



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO 775 OF 2012

DAVID MWANGI MBURU.....CLAIMANT

VS

HOTEL INTERCONTINENTAL NAIROBI LTD.....RESPONDENT

RULING

1. The Respondent's application brought by Notice of Motion dated 16th January 2013 seeks stay of proceedings in this cause pending the hearing and determination of *HCCC No 367 of 2011: David Mburu Mwangi Vs KPMG Kenya*.
2. The application which is supported by the affidavit of Stephen Mutuma sworn on 16th January 2013, is based on the following grounds:
 - a. That the Claimant has filed HCCC No 367 of 2011 in which he alleges that KPMG Kenya issued a report for the Intercontinental Hotel Nairobi, disclosing findings of gross misconduct on the part of the Claimant;
 - b. That the Claimant further alleges that as a consequence of the publication of the report, he was summarily dismissed;
 - c. That the Claimant seeks to prematurely rely on the High Court case which deals with acts of gross misconduct on his part to prove this claim;
 - d. That it is improper and an abuse of the court process to invite two different courts to determine the same facts at the same time.
3. In the written submissions filed on behalf of the Respondent on 16th June 2014, it is submitted that the accuracy of the forensic investigation report submitted by KPMG Kenya has to be determined by the High Court before the Respondent herein is held liable. It is further submitted that the finding of the High Court will have a direct bearing on the outcome of the proceedings in this Court because the termination of the Claimant's employment was based on the forensic investigation report.
4. In a replying affidavit sworn by the Claimant on 8th February 2013, it is deponed that while the cause before this Court seeks payment of the Claimant's terminal dues, HCCC No 367 of 2011 seeks damages for injurious falsehoods made against the Claimant by KPMG Kenya.
5. In his written submissions filed on 20th May 2014, the Claimant submits that the issues,

reliefs and parties in HCCC No. 367 of 2011 are different from those in the case before this Court.

6. The issue for determination in this application is whether the Respondent has made out a case for stay of proceedings in this cause pending determination of HCCC No. 367 of 2011. In its application, the Respondent argues that determination of the case before the High Court has a direct bearing on the outcome of the cause before this Court. The Claimant on the other hand maintains that his claim in HCCC No. 367 of 2011 is distinct from his claim before this Court.

7. According to the pleadings availed to the Court, the Claimant's claim against KPMG Kenya is for general damages for injurious falsehoods while his claim against the Respondent is for damages for wrongful termination of employment and terminal benefits. It seems to me that the only link between the two claims is a forensic investigation report prepared by KPMG Kenya for the Respondent.

8. An employment contract between an employer and an employee creates rights and obligations strictly between the parties. In this regard, Section 43(1) of the Employment Act, 2007 places a burden on every employer to establish a valid reason for termination of the employment of an employee. In the case of *Milkah Khakayi Kulati Vs Sandstorm (Africa) Limited [2014] eKLR* this Court held that the fact that an employer relies on an investigation report does not take away this primary responsibility.

9. In the current application, the Respondent asks the Claimant to wait for the High Court to verify the authenticity of the forensic investigation report prepared for the Respondent by KPMG Kenya before he can pursue his claim under his employment contract. In my view, that amounts to the Respondent abdicating his responsibility to the Claimant as an employee.

10. The day the Respondent issued the Claimant with a termination letter, an independent cause of action arose and the fact that the Claimant has questioned the veracity of the forensic investigation report on which the Respondent may have relied to make the decision to terminate the Claimant's employment cannot operate as a bar to the Claimant's right to pursue a claim under his contract of employment.

11. The Court was referred to a decision by my brother **Rika J** in *Samuel Ouma Barasa Vs Penta Tancom Limited (Cause No. 1298 of 2010)* where proceedings were stayed pending the outcome of a petition filed in the High Court. This case is however distinguishable since the parties and prayers in the industrial cause were similar to those in the petition. In the instant case, both the parties and prayers in the industrial cause are different from the ones in the case pending in the High Court. I therefore find no merit in the Respondent's application which is hereby dismissed with costs to the Claimant.

Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 23RD DAY OF JULY 2014

LINNET NDOLO

JUDGE

Appearance:

Mr. Keyonzo for the Claimant

Mr. Isinta for the Respondent

