REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1634 OF 2013

ELIJAH OCHIENG ACHOCH ……..……CLAIMANT

VERSUS

THE NATIONAL POLICE SERVICE COMMISSION .....…….1ST RESPONDENT

JOHNSTON MAFENYI KAVULUDI …… 2ND RESPONDENT

THE ATTORNEY GENERAL ……..…3RD RESPONDENT

RULING

The claimant filed his application dated 10th October 2013 by Notice of motion brought under the provisions of sections 12, 1(a), 2, 3, 4 and 15 of the Industrial Court Act and sections 9, 10, 35, 36, 41, 42, 43, 45, 46 and 49 of the Employment Act. This is an application seeking for urgent orders for temporary injunction restraining the 1st respondent from barring, blocking and or obstructing the application from performing his duties as Secretary/executive officer of the 1st respondent pending the hearing of the application and the suit and an order directing the respondents from advertising, replacing or conducting interviews for the position of secretary of the 1st respondent. This application is based on the grounds and annexed affidavit of the claimant, noting that the claimant was terminated without a hearing and this decision was done by a committee without the board of 1st respondent approval, this is against the law and that an act that is vindictive and malicious.

In the interim, this Court directed the respondents to reinstate the claimant, pending the hearing of this application. This has been done though with challenges. The claimant was not returned to his office and has not been facilitated in his work. This will not be addressed at this stage and to do so would be to go into the merits and demerits of the case.

The respondents have filed a replying affidavit to the application of the claimant on 17th October 2013, sworn by the 2nd respondent, t he chairperson of the 1st respondent. The respondents and thus opposed to the application by the claimant on the basis that claimant was recruitment through a competitive process and was issued with a letter of appointment that had his terms and conditions of employment dated 24th April 2013 and the claimant was to commence his employment from the date he reported to work to which he wrote and confirmed to commence on 2nd May 2013. That the claimant accepted the terms and conditions of his employment which spelt out that the was to be placed on probation for a period of six (6) months that was to end on 3rd November 2013 based on the date he reported on duty. The claimant has been on probation and been found to be unsuitable for the position of secretary to the 1st respondent thus his termination during the probation period.

The claimant submitted that since his appointment with the 1st respondent he took oath of office on 10th June 2013 and has since diligently performed his duties but on 16th September 2013, the 2nd respondents wrote to him seeking to know why the 1st respondents returned kshs.14 million to the National Treasury to which he did a detailed response dated 23rd September 2013 to which the 2nd respondents stated was not satisfactory and on 4th October 2013 the 2nd respondents proceeded to terminate him. That this was unlawful, unilateral and without regard to the law. He was never given a chance for hearing or a chance to prove his capabilities. That the termination is punitive without being given a fair chance for hearing and thus seek the orders outlined in his application as section 41 and 45 of the Employment Act were never complied with.

In the reply, counsel for the respondents submitted that the interim orders granted by the court are unprocedural as they are final orders and cannot be issued noting the claimant has already been terminated and there is an acting secretary for the 1st respondent. That in the application filed by the claimant there was not prayer for reinstatement and the court can only grant that which has been claimed for as held in ***Peris Wakiuru gaita versus Grace Wanjiru Mbugua, Civil Application 81 of 2010.*** That the claimant agreed to the terms and conditions of his employment to which there was a probationary period of 6 months and thus his contract of employment is governed by section 42 of the Employment Act, during the probationary period. Despite the provisions of section 42, the 1st respondents gave the claimant notice for one month even in a case where he was not legally entitled to notice. That even in a case where section 41 of the Employment Act becomes operational, the rules of equity must apply and the principles in **Giella versus Cassman Brown and Co. Ltd** must apply as an injunction can only apply where there is a prima facie case with a chance of success and for the party that will be most inconvenienced who in this case is the respondents. That there will be irreparable loss to the respondents whereas if the court finds the claimant has a good case, he can be compensated in damages.

The respondents further submitted that before the claimant was terminated he had been issued with a notice to show cause why he should not be disciplined and failed to give a satisfactory response hence his termination. That the claimant was accused of gross misconduct, his performance was wanting and acted contrary to instructions given to him by the 1st and 2nd respondent thus necessitating his termination. That the orders given by the court for the benefit of the claimant are erroneous as substantive orders cannot be given until a full hearing and hence the application should be dismissed.

A Written contract are the best document any employer and employee can have. This is so for the simple reason that the employer and employee are able to outline the terms and condition that wish to be bound by in times of peace and in times of conflict. Most contracts of employment are written in times of peace, when both the employer and employee are about to engage in a relationship that is productive and fruitful and this is a time they are bound to agree on many things, part of which relate on how to end their relationship as well other the rights and responsibilities of each party. Hence this is an important document to go into in times of conflict as the terms that are agreed on bind both parties in equal measure. The law is also important as it further elaborates that which is not clear or that which require interpretation and better elaboration.

Looking at the application before court, I note the provisions fo section 41 and 42 of the Employment Act as made in Mandatory terms. On the one hand the provisions for termination and dismissal with regard to section 41 there must be notification and hearing before termination on grounds of misconduct and on the other hand exclude there mandatory requirements with regard to the provisions of section 42 in the following terms;

41. (1) Subject to section 42 (1), 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.

(2)

Therefore the law with regard to termination and dismissal of an employee, require that there is notice and hearing but the same does cover a probation contract which is covered under section 42 of the Employment Act in the following terms;

42. (1) The provisions of section 41 shall not apply where a termination of employment terminates a probationary contract.

(2) A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee.

(3) No employer shall employ an employee under a probationary contract for more than the aggregate period provided under subsection (2).

(4) A party to a contract for a probationary period may terminate the contract by giving not less than seven days' notice of termination of the contract, or by payment, by the employer to the employee, of seven days' wages in lieu of notice.

This section also ousts the provisions of section 41 as the notice and hearing provided for under this part is mandatory but not with regard to probationary contracts. To restate this is important here as the overall intention of the law with regard to labour relations is to protect that which is fair and just in a democratic society guided by Article 41 of the Constitution that give the best preamble in terms of how labour rights and labour relations are to be enjoyed and exercised. Hence even where an employee is on the probationary contract, there must be seen and found a practice and process that is free from unfairness and legitimate that is in consonance with the provisions of the constitution as under Article 41.

in a celebrated authority from the South African Appeals Court ***Black Allied Workers Union and Others v One Rander Steak House (1988) 9 ILJ 326 (IC),*** where it was held that the status of a probationary employee differs from that of the permanent employee and that a disciplinary hearing can in fact be dispensed with if dismissal is substantively fair and if reasonable or stipulated notice is given. The applicant further argued that it was trite that the purpose of probation is to confer on the employer a right to terminate the contract at the end of the probationary period if the employee does meet the employer's expectation.

However in such a senerio and as the case for the claimant herein the purpose of the probation is to provide the an employer an opportunity to evaluate the employee's performance before confirming his appointment and although the period of probation is not used for the purposes of depriving the employee of the status of permanent employment, it is of particular significance that proper evaluation and consideration be given to the employee's performance, compatibility and overall conduct. To this extent the it is therefore necessary, the employee be given reasonable evaluation instruction, training, guidance or any other necessary support in order to allow the employee to render satisfactory service during the course of the probationary period. The extent thereof will depend upon the seniority and remuneration of the employee.

Hence in the event that an employer determines that the employee's performance is below standard, the employer ha the duty to advise the employee of any aspects in respect of which it considers the employee to be failing to meet the required performance standards and, at the conclusion of the probationary period either dismiss the employee or extend the probationary period, as the case may be. The period of probation may only be extended for a reason that relates to the purpose of probation and the employer will only dismiss an employee or extend the probationary period after the Employee has made representations, duly assisted by a fellow employee without there beign a conflict between eh provisions as under section 41 and 42 of the Employment Act. The two sections fo the law are not in conflict but must be seen in a progressive manner that set constitutional principles outlined under Article 41 into perspective. Should it be determined, however, prior to the expiry of the probationary period that the employee is not rendering the service satisfactorily as might reasonably be expected by the employer and that, in the opinion of the employer, the continuing of the employment relationship through to the expiry of the period of probation would be inconsequential, the employer *may* terminate the employment

contract prior to the expiry of such probationary period.

The efforts made, the process undertaken to support a weak employee and the substance of that support is important. This is because the court must established that the process adopted by an employer is fair and reasonable viewed in the perspective of the constitutional safeguard under Article 41.

In this case, the claimant was still serving within his probation period; he was terminated just before that period came to end. The efforts, process and support undertaken by the employer within this period to support his work is not a matter that can be determined at this preliminary stage. It is a weighty matter that can only be canversed at a full hearing. The interim measures granted by the court will therefore be vacated to allow the parties address the substantive issues herein. The claimant should be period his salaries for the time served and be allowed to argue his case from outside the respondent offices.

The application dated 10th October and the prayers therein will not be granted in the interim. The claimant be paid his salary and all benefits due to him for time served to this day. Parties to take hearing dates for the main cause. Costs will be in the cause.

Delivered and dated at Nairobi this 1st day of November 2013.

M. Mbaru

Judge