



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

CAUSE NO. 1942 OF 2013

(Before D.K.N. Marete)

JEREMIAH MBUTHIA NDIRANGUCLAIMANT/APPLICANT

Versus

JUBILEE INSURANCE COMPANY LIMITEDRESPONDENT

RULING

This is an application by way of Notice of Motion dated 4th December, 2013. It comes to court vide a certificate of urgency of the same date and is supported by the supporting affidavit of Jeremiah Ndirangu sworn on 31st December, 2013. It seeks the following orders of court;

1. *THAT this application be certified urgent.*
2. *THAT pending the hearing and determination of this application, the claimant herein be reinstated to his position as an I.T Applications Analyst.*
3. *THAT pending the hearing and determination of the claim herein, the claimant be reinstated to his position as an I.T applications Analyst.*
4. *THAT cost of this application be granted to the claimant.*

and is based on grounds that;

- a. *The claimant has been an employee of the Defendant since December 2010.*
- b. *The applicant has always executed his duties faithfully and diligently.*
- c. *The applicant was unlawfully dismissed from work on the 1st August 2013 on unsubstantiated allegations of fraud.*
- d. *The applicant had acquired a loan facility which was being serviced by the respondent herein.*
- e. *The respondent stopped servicing the said loan facility and the applicant is apprehensive that if the said loan facility is not serviced, he will run into financial difficulties.*
- f. *This Honourable court has the discretion to make the orders sought.*
- g. *It is only fair, just and also in the interest of natural justice that the claimant be reinstated to his position.*

The respondents in their replying affidavit sworn on 7th February, 2014 oppose the application and pray that the same be dismissed with costs.

The claimant's case is that since December, 2010, he was employed by the respondent as an IT Applications Analyst and all along undertook his duties diligently and with lots of professionalism. That

on 4th July, 2013, the Chief Executive Officer of the respondent scheduled a meeting with the top officers of the respondent whereupon he reported that there was an ongoing fraud case against some officers working for the respondent and wished or wanted the claimant/applicant to be a witness in the matter. The claimant's services were then terminated. In the meantime, the claimant had acquired a loan facility with Standard Chartered Bank and that the loan was being serviced by the respondent. This was discussed with the Chief Executive Officer at this meeting.

The claimant/applicant further avers that contrary to the Chief Executive Officer's intimation at the meeting, he had no relationship to and that the respondent has not brought out a case of fraud against him.

The respondent opposes the application and denies the allegations of diligent and professional services by the applicant to the respondent. Instead, she avers that the claimant/applicant now faces criminal prosecution on suspicion of fraud against the respondent's company and therefore a disclaimer of the elements and claims of diligence and professionalism by the claimant. On 10th December, 2010 the claimant/applicant was suspended from employment on grounds of fraud of Ksh.102,240.00 as per paragraph 9 of her replying affidavit sworn on 7th February, 2014 as follows;

9. *THAT I am further aware that the particulars of the fraudulent activity which the Applicant was suspected of having committed were as follows:*

- a) The Applicant on or about 22/11/2012 in conjunction with others raised with the Respondent Company a false claim for the alleged loss of a HP Elite Book Laptop valued at KShs.102,240 purportedly belonging to one Samuel Mwai Nguni;*
- b) The above said false claim was lodged with the Respondent Company following an intricate manipulation of data and/or information in the computer data systems operated by the Respondent Company. The said manipulation resulted in the generation of a false claim (and credit note) from a non-existent policy allegedly held by the above said Samuel Mwai Nguni.*
- c) At the time of the above said manipulation the Applicant had both the authority and capacity to access the computer database systems of the Respondent Company. He was also in charge of the said database system.*

The respondent further avers that the claimant is suspected of having been involved in inflating an insurance claim for his vehicle with the respondent from Ksh.650,000.00 to Ksh.970,000.00

The respondent brings out a different version of the eventualities of the meeting with the Chief Executive Officer and provides that the issue of termination of the claimant's employment was raised and that the allegations by the claimant are only intended to besmirch the process. The respondent also denies the responsibility for the service of the claimant's loan facility with the Standard Chartered Bank. Instead, he only acted on the claimant/applicant's instructions as its employee to effect deductions.

The respondent further submitted that reinstatement is not feasible or grounded and should be denied as this does not fall into the criteria stipulated under S.49, Employment Act, 2007. She further avers that the applicant has not established a prima facie case with a probability of success and that his termination was fair. The application should therefore be dismissed with costs.

When the application came for hearing on 21st October, 2013, it was certified urgent and the applicant ordered to serve the respondent. On 10th February, 2014, the parties put in a case of disposal of the matter by way of written submissions and therefore today's ruling.

The claimant has not filed his written submissions. The respondent submits that this application is intended to oust the hearing and determination of the main suit in that the orders sought would at the end settle the issues sought therein.

The respondent in her submissions posited that the applicant has to demonstrate that his application fell

within the criterion set out in the celebrated authority of **Giella –vs- Cassman Brown, [1970] EA 358** in order to obtain a grant of a specific mandatory injunction of reinstatement to employment. She also relied on the authority of **Gladys Boss Shollei –vs- Judicial Service Commission [2013] eKLR** where the court through the back door reiterated the principles in **Giella –vs- Cassman Brown** above.

32. The requirement of a grant of interim orders were considered by a five (5) judge bench comprising of Busigiye, PJ, Arach-Amoko, DPJ, Mkawawa Butasi and Kubo, JJ at the East African Court of Justice in the matter of Mary Aliviza and Okoth Mondoh v. Attorney General of Kenya and Secretary General of East African Community Application No. 31 of 2010, EALS, Law Digest – 2011 page 1...

a) An applicant must show a prima facie case with a possibility of success.

b) An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by award of damages, and

c) If the court is in doubt, it will decide an application on the balance of convenience.

They also sought to rely on the case of **Alfred Nyungu Kimungui –vs- Bomas of Kenya [2013] eKLR** where Rika, J, held as follows;

12. Ordinarily, reinstatement of an employee is a substantive remedy, not a temporary relief. The law does not contemplate that reinstatement issues as a provisional measure. It is a remedy that should normally be granted upon the full hearing of the employer and the employee...

In a nutshell, this application falls short of the principles set out for the issue of injunctions as established by law and precedent. It does not, from the onset demonstrate a prima facie case with a possibility of success as mandated in **Giella** aforesaid. It also falls short of the other two criterion set out therein and therefore must fail. I am therefore inclined to dismiss this application with costs to the respondent.

Delivered, dated and signed the 7th day of November 2014

D.K. Njagi Marete

JUDGE

Appearances

1. Mr. Gichuki instructed by Areba & Co. Advocates for the Claimant/Applicant.

2. Mr. Muchiri instructed by Daly & Figgis for the Respondent.