



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO. 741 OF 2014**

**CHURCHILL ONGALO.....CLAIMANT**

**VERUS**

**KENYA KAZI SECURITY SERVICES LIMITED.....RESPONDENT**

Mr. Odawa for Claimant/Applicant

Mr. Makori for Respondent

**RULING**

1. By a notice of motion dated 6<sup>th</sup> May, 2014 the Claimant seeks an order of injunction to stop the Respondent from declaring the Claimant redundant pending the hearing and determination of the application and the claim filed herein.

The application is supported by the affidavit sworn by the Claimant on 6<sup>th</sup> May 2014 and a further affidavit sworn on 23<sup>rd</sup> May, 2014.

2. The Claimant alleges that the decision to terminate his contract of employment by way of redundancy is unlawful and not done in good faith. That the decision is only aimed at defeating the decision of the court in the judgment delivered on 9<sup>th</sup> April, 2014.
3. In it's judgment the court had held inter-alia.

“Accordingly, the court;

- a. ***Declares that the contract of employment dated 10<sup>th</sup> May, 2012 between the parties and concluded on 11<sup>th</sup> May, 2012 is still in place and the Respondent is directed to honour the same by designating a schedule of duties and responsibilities to the Claimant in terms thereof until “the contract is otherwise lawfully terminated by either party”***
4. It is the Claimant/applicant's contention that the Respondent has in contempt of the judgment of the court not assigned him any duties and was only recalled from leave and thereafter given a letter of redundancy and for that matter, he was the only one affected by the said redundancy out of the Respondent's work force of about 12,000 employees.
5. That the Claimant was abused, subjected to a disciplinary proceeding emanating from an incident

at the work parking lot on 27<sup>th</sup> April, 2014 where a senior officer of the Respondent Mr. Guy Kendel Richards whilst driving into the parking and the Claimant was walking therein, he rolled down his window and uttered racial expletives at him to the effect “.....*can't you see the car coming you bloody African and you bloody black African get out of the way*”

He promised to sack the Claimant by the end of the day as follows. “*You are not going to finish the day herein.....I will sack you, you stupid idiot*”.

6. The Claimant alleges that Mr. Guy Richard got out of his car and physically butted his head. That he told Mr. Richards

**“I think you are the one on the wrong since you have to drive carefully and watch out for pedestrians in a parking lot”.**

The incident was reported by the Claimant to the Human Resources Manager and thereafter to the police vide OB NO. 20 OF 2813/2014.

7. In his replying affidavit the Respondents Senior Human Resource Manager Mr. Antony Odera deposes that on 27<sup>th</sup> March, 2014 before the judgment was delivered and while in the cause of his employment, the Claimant in the presence of other employees uttered abusive words, expletives and very derogatory words towards the Respondent's Group Standards Executive and the Claimant was issued with a show cause letter setting out the misconduct he was accused of and requiring him to submit a written explanation on 2<sup>nd</sup> April, 2014.
8. The Claimant has declined to acknowledge receipt of the letter and has also refused to submit the required response.

The letter to show cause refers to a CCTV footage of the incident and a conclusion by the Group Human Resources Manager Mr. Willis Onyango that “*there is a clear misconduct on your part directed at a Senior Manager of the Company*”.

9. What confounds the court further is that the Claimant alleges in his supplementary affidavit that this incident took place on 27<sup>th</sup> April, 2014, which would be a few days after the judgment. Whereas the Respondent states that the incident occurred much earlier on 27<sup>th</sup> March 2014 which is earlier than the judgment of the court dated 9<sup>th</sup> April, 2014. The notice to show cause is dated 1<sup>st</sup> April, 2014.

The Respondent deposes that it was not possible to assign the Claimant duties that were compatible with his letter of appointment dated 10<sup>th</sup> May, 2012 as a Management Trainee.

10. That the Claimant's services with the Respondent have been rendered superfluous since he has declined in the past two offers of substantive placements upon expiry of the training process.
11. The Respondent has therefore and in compliance of the court order issued a notice to terminate the Claimant's contract of employment lawfully by declaring him redundant under **Section 40 of the Employment Act, 2007**.

That the Claimant was recalled from paid leave on 22<sup>nd</sup> April, 2014 with a view to appraise him of these developments but the Claimant declined to attend a meeting called for that purpose on 28<sup>th</sup> April, 2014 with the Country Human Resource Manager and the Group Human Resource Manager.

12. A notice dated 28<sup>th</sup> April, 2014 to declare him redundant with effect from 2<sup>nd</sup> June, 2014 was mailed to him. The notice offers him payment in lieu of notice and final due payable upon termination.

### 13. **The Law**

On the face of the notice made in terms of **Section 40 of the Employment Act**, the Respondent has complied with all the requirements of an employer who wishes to declare an employee redundant by;

- i. Giving the employee one (1) months' notice prior to the coming into effect of the notice.
- ii. An offer to pay the employee salary in lieu of notice.
- iii. An offer to pay terminal benefits through the quantum is not specified in the notice itself.

14. The notice is copied to the County Labour Officer Nairobi. The Claimant was to remain on paid leave which would lapse on the 2<sup>nd</sup> June, 2014. He was further instructed to return all Company property and would be given a certificate of service.

It is the Respondent's case that the steps it has taken to declare the Claimant redundant are lawful and in terms of **Section 40 of the Employment Act** and therefore the application should be dismissed with costs.

15. The minimum requirement in terms of **Section 40(1)(g)** is to pay the employee severance pay at the rate of not less than fifteen (15) days pay for each completed year of service. If the service is less than one year payment ought to be on pro-rata basis.

16. The employer also has placed the Claimant on compulsory paid leave though this should not be in lieu of annual leave duly earned by the Claimant on the basis of the length of service.

#### 17. **Interim relief**

The substantive issue as to whether or not the declaration of redundancy of the Claimant by the Respondent is lawful, just and fair is a matter that cannot be determined until the court has heard all the relevant facts placed before it. This matter must therefore await the full hearing and determination of the suit.

The issue before court is whether or not the Claimant/applicant is entitled to an injunction which has the effect of keeping him in employment notwithstanding the express intention of the employer to declare him redundant and effectively terminate his services.

18. It is noteworthy that an *ex parte* interim order was granted by the court prior to the effective day of the notice to terminate the services of the Claimant.

19. It is well settled in **GIELLA VS CASSMAN BROWN & CO. LIMITED [1973] E. A. 358 at 360** that an applicant who seeks interim relief has to show;

- i. **a prima-facie case with a probability of success;**
- ii. **irreparable harm would be suffered by the Applicant if the relief sought is not granted;**
- iii. **the balance of convenience favours the grant of the interim relief.**

20. In employment matters, the court has always been very slow to descend into the arena and grant interim orders aimed at restraining the hand of the employer in running its own affairs. This is because courts have traditionally considered management of an enterprise as a prerogative of the employer which is essential to ensure that the business remains viable and sustainable.

21. It is not sufficient to just demonstrate a *prima facie case* with a probability of success, but an applicant employee must go further than that. The 2<sup>nd</sup> pillar becomes critical in this regard. The applicant must demonstrate that the conduct by the employer complained of is so gross and definitive to the rights of the employee in a manner incapable of being remedied in the final judgment.

22. The court notes that in almost all cases of termination of employment, be it for reasons attributed to the employee or not, the consequences to the employee are dire in financial terms and career development. At the particular moment, fortunes that may accrue to the employee from the development appear far-fetched and uncertain.

23. The negative consequences of keeping an employee who the employer does not desire for operational purposes coupled with simmering acrimony between the employee and senior management in the present case outweigh the gain of allowing the employment relationship to remain in place. In any event, the damage if any to the employee is remediable by way of general damages/compensation.
24. The Court will no doubt explore and determine the merits and demerits of the substantive claim in the absence of an amicable settlement by the parties which is the result the court would desire in the circumstances of this case.

Accordingly the application is dismissed with costs in the cause.

**Dated and Signed at Nairobi this 11<sup>th</sup> day of August, 2014.**

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**

**Read and delivered in open court by this 11<sup>th</sup> day of August, 2014**