



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 1552 OF 2011

VICTOR OWUOR OKEYO.....CLAIMANT

VS

AFRICAN BANKING CORPORATION.....RESPONDENT

RULING

Introduction

1. On 13th September 2011, the Claimant filed a Memorandum of Claim seeking relief for unfair termination of his employment by the Respondent. The Respondent filed a Memorandum of Reply on 14th September 2012. Much later on 10th February 2014, the Respondent filed a Notice of Motion seeking orders to strike out the Claimant's claim.

The Notice of Motion

2. The Respondent's application is based on the following grounds:
- a. That the Claimant's claim discloses no reasonable cause of action against the Respondent;
 - b. That the prayers sought in the Memorandum of Claim are misconceived and do not lie against the Respondent; for the Respondent properly exercised its right to terminate the Claimant's contract of employment on a fair ground;
 - c. That the continuance of this suit will embarrass the Court as the Respondent's act of summarily dismissing the Claimant for desertion of duty has been further vindicated by the sentencing of the Claimant to 5 years' imprisonment for the offence of theft by servant contrary to Section 281 of the Penal Code, Cap 63 of the Laws of Kenya;
 - d. That the Claimant's claim against the Respondent is frivolous and is intended to unnecessarily vex the Respondent;
 - e. That the Claimant's claim is an abuse of the court process;
 - f. That the claim herein is an affront to the Respondent's right to summarily terminate the Claimant's employment contract on fair grounds.

The Claimant's Reply

3. In a replying affidavit sworn by the Claimant on 21st March 2014 it is deponed that the Respondent's application is defective as it is brought under the wrong provisions of law. Further, the application is said to be supported by an affidavit of one Faith Nteere which is not attached to the application. Instead, an affidavit sworn by Samuel Njoroge is attached.

4. The Claimant also depones that in terminating his employment, the Respondent did not follow the procedure laid out in law. Moreover, the outcome of the criminal case is contested and the Claimant has filed an appeal.

Determination

5. The issues for determination in this application are as follows:

- a. First, whether the Claimant's claim should be struck out on the basis that it discloses no reasonable cause of action;
- b. Second, whether the Respondent's application is fatally defective.

The Claimant's Claim

6. The Respondent's application is based largely on the Claimant's conviction in Criminal Case No. 126 of 2011 in the Chief Magistrate's Court at Nairobi. The Respondent's argument in this regard is that since the Claimant has already been convicted of the offence of theft by servant, he cannot lay a claim for unfair termination of employment.

7. In my view, the position taken by the Respondent is a misrepresentation of the nexus between a criminal trial and internal disciplinary proceedings facing an employee. In the case of **David O. Owino Vs Kenya Institute of Special Education (Cause No 453 of 2012)** this Court held that a criminal trial and internal disciplinary proceedings initiated by an employer against an employee are two distinct processes with different procedural and standard of proof requirements.

8. In his Memorandum of Claim filed on 13th September 2011, the Claimant pleads that the termination of his employment by way of summary dismissal was substantively and procedurally unfair. The Respondent on the other hand maintains that it had a valid reason to dismiss the Claimant and that in doing so it followed proper procedure. To my mind, these are matters of evidence to be established in a full hearing.

9. One of the distinctive features of claims arising from employment contracts has to do with the burden of proof. Unlike in other civil matters where a defendant can simply put a plaintiff to strict proof, employment law places a specific burden on the employer. For example under Sections 43(1) and 45(2) of the Employment Act, 2007 an employer is required to prove not only a valid reason for termination of employment but also fair procedure in effecting the termination.

10. In the submissions filed on behalf of the Respondent on 9th April 2014, a lot of information was provided in an effort to convince the Court why the Claimant's dismissal was justified. In my view, this information which is made up of matters of fact ought to be tested in a full hearing. This is more so because the reason given for the Claimant's dismissal in letter dated 10th February 2011 was not part of the proceedings in Criminal Case No. 126 of 2011 on which the Respondent seeks to rely.

Form of the Respondent's Application

11. With regard to the form of the Respondent's application, Counsel for the Claimant made extensive submissions on procedural law. However, in light of my finding on the first issue in this application, I

find it unnecessary to dwell on the second issue. Suffice it to say that the defects noted by Counsel for the Claimant would not in my view invalidate an otherwise competent application.

Upshot

12. That said and for the reasons given under the first issue, I find no merit in the Respondent's application seeking orders to strike out the Claimant's claim. The application is therefore hereby dismissed with costs to the Claimant.

Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 25TH DAY OF JUNE 2014

LINNET NDOLO

JUDGE

Appearance:

Mrs. Kamau for the Claimant

Mr. Deya for the Respondent