



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 841 OF 2014

JOHN KIBORO NJUGUNA.....CLAIMANT

VERSUS

THE UK BOARD OF TRUSTEES AND THE KENYA COUNCIL OF

REFERENCE OF VISION AFRICA (KENYA).....RESPONDENT

RULING

The Claimant herein sued the Respondent vide statement of Claim dated 20th May 2014 and filed on the same date. He alleges that he has been declared redundant unlawfully, irregularly and unfairly.

Together with statement of Claim the Respondent filed a Notice of Motion under Certificate of urgency seeking orders of temporary injunction restraining the Respondent from terminating his employment through redundancy and stopping him from attending to his duties as Project Administrator or in any other way interfering with his duties and emoluments pending hearing and determination of the suit.

The Notice of Motion is supported by the Claimant's affidavit and the following grounds:-

1. The Claimant's office has not been abolished.
2. The Claimant is still undertaking various projects on behalf of the Respondent. The projects are active and therefore he cannot be said to be redundant.
3. The termination of employment is actuated by a personal grudge by one of the employees of the Respondent.
4. The due process laid down in the operation manual of the Respondent has not been followed before the Claimants termination.
5. That, the terminal dues and benefits have not been discussed and agreed between the Respondent and the Claimant.
6. That, abrupt termination of the Claimant shall prejudice some needy children who relies on donors who come through the Claimant.

The Respondent filed a Replying Affidavit of Deborah Kimathi the Field Director. When the application came up for hearing interpartes on 23rd June 2014 the parties agreed to dispose of the application by way of written submissions.

The Claimant was represented by Jessee Kariuki instructed by Jessee Kariuki & Co. Advocates while the Respondent was represented by Mr. Ouma of B.A. Ouma & Associates, Advocates.

The Claimant submitted that the Claimant is the project administrator for the Respondent. He was declared redundant by letter dated 24th April 2014. It is submitted that the redundancy is unlawful and unprocedural. That the Claimant's services are not superfluous as his office has not been abolished. That the redundancy was never discussed by the UK Board of Trustees. That the Claimant was not involved in the redundancy and his opinion was never sought as required by law. That the labour officer has not been involved in the redundancy. That the claimant was involved in a lot of unfinished tasks.

The Claimant relied on the case of **Aviation Workers Union V. Kenya Airways Limited and 3 others [2012]eKLR** and **Industrial Court Cause No. 25 of 2004, Kenya Union of Commercial Food and Allied Workers V. Kapa Oil Refineries Ltd.**

The Claimant urged the court to order that he be retained in office pending hearing and determination of the Claim.

The Respondent opposed the application. The Respondent filed a replying affidavit of Deborah Kimathi sworn on 17th June 2014. The Respondent submitted that in the first place the Claimant was already out of employment by the time the court ordered status quo to be maintained.

Secondly the Respondent submitted that the Claimant's terminal dues were paid into his account and he has withdrawn a substantial portion thereof and is therefore deemed to have accepted the termination of his employment.

The Respondent further submitted that it complied with Section 40 of the Employment Act and that during the notice period the Claimant wrote a letter to the Non-Governmental Organization Board alleging that the Respondent's Field Director Deborah Kimathi was a racist and further that the Claimant on 24th April 2014 wrote a letter of outright insubordination to Deborah Kimathi. It was further submitted for the Claimant that there is lack of trust and the working relationship between the Claimant and the Respondent has broken down, that compelling the Respondent to re-engage the Claimant pending hearing and determination of this case shall be unfair to the Respondent. The Respondent further submits that it would suffer prejudice and that the Claimant can be adequately compensated by monetary remedy. The Respondent prays that the application be dismissed with costs.

I have considered the application and the documents attached thereto, as well as the affidavits sworn by the applicant. I have also considered the Replying affidavit the submissions filed by the parties and the authority relied upon by the applicant.

My understanding of the case is that the Claimant was employed by the Respondent in 2004. He received a redundancy notice of 24th April 2013 informing him that his last day of work was 24th May 2014 and specifying payment's due to him as well as handover schedule.

The Claimant avers that the redundancy is unlawful, irregular and unfair because his office has not been abolished, the duties he is undertaking are ongoing and require his personal involvement, his redundancy has not been discussed between the parties and agreed and the Respondent has not laid any sound legal or factual basis for declaring the Claimant redundant. The Claimant further states that parties have not agreed on terminal payments. He is demanding 3 months' pay for every completed year of service, 5 months leave, a lump sum of Shs. 564,750.00 and payment of statutory deductions, a certificate of service and 3 months' notice. He prays for an injunction restraining the Respondent from declaring him redundant until his demands are settled.

When the application came before me under certificate of urgency, I only certified the application urgent and directed the applicant to serve the Respondent. On 26th May 2014 when parties appeared before me I ordered status quo to be maintained and the Claimant be retained in employment until this application is disposed off.

When parties were last before me the Respondent informed me that they had already paid the Claimant his terminal benefits as specified in the letter of redundancy.

The law relating to redundancy is provided for in Section 40(1) of the Employment Act as follows:-

40. Termination on account of redundancy

(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—

- a. where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;*
- b. where an employee is not a member of a trade union the employer notifies the employee personally in writing and the labour officer;*
- c. the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;*
- d. where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;*
- e. the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;*
- f. the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and*
- g. the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days' pay for each completed year of service*

Redundancy is therefore essentially a termination of employment but in circumstances where the employee is not at fault and the termination is initiated by the employer on grounds that the services of the employee are superfluous. This means that contesting a redundancy falls within the same category as contesting an unfair dismissal or termination.

From the evidence on record, it appears as if the only reason the Claimant is seeking injunction is that stated in paragraph 14 of his affidavit which is that :-

14. That, I would therefore pray that an injunction do issue restraining the Respondent from determining my employment through redundancy until the foregoing is settled.

The “foregoing” refers to the Claimants demands at paragraph 13 of the affidavit which reads as follows:-

13. That, we have also not discussed and agreed on my terminal payments in case of the redundancy as I am claiming the following from the Respondent.

i. Three (3) months’ pay for every year worked

Ksh. 56,475 x 10 x 3 = 1,694,250.00

ii. Five (5) months leave 56,475 x 5 = 282,325.00

iii. Lump sum of Kshs. 564,750.00

iv. Immediate payment of all statutory deductions for ten (10) years

v. Certificate of service.

vi. Three (3) months’ notice of termination during which time the Claimant handover will smoothly and be financially facilitated.

The Principles of granting injunction were set out in the **Giella** Case which are :-

- a. An applicant must show a prima facie case with a probability of success.
- b. An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury and
- c. When in doubt, the court will decide on the balance of convenience.

The court’s will also not normally grant injunctions where the injury is capable of being paid in monetary terms.

In the present application the Claimant has set out his demands. Whether or not he is entitled to those demands is a matter to be proved at the hearing. Suffice to state that the demands are capable of being paid for even when he is out of employment.

Since the case has not yet been heard and the Claimant has not in either the application or the Memorandum of claim pointed out the legal underpinning of the claims, I cannot determine on the basis of the evidence before me whether or not the Claimant has a prima facie case with a probability of success.

On the second principle, that the applicant might suffer irreparable harm, this has not been pleaded by the Claimant. His claim is monetary and there is no risk of him suffering irreparable harm should the injunction not be granted.

This therefore leaves me with the option to decide this matter on a balance of convenience.

In the present case, the Claimant’s redundancy has in fact taken place, but for the court order on status quo. He received the letter notifying him of redundancy on 24th April 2014. He has been paid his terminal benefits as tabulated by the Respondent. He has not been reporting to work. Should the injunction be granted the Respondent would be compelled to continue paying his salary while he is not working.

On the other hand should the Claimant succeed in his case, all the Respondent has to do is pay the terminal benefits.

I must also consider the relationship between the Claimant and the Respondent. From the evidence on record, that relationship is no longer cordial. In fact from the evidence, adduced by the Claimant through the emails attached to his application which the Respondent contends were obtained irregularly, the Claimants conduct is described as follows:-

“He is becoming quite difficult to work with and is being very negative.”

This means that the working relations between the Claimant and his employer are no longer cordial.

From the foregoing the balance of convenience would dictate that I decline the injunction. I so order. The result is that the Claimant’s application dated 20th May 2014 is dismissed. There will be no orders for costs.

Orders accordingly.

Dated and delivered at Nairobi this 17th day of July 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

John Kiboro Njuguna for Claimant

Ms. Ouma for Respondents