



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 333 OF 2013

(Before D.K.N. Marete)

LEAH WAKIO NGAMI.....CLAIMANT

Versus

OPTICA LIMITED.....RESPONDENT

RULING

The matter before court is an application by way of Notice of Motion dated 17th December, 2013 and filed on the same date. It seeks the following orders;-

1. **THAT** the Claimant’s Memorandum of Claim dated the 8th March, 2013 be struck out and the suit against the Respondent be dismissed.
2. **THAT** the costs of this application and the suit be borne by the Claimant.
3. This Honourable Court be at liberty to make such further and other orders that it deems fit and appropriate to grant to meet the ends of justice.

and is grounded on the basis that;-

1. The Claimant’s claim is frivolous, vexatious and an abuse of court process and does not raise a reasonable cause of action against the Respondent in law.
2. The Claimant was engaged on 2nd October, 2012 on agreed terms stipulated in the letter of appointment dated the 1st November, 2012.
3. The Claimant being the custodian of the Respondent’s employee records including her records failed, refused and/or neglected to have her contract executed by the Respondent’s Management.
4. The Claimant in bad faith and out of malice retained her original contract without authority of the Respondent management.
5. The Claimant’s contract dated the 1st November, 2012 provided for a probationary period of three (3) months for purposes of reviewing the Respondent’s performances.
6. The Claimant’s services were terminated on the 16th November, 2012 and she was appropriately given one week’s notice before the said termination as provided in law and her contract.

The respondent on the other hand opposes the application vide a replying affidavit sworn on 3rd February, 2014 and filed on the same date.

The matter came to court severally until the 16th June, 2014 when it was heard *viva voce* with each party making therein and submissions.

At the hearing, Mr. Change, counsel for the respondent submitted that the application is premised on the fact that the case before court does not raise a reasonable cause of action against the respondent, is misconceived and incompetent in law.

The issue is that there is a letter of employment dated 1st December, 2012 which made a probation period of three months. Termination was done on 16th November, 2012 and this was done with the issue of a seven day notice on the claimant/respondent. It is trite law that S.42(1) states that S.41(1) shall not apply where termination occurs during the probation period.

The applicant also relies on the authority of **Carole Nyambura Vs Oxfam, Industrial Court Cause No. 1979 of 2013** where Rika, J. held as follows;

16. Probation is served by new employees to provide job adjustment opportunity for both the new employee and the employer, to determine whether to continue with the employment relationship. Under Section 42(1) of the Employment Act, 2007, an employee who is on probation, is not entitled to the minimum statutory procedural guarantees created under Section 41, upon termination of the contract of employment. Employment during probation is at-will. The protections afforded to regular employees under the unfair dismissal laws are not available to employees whose contracts are terminated while on probation.

The learned judge ultimately, determined that the termination was fair in the circumstances.

The applicant further argues that the absence of claim for leave in lieu of notice in the memorandum of claim confirms that notice was indeed made before termination and therefore the futility of this claim.

Mr. Obok for the claimant/respondent fervently opposed the application on grounds that paragraphs 3 and 4 of the same would call for evidence which is not offerable in this nature of proceedings. It would call for a hearing to be able to adduce evidence on these issues. The applicant has annexed an undated notice and a letter dated 16th November, 2012 in support of this application. This is a contradiction on dates. The crux of the matter is that the issues and facts deponed in support of the application cannot be settled at this stage and can only be fully interrogated at trial.

S.41 and 42 of the Employment Act and particularly S.42(1) and 41(1) are not applicable in that termination was done on grounds of a protest against reduction of salary in paragraph 5 of the memorandum of claim and paragraph 4(a) of the claimant's replying affidavit sworn on 3rd December, 2013. The claimant/respondent disagrees with the poor performance as a ground for termination and submits that the application is premature, frivolous and should be dismissed with costs. These provide as follows;

42.(1) the provisions of section 41 shall not apply where a termination of employment terminates a probationary contract.

41. (1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

The scenario presents a no compromise situation. Each party stands his ground and there is no possibility of bulging. The court has to establish some other criteria for resolving the issues in dispute.

The sets of issues by the parties are disputed and like is submitted by the claimant/respondent, ought not and cannot be determined at this stage. They are controverted and can only be determined on trial. I therefore agree with the respondent that this application is premature and ought to be estopped.

I am therefore inclined to dismiss the application with costs to the claimant.

Delivered, dated and signed the 26th day of June, 2014.

D.K. Njagi Marete

JUDGE

Appearances:

1. Mr. Change instructed by E. Wafula & Associates for the Respondent/Applicant.
2. Mr. Obok instructed by Kouna & Company Advocates for the Claimant/Respondent.