



REPUBLIC OF KENYA

Industrial Court at Nairobi

Cause 620 of 2013

ALFRED NYUNGU KIMUNGUI.....CLAIMANT

VERSUS

BOMAS OF KENYA.....RESPONDENT

Rika J

CC. Leah Muthaka

Mr. Ndolo instructed by Muriungi & Company Advocates for the Claimant

Mr. Masese instructed by the Federation of Kenya Employers, Advocate for the Respondent

RULING

1. Alfred Nyungu Kimungui filed an application dated 2nd May 2013, against his former employer, Bomas of Kenya Limited. He served as the Food and Beverage Manager, beginning 3rd January 2012.

2. He was interdicted on 22nd February 2013, on the allegation that he had instructed three employees – Dickson Muli, Catherine Mueni and Joshua Omurundo – to continue discharging their duties in the Food and Beverage Department, even after the Public Health Authorities had directed the three employees should not handle food.

3. Kimungui was asked to show cause why his contract of employment should not be terminated. He did this by forwarding the Certificates of Medical Examination, issued by the Public Health Authorities, showing Muli, Mueni and Omurundo as fit under the Food, Drugs and Chemical Substances Act, Cap 254 the Laws of Kenya, to work at the Bomas of Kenya.

4. In his response showing Cause why termination should not be effected, he told the General Manager that:

“Anyone in their right mind can tell if you are to have it your way, I would not be here.”

5. Quresh H. Ahmed the General Manager, issued the Claimant the letter of termination dated 22nd April 2013. Termination was justified on the following grounds:-

(a) The Claimant had instructed some employees to continue discharging their duties in the Food and Beverage Department, despite being advised by the Clinic Department that these employees should not discharge their duties. This led to some members of the staff falling sick, after consuming food prepared by their restricted colleagues.

(b) The language used by the Claimant in his response to the letter to show cause, was abusive and

insulting, portraying arrogance on the part of the Claimant. This went against the workplace regulation, which emphasizes respect to a person placed in authority.

6. On 3rd May 2013, the Claimant filed an application in this Court in which he seeks:-

(a) The application be certified as urgent and the same be heard *ex parte* and orders be made;

(b) There be a prohibitory order against the respondent agent/servant or employee, barring the ejection of the Claimant from the Respondent's housing premises, pending hearing and determination of this application;

(c) The same order do issue prohibiting the respondent agent/servant and or employee, from ejecting the Claimant pending hearing and determination of the claim;

(d) The Court be pleased to make a declaratory order, that termination of the Claimant's employment by letter dated 22nd April 2013 was unlawful and void, and the Claimant be reinstated back to employment, pending the hearing and determination of the claim; and

(e) Costs of the application be provided for.

7. The Respondent filed a Replying Affidavit sworn by its Human Resource Officer Mr. Jimmy Okidiang. The Affidavit was sworn on 16th May 2013 and filed on the same date. The Affidavit explains that the Claimant's contract was terminated on account of insubordination and use of abusive language against the management. According to the Respondent, an employer cannot be compelled to continue housing an employee after termination. The application is incompetent, bad in Law and misconceived.

8. The application was argued by the respective parties' Advocates, on 20th May 2013.

9. The Claimant's position is that termination was unlawful. The Claimant's contract was governed by the terms and conditions of employment outlined in his letter of employment dated 3rd January 2012, and the Human Resource Manual. He explained why the three employees were allowed to continue serving in the Food and Beverage Department. He availed their Medical Certificates. The ground in the letter of termination was changed, to comprise use of abusive language against the management. The Claimant was an employee of the Board, not the General Manager. The Claimant seeks to have the letter of termination declared a nullity, invoking the jurisdiction of the Industrial Court under Section 12 of the Industrial Court Act, with the result that the Claimant goes back to work. He argues procedure was not fair.

10. The Respondent holds that the Claimant is prosecuting his claim at an interlocutory stage. The Respondent has not even filed its Statement of Response. The Employment Act requires the employer to provide the employee with reasonable housing accommodation, or house rent allowance. After termination, there is no employment relationship, and no obligation on the part of the employer, to continue to house the former employee. The Respondent argues that it will show at the main hearing that it followed a fair procedure. There was interdiction, followed by investigation. The employer intends to recruit another employee. It would be unjust to order that an ex-employee continues to occupy the employer's house, at the expense of the incoming employee.

11. (a) Should the Court grant an order for reinstatement of an employee, as an interlocutory measure?

(b) Should an employee whose contract has been terminated, continue to enjoy free housing accommodation provided under the Employment Act 2007, by the employer?

The Court Finds and Orders:-

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.

13. In the ***Industrial Court Cause Number 1200 of 2012 between Professor Gitile Naituli v. University Council Multimedia University College and another***, this Court refused to issue a temporary injunction restraining the employer from interference with the employee's peaceful performance of his duties (read initiation of a disciplinary process), pending the hearing of the main claim. The Court stated this of interlocutory orders:-

“The Employment Act does not intend that Courts take away managerial prerogatives from employers. To give the interim order would have the effect of stifling the management prerogative in staff administration. It would mean the employer does not have any more say in the contract of employment it has authored. This would be contrary to the intention of the Employment Act, which seeks to merely protect the weaker of the bargaining partners, not deprive the employer the power to run its business altogether.”

14. The Industrial Court should be cautious in exercising its jurisdiction, so as not to appear to take over and exercise managerial prerogatives at workplaces. Grant of interim orders that have the effect of limiting genuine exercise by management of its rights at the workplace, should be avoided. Termination of employment, and initiation of disciplinary processes at the workplace, are presumed to be management prerogatives. The Court should be slow in intervening, particularly at interlocutory stages, otherwise the Court would be deemed to be directing the employers in regulation of their employees.

15. The protections given under the Employment Act are to be taken by employees as a shield, not a sword placed in their hands to impose themselves, with the aid of the Court, at the workplace. The Court has witnessed a large inflow of interlocutory applications where employees wish to be protected against disciplinary processes. Some of the employees have approached the Court seeking *ex parte* orders of reinstatement. Rule 16 (8) (a) of the Industrial Court (Procedure) Rules 2010, states that the Court ***shall*** not grant an *ex parte* order which reinstates an employee whose service has been terminated. Interim reinstatement should not be granted *ex parte*.

16. Although the Industrial Court has jurisdiction as argued by the Claimant to grant a wide range on interim reliefs and remedies in employment and labour disputes, it must exercise caution and draw a distinction between workplace disciplinary process, and the judicial process. Judicial officers should not descend into the arena of the disciplinary process, determining how termination letters should be written or nullifying termination letters. The Court agrees entirely with the Respondent that, whether termination was unlawful or unfair, cannot be determined at the interlocutory stage. It is a matter to be decided upon the full presentation of facts.

17. The Employment Act 2007 places the burden of justifying termination decision, and showing the fairness of procedure, on the employer. In rare cases where interim reinstatement may be granted, the termination must be shown to be patently unfair, that even the ultimate remedies of compensation or reinstatement with back wages, would not have redressed the injury suffered by the employee in the pendency of the full hearing. Certain forms of termination grounds, the kind that result in automatically unfair termination such as pregnancy, race, gender or religious discrimination, may warrant the rare exercise of the Court's discretion in issue of interim reinstatement. This is more so particularly under the new liberal Constitution of Kenya, which frees the hands of the Courts in administration of justice.

18. As the burden in justifying termination is with the employer, the Court should enquire whether the employer, on the *prima facie* evidence before the Court, had reasonable ground to terminate. In this case, there is *prima facie* sufficient ground for the Respondent to exercise its right to terminate. At paragraph 4 of this ruling, the Claimant is quoted as using improper language to the General Manager. The production by the Claimant of his colleagues' medical certificates notwithstanding, it was alleged there were instructions his colleagues should not serve at the Food and Beverage Department. It is alleged the Claimant authorized his co-employees to continue serving, resulting in the spread of illness to other members of staff. These are *prima facie* valid reasons for termination. Whether the decision was arrived

at fairly, is a matter that calls for full evidence from the parties. The termination in this case was not based on grounds that would be deemed to result in automatic unfair termination. The Claimant does not merit interim reinstatement.

19. The Court retains the remedial powers of reinstatement, re-engagement and compensation in event the claim succeeds. The Claimant may be reinstated with back wages, and without the loss of privileges and seniority, at the end of the full hearing. The employee suffers nothing which is irremediable. The employer would be forced into an employment relationship during the trial period. The employee would continue drawing salaries, and restricting severely, the right of the employer to recruit an employee whom the employer can enjoy the cornerstone values of mutual trust and confidence with. In this case, the employee is still in the house availed by the employer freely, under section 31 of the Employment Act 2007. The rights and obligations of the employer and employee, ended with termination. There is no reason why the Claimant is still resident in his former employer's house, or why the Court should order that he goes on residing there. As stated above, employment protection is a shield, not a sword by which an employee should deprive the employer of its property rights.

20. Against this backdrop, the Court is satisfied there exists no special circumstances to grant interim reinstatement. There are *prima facie* valid reasons for termination. The fairness of procedure shall become known after recording of the full evidence. The intervention sought by the Claimant would result in an unjust limitation of the managerial prerogative. The Claimant, if successful, can have full restoration, while this cannot be said of the Respondent, if its decision to terminate is upheld by the Court at the end of the proceedings.

IT IS HERBY ORDERED:-

- (a) The application dated 2nd May 2013 is rejected;***
- (b) The Claimant shall endeavour to prosecute his claim expeditiously, after the Respondent has filed its Statement of Response.***
- (c) The Respondent to file and serve its Statement of Response within 14 days of this Ruling; and***
- (d) Costs in the cause.***

Dated and delivered at Nairobi this 28th day of May 2013

James Rika
Judge
