resignation of the Claimant and purported acceptance of that so-called resignation by the 2nd Claimant. The purported acceptance is annexed as an exhibit in the Affidavit. His submissions were that manner of bringing the contract of service to an end is unlawful as it does not conform to the prescribed manner of termination under the contract. That is the reason that at this stage he sought a stay of the termination. He stated that the purported resignation of 7th October has not been annexed anywhere in the pleadings. The Claimant does concede that he was summoned on 7th October and made to append a signature on a document on 7th in the offices of the HR Director of the 2nd Respondent. Mr. Mogaka submits that the Claimant was summoned from home that day and made to sign a letter written for him and that it was not his letter because if it were, he would have annexed it as his resignation. He submitted further that prior to 7th October, that is between 4th and 5th October, the Claimant had been assaulted by the 1st Respondent in a social function and the 1st Respondent had stripped the Claimant of his clothes above the waist and that lay basis for the 2nd Respondent to summon the Claimant and hound him from his job in the Respondent. This, it was submitted, makes the termination fail any test of a consensual end of the employee-employer relationship. He stated that all the Claimant needed to show is that there is a *prima facie* case capable of being argued at trial as guided by the celebrated case of **Giella v. Cassman Brown**. Cognisant of the fact stay of the letter of 7th October may be construed as mandatory order, he argued that this is a crystal clear case that calls for a mandatory order. The contract speaks for itself. There is no resignation presented, the purported resignation is recanted and the Court should grant prayers sought as it conforms and is within the law.

3. He submitted that the 1st Respondent is about to exit the top position of the 2nd Respondent and pointed out that the substantive suit is set down for hearing sometime in December this year. He stated that because the date will not find the 1st Respondent in the employ of the 2nd Respondent yet the 1st Respondent is the executor and architect of the matter, the Court should move the hearing forward while the 1st Respondent is still in his current position. It is in both Respondents' best interest if matter is heard and determined before the 1st Respondent leaves employ of the 2nd Respondent. He submitted that what triggered this case is a t-shirt that allegedly had words printed on it that were unpalatable to the 1st Respondent. He submitted that whatever is worth, a t-shirt in a social setting is not and should not be reason for the 2nd Respondent and this country to lose productivity of an employee such as the Claimant. He stated that setting the matter in context, the manner of dress at 10.00 p.m. at night should not have brought the matter to this point. The prayers are merited and it was his humble submission that this Court was set out to protect not only vulnerable employees and also to contribute to growth of gross domestic product and bar the trivial act of a t-shirt worn to stop productivity.

4. The Respondent was opposed and had filed Grounds in Opposition and a Replying Affidavit. The Grounds of Opposition were that the Application was misconceived and incompetent, neither stay nor injunction are available in respect of events that have already occurred and that the orders sought were not underpinned by the Claim. Mr. Ohaga for the Respondent submitted that the issue to be dealt with at trial is how to coerce a well-educated adult to sign a resignation letter. Counsel concedes that is acknowledged on paragraph 45 of the Supporting Affidavit that the Claimant resigned from employment. He states that there is consensus that there was a resignation and there is no benefit in displaying it as there was a resignation. He submitted that the Claimant states in paragraph 45 that he succumbed to extreme duress and signed the letter. Mr. Ohaga submits this is in the HR office, not at Central Police station, not at the basement of Nyayo House. The same will need to be examined to see what duress is. He submitted that the factual position is that the Claimant resigned and that resignation is a voluntary act. That resignation has been identified as having been made on 7th October 2012 and the present Application was filed on 14th March 2014 under certificate of urgency. He posed what has become so urgent 5 months later to require the Court to hear this application? He submitted that

Mr. Mogaka learned Counsel for the Claimant/Applicant has not sought to explain. He submits that under section 12(4) of Labour Institutions Act this Court has the jurisdiction to grant injunctive reliefs and reinstatement of an employee among others.

5. A stay suspending removal of Claimant from employment is under paragraph 4 and 5 of the Application and this is the prayer that has been transcribed in the proposed amendment of Memorandum of Claim. Prayer 5 of the Claimant's Application seeks a stay of removal of Claimant from employ. Mr. Ohaga submits there is no prayer for reinstatement in the Claim. Despite it having taken 5 months to conceive this application and to ask to amend the Memorandum of Claim he has seen it fit not to ask for reinstatement. Even if Court was minded to exercise its discretion the Court cannot and will not be asked to order reinstatement. He submitted that notwithstanding that, the Claimant seeks to amend the Memorandum of Claim and return to his position, he still seeks 24 million for the 16 months of the remaining contract and the full period of the renewed contract. Counsel submits that the Claimant by this admits his contract is at an end and seeks compensation for the remaining term of his contract and salary for the full terms of the renewed period. At prayer 9 of proposed amended Memorandum the Claimant seeks Gratuity damages of 2.4 million for the first contract and the claims for damages are inconsistent with the request now being put before Court to have the Claimant return to work.

6. He submits that Article 31 of Constitution is on the right to privacy and right of privacy has nothing to do with amendment of claim and if the Claimant sought to bring and action under section 8 and 9 this matter should be before the Judicial Review division of the High Court and not the Industrial Court. He submits that judicial review *is sui genesis* and of special nature and nothing in the Memorandum of Claim seeks *mandamus*, *certiorari* or prohibition. He states that Section 250 of Penal Code also relied on relates to assault. Counsel submits that the jurisdiction of this Court is to hear and determine disputes between employee and employer and this court does not try parties to establish criminal liability. He submits that there is the Industrial Court Act and Industrial Court (Practice and Procedure) Rules and the invocation of the Civil Procedure Act is misplaced. He submitted that the foundation on which any application is brought is not a technicality and Article 159 will of no relief to Claimant. He submitted that none of the substantive provisions under which application is brought are of any relevance except Rule 16.

7. He submitted in closing that the Claimant has not demonstrated a *prima facie* case with probability of success and the Claimant by his own pleadings had indicated that damages would be an adequate remedy. Counsel submits if damages are an adequate remedy, then an injunction would not lie as sought at prayers 6 and 7 of the Motion. Even if Court is minded to grant or consider to grant there is no prayer for reinstatement. Further, there is no prayer for an injunction or of any such nature to prevent the Respondent and the only one is sought against the 1st Respondent who is not the Claimant's employer. Insofar as the 1st Respondent is not the Claimant's employer such a prayer is not one that can be sought in relation to the Claimant's employment. Lastly he submitted that the Court is being asked to issue an injunction in relation to an event that occurred 5 months ago. The purpose of an injunction is to protect a party from a threatened action and the threat must be imminent or in the future. It cannot be an incident that is in the past. In this case it occurred 5 months ago. As for the request that this case be heard as a matter of priority there are no circumstances relating to the Claimant himself which have been given that would cause the Court to hear the case in priority and that prayer is inconsistent with the prayer sought that Claimant be allowed back to work. More important is that the reason put forward is that the 1st Respondent is about to leave the 2nd Respondent's employ. No evidence has been laid before court to this effect and even if the 1st Respondent left employment, insofar as he is a Respondent it is in his self-interest to appear in Court at whatever time in future to defend the allegations made against him and that does not depend on the continued engagement with the 2nd Respondent. Mr. Ohaga submitted that he had merely sought to amplify what is in the Grounds of Opposition and the Replying Affidavit of Alvan Mwendar that the application is one that cannot stand and should be dismissed with costs.

8. In his response Mr. Mogaka submitted that Courts of law will dispense justice in accordance with substance and avoid technicalities and even the rules of this Court suspend the rules of evidence. He urged the Court to look at the substance of the matter. He admitted that even the Penal Code is cited and he did submit that at the appropriate forum there is an element of assault evident, there is issue of Constitutional abridgement and even though they may be inappropriate in this forum are germane to this issue. As regards injunction he submitted that the position taken by Mr. Ohaga is a technicality and that unless we go into semantics an order of stay is analogous to the order under section 12 and that called by any other name what he sought is the return of the Claimant. He urged the Court to find the appropriate reference within the provisions of Section 12 of the Industrial Court Act. He submitted that reference to Court procedure is a refuge to technicalities. The substance of the Claim is for the reliefs the Claimant is entitled to. He submitted that the Claimant can amend again as this is not the final hearing. The reason the Claimant seeks damages is if the back to work order should be unavailable but it is only fair and proper that he goes and makes a skills contribution for the salary he will earn. The court was told there is nothing urgent in the matter and he submits that it is not controverted that the 1st Respondent is the face of the 2nd Respondent its alter ego. This case is a straightforward case that should not be queuing in the Industrial Court. To assault the Claimant and send him packing contrary to the contract speaks a lot about the stature of the 1st Respondent in the 2nd Respondent. He ended by saying that it is in the interest of labour and on the right to work that the orders sought be granted and the Response dismissed.

9. That marked the end of parties submissions and I reserved the Ruling to today.

10. An injunction is defined by **Blacks Law Dictionary Ninth Edition** as a Court order commanding or preventing an action. To get an injunction, the complainant must show that there is no plain, adequate, and complete remedy at law and that an irreparable injury will result unless the relief is granted.

11. The principles of injunction are well settled in the notorious case of **Giella v. Cassman Brown & Co. Ltd [1973] E.A. 358** which was cited by both parties. In that case, the Court of Appeal for East Africa while granting an injunction, the court should consider the grant of injunction on the settled principles which were enunciated by the leading decision of Justice Spry, Vice President of the Court at pages 359, 360 and 361.

12. First, the applicant must show a *prima facie* case with a probability of success, secondly, it must be demonstrated that the applicant might suffer irreparable injury if the injunction is not issued and thirdly, should the court be in doubt, it will decide the application on a balance of convenience.

13. To my mind, these principles are to be applied sequentially. There seems to be a *prima facie* case with a possibility of success. It is not in doubt that the Claimant was an employee of the 2nd Respondent. It is also not in dispute that there was an end to that relationship in October 2013 leading to the present suit. There is a dispute as to manner and reason for the termination and the Court will of necessity inquire into the same. As regards the second test, it must be established that the Claimant will suffer irreparable loss in order to benefit from the injunctive relief. In this case, there is an allegation that the Claimant must be allowed to exercise his right to work and failing to grant the injunction, mandatory or otherwise, will result in the loss of gross domestic product. I am not persuaded that if I do not order the reinstatement sought in this Application the Nation will suffer irreparable loss. It is possible to make an order of compensation if the Court finds in favour of the Claimant. The last tier in the injunction test is the balance of convenience and in this case it falls in favour of the 2nd Respondent because the *status quo* is without the Claimant. Should the 1st Respondent leave the employ of the 2nd Respondent which is his right to do, there would be no prejudice suffered as he is a party in this suit and must attend the matter to defend himself regardless of his position after the anticipated departure from the 2nd Respondent. In any event, no evidence was tendered to support the contention made by the Claimant.

14. Regarding the amendments sought by the Claimant, this Court is allowed the discretion to permit amendment at any stage of the proceedings. The amendment can be oral, formal or as directed by the Court. In **Jenipher Gumba Oyoo v. Kenindia Assurance Company Limited [2011] eKLR** Makhandia J. (as he then was) held that **"a court has the discretion to grant an application for amendment of pleadings at any stage of the proceedings with the main purpose being the determination of the real questions in controversy between the parties."**

15. The law regarding amendments of pleadings is well settled by the Court of Appeal for **Eastern African in the case of Eastern Bakery v. Castelino (1958) EA 461** where at page 462 the Court held:-

"It would be sufficient for purposes of the present case to say that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs …….The court will not refuse to allow an amendment simply because it introduces a new case……..The Court will refuse leave to amend where the amendment would change the action into one of a substantially different character …….. or where the amendment would prejudice the rights of the opposite party existing at the date of the amendment, e.g. by depriving him of a defence of limitation accrued since the issue of the writ ……..

The main principle is that an amendment should not be allowed if it causes injustice to the other side."

16. In the case of Charles Ndirangu Kamau & 6 Others v William Kimani Thuku & 5 Others [2012] eKLR my brother Kimondo J. stated thus in a Ruling delivered on 19th April 2012

"**True, this court has power and wide discretion to allow amendment of pleadings at any time before judgment. See** Kenyatta National Hospital v Kenya Commercial Bank Limited **[2003] E A 528**, D.T. Dobie v Muchina **[1982] KLR 1,** Eastern Bakery v Castelino **[1958] E.A 461 and** Leroka v Middle Africa Finance Company Limited **[1990] KLR 549**"

17. I associate myself fully with the findings of my brother Judges from the Courts of Appeal and the High Court. An amendment can be sought at any time and the discretion of the Court is unfettered. The intention is to do justice and I would allow the amendments sought by the Claimant but disallow the injunction sought.

18. The fact that the Claimant cited wrong provisions in law is a flaw that would in the absence of the citation of Rule 16 of the Industrial Court (Procedure) Rules 2010 have been fatal. To his saving grace even after expunging the irrelevant citations of the Constitution, Penal Code and the Civil Procedure Act the case has some legs to stand on. This Court has power to grant interim preservation orders including injunctions in cases of urgency, a prohibitory order, an order for specific performance, a declaratory order *inter alia.* The provisions of Section 12 of the Labour Institutions Act were repealed and replaced by the Industrial Court Act 2011 Act No. 20 of 2011 with commencement on 30th August 2011. Before departing from this point, the Court can seek recourse to the Civil Procedure Rules where *lacunae* exist in the Rules of this Court.

19. As the Claimant was partly successful in the Application and the Respondent partly successful in the opposition to the grant of injunctive relief I will not order any costs.

Orders accordingly.

Dated and delivered at Nairobi this 4th day of April 2014

Nzioki wa Makau

JUDGE