



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT KISUMU**  
**CAUSE NO. 268 OF 2014**

(Before Hon. Justice Hellen S. Wasilwa on 3<sup>rd</sup> December, 2014)

RISPER OTIENO MTULA ..... CLAIMANT

**-VERSUS-**

MUMIAS SUGAR COMPANY LTD ..... RESPONDENTS

**R U L I N G**

The application before court is the one dated 27.9.2014. The application was filed under certificate of urgency and brought through a notice of motion brought under Order 40 rule 2(i) (2), Order 51 rule (1), (3) (4) (8), Articles 25(a) & (c), 27, 28, 29, 31, 35(1)b & (2), 41(1) & (2), 50(2)a, b & c of the Constitution of Kenya 2010. The applicant sought orders that:-

1. **That this notice to the respondent be dispensed with and this application be heard *ex-parte* in the first instance.**
2. **That pending the hearing of this application *inter partes* a temporary injunction be granted by the court against the respondent, its servants or agents to restrain them from terminating the applicants' employment as the termination is unlawful and irreparable harm will be caused to the applicant and her family and interfere with her rights under the Constitution of Kenya 2010 particularly the rights under Article 41(1) & (2) of the said Constitution.**
3. **That pending the hearing and determination of the suit a temporary injunction be granted against the respondent, its servants and/or its agents from terminating the employment of the plaintiff or in any other way interfering with her said employment, including but not limited to her right to peace, quiet and human dignity.**
4. **That further the respondent be restrained from inventing nefarious criminal claims against her clearly designed to intimidate and/or embarrass her.**
5. **That in furtherance of 4 hereof Mumias Criminal Case Number 918 of 2014 by the respondent herein against the claimant be stayed pending the final determination of this suit.**
6. **That this application be heard *inter parte* on a date the court will order.**
7. **That costs be provided for.**

The application is based on the grounds that:-

- i. **The letter of termination is unlawful and without any legal basis and upon other grounds to be added at the hearing of this motion and affidavit of the applicant.**
- ii. **That post the unlawful termination of the plaintiff's employment the respondent has taken to making and prosecuting all manner of criminal claims against the plaintiff.**

The application is also supported by the supporting affidavit of Risper Otieno Mtula the applicant

herein deponed on 27.8.2014.

The applicant contends that she has worked for respondents for 10 years without blemish at all and that out of the blues, the respondents served the applicant with a letter of suspension – **App 'G'**. The letter alleged that a serious complaint had been received regarding her conduct of work the nature of which was not disclosed. The applicant was thus sent on suspension with effect from 30th July 2014 and was required to submit her defence within 48 hours. She was also forbidden from visiting her place of work within the period of suspension.

The applicant replied to this notice on 31.7.2014 as expected as stated as follows:-

**“So far I have not received any complaint in regard to the performance of the guest house. We have been serving clients both internal (employees) and external (other stake holders). There has been no issues that have been brought to my attention. For the period I have been in charge of Mumias Company Club and Guest House, 10 years ago, I have not been disciplined or warned in regard to discharging my duties and this can be established from personal file.”**

On 12.8.2014, she was summarily dismissed. The summary dismissal letter read in part:-

**“Following investigations into your work performance and conduct, we find your defence inadmissible and unacceptable as justification for your conduct, the details of which have already been brought to your attention. We wish therefore to notify you of management's decision to summarily dismiss you from employment with Mumias Sugar Company effective 13th August 2014.”**

She was expected to sign the letter acknowledging it which she didn't. The applicant contends that due process has been thrown out of the window in that the accusations levelled against her were *omni bus* in nature and she didn't understand what she was accused of and she couldn't even respond and the allegation that she knew what she was accused of does not suffice.

The applicant avers that Article 41 clothes claimant with a right to fair labour practices and Article 47 with fair administrative action which overrides the principles in **Giella V Cassman Brown**.

The respondents opposed this application. They filed their grounds of opposition dated 6.10.2014 and their contention is that the claimant applicant has not established a *prima facie* case with a probability of success as per the tenets of **Giella V Cassman Brown**. They also submitted that prayer No. 1 cannot be sustained as it has already been overtaken by events as the applicant has already been terminated.

I have considered the submissions of the parties herein. This court takes note of the tendency that has been cropping up where due process is being ignored even from the stage of disciplining employees. Employees have more often or not relied on the principle of **Giella V Cassman Brown** that the applicant can adequately be compensated through damages. In certain cases, however, damages can never adequately compensate a party who has been wronged as damages may come *albeit* too late. If internal disciplinary processes cannot be adhered to, then the employee is left to wait for the unfairness to be disclosed late in the day when damage is grave.

In the case of **Dinah Musindarwezo V African Women Dev & Communication Network (Femnet) [2012] eKLR**, the learned judge **Abuodha J** alluded to this tendency and stated thus:-

**“It has been argued that damages can adequately compensate the claimant in the event that she ultimately proves her termination was unlawful and unfair, however the court is not of the view that simply because damages can adequately compensate a person, an injunction cannot issue. Such a scenario would mean that provided a person is rich enough and can pay damages, he can go ahead and act contrary to procedures laid down by himself and act contrary to substantive and procedural fairness simply because they can pay --- The court in appropriate and compelling circumstances can grant an injunction even where damages would suffice if the wrong**

**complained against is eventually proved.”**

I do agree with the learned judge.

In the current case, the applicant has established a *prima facie* case against the respondents given that she was dismissed even without knowing why as no reasons were given to her. She was also never given any hearing.

I find that the application has merit and I find for the applicant. Since she has not acknowledged the termination letter as part of completing the dismissal process, she stands not dismissed.

I therefore order that she be treated as not dismissed and be reinstated to the position she occupied before 13.8.2014. She should be paid all pending salaries since then to-date. The respondents if they so wish may subject her to proper administrative and disciplinary procedures before any other decision is taken against her. The order will remain in force until the disciplinary process (if any) or the final determination of this case whichever comes earlier.

**HELLEN S. WASILWA**

**JUDGE**

**3/12/2014**

**Appearances:-**

Omondi h/b Nyamogo for claimant

N/A for Respondents

CC. Wamache