



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

**CAUSE NO. 249 OF 2014**

(Before Hon. Justice Hellen S. Wasilwa on 13<sup>th</sup> November, 2014)

EMILY KADENYI OTIENO .....CLAIMANT

**-VERSUS-**

MUMIAS SUGAR COMPANY LTD ..... RESPONDENT

**R U L I N G**

The application before court is the one dated 19th September 2014 and filed by the applicant petitioner herein under certificate of urgency and brought through a notice of motion dated the same day. The application is brought under Articles 22, 23(1) & (3), 27(1), 27(4), 27(5), 28, 35, 41(1), 47(1), 47(2), 48, 50(1), 73, 159, 160, 165, 236(b), 259 & 260 and 159(2)(d) of the Constitution and Rules 23 and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, Rule 16 of the Industrial Court Rules, Section 49 of the Employment Act 2007 and all enabling provisions of the law.

The applicant sought orders that:-

- i) That this application be certified urgent and be heard *ex parte* at the first instance for the purposes of granting this prayer and prayers (ii), (iii), (iv), (v) and (vi) herein.**
- ii) That pending the *inter partes* hearing and determination of this application, a conservatory order to issue restraining the respondent, either by themselves, assigns or any person claiming through them, from advertising or conducting any activity directed towards or with the intention of substantively filling the position of Company Secretary/Director Legal Affairs of the respondent or in any manner whatsoever substantively filling the said position.**
- iii) That pending the *inter partes* hearing and determination of this application, a conservatory order to issue restraining the respondent, either by themselves, assigns or any person claiming through them, from interfering with the petitioner's possession of Motor Vehicle Registration Number KBW 001Q Toyota Land cruiser.**
- iv) That pending the hearing and determination of the petition herein, a conservatory order to issue restraining the respondents, either by themselves, assigns or any person claiming through them, from advertising or conducting any activity directed towards or with the intention of substantively filling the position of Company Secretary/Director Legal Affairs of the respondent or in any manner whatsoever substantively filling the said position.**

v) That pending the hearing and determination of the petition herein, a conservatory order to issue restraining the respondents, either by themselves, assigns or any person claiming through them, from interfering with the petitioner's possession of Motor Vehicle Registration Number KBW 001Q Toyota Land cruiser.

vi) That the respondent bears the costs of this application.

The application was based on the grounds that:-

1. The petitioner/applicant was employed by the respondent on 8th May 1998 initially as the Legal Officer/Assistant Company Secretary at a monthly salary of Kshs 20,134.00/= among other benefits. The petitioner was later promoted to Company Secretary/Director of Legal affairs of the respondent Company.
2. The respondent in a letter dated 27th June 2014 unlawfully, illegally and wrongfully summarily dismissed the petitioner and threatens to commence the process of recruiting another person to the position previously held by the petitioner/applicant herein.
3. The respondent had decided to terminate the employment of the petitioner/applicant on an incomplete investigation and without considering hearing the petitioner's/applicant case on the allegations contrary to the rules of natural justice, company rules on discipline procedures, employment Act and the Constitution.
4. The respondent arrived at the decision to summarily dismiss the petitioner/applicant based on a forensic investigation whose findings were not availed to the petitioner/applicant to enable her adequately and efficiently respond to the claims thereby infringing the petitioner's/applicant's right to fair trial enshrined in Article 50 of the Constitution of Kenya, 2010.
5. The respondent in further contravention of Articles 47 and 50 of the Constitution, did not refer to any particular conflicting clauses in the alleged agreement that the petitioner was accused of, making the allegation in the show cause letter subjective and ambiguous.
6. The allegations made by the respondent against the petitioner did not amount to grounds for summary dismissal as enshrined in Section 44 of the Employment Act.
7. The respondent contravened the mandatory requirements of Section 42(1) which provide that 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. [Emphasis added].
8. The respondent in its summary dismissal letter dated 27th June 2014 never gave reasons for summarily dismissing the petitioner/applicant as mandatorily required under Section 45 of the Employment Act, 2007.
9. The respondent's actions violated the petitioner's right to fair administrative action as per Articles 47 and 50 of Constitution of Kenya 2010, Section 45 of the Employment Act, 2007 and the rules of natural justice and fairness.
10. Unless conservatory orders are granted the petitioner is highly likely to lose her

**employment and benefits without due process of the law if the position of Company Secretary/Director of Legal Services in the respondent is filled.**

**11. The petitioner's further prayer for non repossession and or interference with motor vehicle Land cruiser Reg. No. KBW 001Q financed on staff loan by the respondent will be rendered nugatory if the respondent proceeds to repossess and dispose of the vehicle on the basis of the illegal, unlawful and wrongful dismissal of the petitioner.**

**12. The petitioner is further likely to face extreme hardship and injustice by the actions of the respondent and unless the respondent is restrained, the petitioner's legal and constitutional rights shall continue to be infringed upon.**

**13. The petitioner's prayer in the petition for reinstatement will be rendered nugatory if conservatory orders are not granted.**

**14. It is in the interest of justice and fairness that the application for conservatory orders be allowed and petition herein be urgently admitted for hearing on priority.**

When the applicant first approached this court under certificate of urgency, she was ordered to serve the respondents for *inter partes* hearing and no interim orders were granted.

The respondents were served on 8.10.2014 for hearing on 29.10.2014. The respondents did not file any reply nor enter any appearance though Mr. Yogo for the petitioner intimated to the court that the firm of Enonda & Makoloo were to come on record. At the time the application came up for hearing on 29.10.2014, there was still no appearance or reply for the respondents.

Given that the application is unopposed, I will grant the petitioner applicant orders in terms of prayers IV and V. The orders will remain in force until the hearing and determination of this petition.

**HELLEN S. WASILWA**

**JUDGE**

**13/11/2014**

**Appearances:-**

N/A for both parties

CC. Wamache