



JUDICIARY
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY (CIVIL DIVISION)
CIVIL CAUSE NO 204 OF 2021

BETWEEN

ESTHER CHIVIYA CLAIMANT

AND

THE ATTORNEY GENERAL 1ST DEFENDANT

MUKURU MONEY TRANSFER 2ND DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Claimant, appeared in person

Mr. Chikwakwa, Counsel for the 2nd Defendant

Mr. Henry Kachingwe, Court Clerk

RULING

Kenyatta Nyirenda, J.

This is my ruling on an application by the Claimant for summary judgement. The application is brought under Order 12, r.23, of the Court (High Court) (Civil Procedure) Rules [Hereinafter referred to as "CPR"].

The action herein was commenced by the Claimant by a specially endorsed writ of summons issued on 17th December 2020. Her claim against the 1st Defendant is for damages for false imprisonment and loss of employment. She also claims damages against the 2nd Defendant for unfair termination of employment.

On 6th May 2021, the Claimant filed with the Court an application for default judgement against the 1st Defendant on the ground that the 1st Defendant had filed neither a defence nor a response. The application was granted by the Assistant Registrar on 7th May 2021. The Court notes that the Claimant has taken no follow-up steps to obtain a formal order and have it executed against the 1st Defendant.

On 28th April 2021, the 2nd Defendant filed the following Defence:

1. The second defendant refers to paragraphs 24 to 40 of the statement of case and contends that the claim against the second defendant is purely a labour matter. The appropriate forum to determine the claimant's claim against the second defendant is the Industrial Relations Court.
2. The second defendant repeats paragraph 1 above and will move the court to dismiss the claimant's claim against the second defendant for being filed in a wrong forum. Alternatively, the second defendant will move the court to transfer the claimant's claim against the second defendant to the Industrial Relations Court.
3. The second defendant refers to the claimant's statement of case and contends that the statement of case has not been properly drafted. It is not a concise statement of the case. It contains or refers to evidence that is intended to be relied on by the claimant in support of her case. The second defendant will move the Court for an order directing that Claimant gets legal aid assistance to draft the statement of case in a manner that conforms with the rules of procedure.
4. Notwithstanding paragraphs 1, 2 and 3 above, the second defendant denies paragraph 24 of the statement of case in that the contract of employment was lawfully terminated. The second defendant summarily dismissed the claimant and in that case, there was no obligation pay her in lieu of notice or provide her a notice of termination of the contract of employment.
5. In or about 2nd August 2019, the second defendant received a report that one of its branches located at Mzimba was robbed. The robbers had gotten away with K14,373,314.00 which was left in office drawers by the claimant and her office mate, instead of being locked in a cash vault as was provided in the second defendant's standard operating procedures.
6. The second defendant internally investigated the robbery. The claimant was one of the people questioned during the investigations. The findings of the investigations necessitated the calling of the claimant to a disciplinary hearing.
7. The claimant was called for a disciplinary hearing on or about 22nd November 2019 and consequently summarily dismissed upon being found guilty of misconducts. The claimant was found guilty of gross negligence and unauthorized absence from work.
8. The second defendant lost the sum of K14,373,314.00 due to claimant's gross negligence. The second defendant was thus justified in summarily dismissing the claimant.
9. The action should be dismissed with costs.

COUNTERCLAIM

10. In the event the Courts entertains the claimant's claim against the second defendant, the second defendant repeats 5 to 8 above and contends that due to the claimant's gross negligence, in that she failed to adhere to standard operating procedures by leaving cash in the office drawers instead of cash vault, the second defendant lost the sum of K14,373,314.00.

11. *The second defendant claims from claimant the sum of K14,373,314.00 plus interest at commercial bank lending rate from 2nd August 2019 to date of payment by the claimant.*
12. *The claimant also claims costs of the counterclaim."*

The application for summary judgement is supported by a statement sworn by the Claimant herself wherein she deposes as follows:

- "1. **THAT** I am self-represented in this action
2. **THAT** the matters of fact I depone to herein are to my knowledge as a former employee of Mukuru Money Transfer (MMT).
3. **THAT** I commenced the proceedings by way of Writ of Summons against the Attorney General being the 1st Defendant for false imprisonment and loss of employment among other claims stated in the Statement of Claim and Mukuru Money Transfer Limited being 2nd Defendant for unfair termination of employment or unfair dismissal among other claims stated in the Statement of Claim.
4. **THAT** on 28th day of April, 2021 the 2nd Defendant served a defence which in strict sense is of general denial. The second Defendant's defence is a mere sham calculated to delay the course of justice. Now shown to me is a copy of the said defence unmarked but dated 28th April, 2021.
5. **THAT** in the circumstances it would only be fair and just, and in the interest of justice that a summary judgement be entered against the Second Defendant."

The 2nd Defendant is opposed to the to the application and there is a sworn statement to that end made by Counsel Lawrence John Kapinda wherein he states as follows:

- "5. **THAT** I have read the claimant's sworn statement in support of the application for summary judgment and respond to it as I do hereunder.

Documents filed and exchanged by the parties

6. **THAT** the claimant commenced the within action through summons. The action is against two defendants, namely, the Attorney General and Mukuru Money Transfer Limited. I now produce and exhibit a copy of the claimant's summons and statement of claim which is marked LK1.
7. **THAT** it clear from the claimant's statement of claim that the action is essentially two causes of action. One cause of action is against only the first defendant, the Attorney General, and this consists of claims for damages and loss due to false imprisonment, defamation, loss of dignity and mental distress. The other cause of action is against only the second defendant, Mukuru Money Transfer Limited, and this consists of claims for compensation of unfair dismissal, payment for annual leave days, notice pay, and back pay.

8. *THAT* the second defendant filed a defence protesting to the claim and a counter claim. I now produce and exhibit a copy of the second defendant's defence marked LK2.
9. *THAT* upon receipt of the second defendant's defence and counter claim, the claimant filed a document titled "statement of claim against the second defendant" which was an abridged version of the initial statement of claim that was filed by the claimant. I now produce and exhibit a copy of this document marked LK3.
10. *THAT* the abridged version of the statement of claim was accompanied by a document that appears to be a defence to the second defendant's counter claim. The document started with paragraph 6 and there was no heading to it. It was also accompanied by the claimant's sworn statement in support of the claimant's defence to second defendant's counterclaim. I now produce and exhibit the claimant's "defence to counterclaim" and the sworn statement in support of claimant's defence to counterclaim which are marked LK4.
11. *THAT* both parties filed and served on each other statement of issues for the purposes of mediation. To the surprise of the second defendant, the second was served with a filed objection to mediation purportedly made under Order 13 rule (2) (b). The claimant did not specify the procedure rules that provided for the said Order 13 rule (2) (b). I now produce and exhibit a copy of the objection to mediation marked LK5.

Particulars of second defendant's defence

12. *THAT* I refer to paragraph 4 of the claimant's sworn statement in support of the application for summary judgment and state that the second defendant's defence, which is exhibit marked LK2, is not a general denial as alleged by the claimant. It is neither sham nor intended to delay the wheels of justice.
13. *THAT* the second defendant raised the following issues in their defence:

Forum conveniens

- 13.1 The second defendant pointed out that the cause of action against the second defendant is purely a labour matter, as such, the appropriate forum to handle the claimant's claims against the second defendant was the Industrial Relations Court. I refer paragraphs 1 and 2 of the second defendant's defence.
- 13.2 The second defendant further stated its intention to have the cause of action against the second defendant transferred to the Industrial Relations Court or be dismissed for the High Court is not the appropriate forum to deal with the claim against the second defendant.

Inappropriate drafting of the statement of case

- 13.3 The second defendant pointed out that the claimant's statement of case contained evidence that the claimant intended to rely in support of her case. The second defendant further pointed out that the claimant's statement of case was not concise. I refer to paragraph 3 of the second defendant's defence.
- 13.4 The second defendant stated its intention to move the Court to order that the claimant gets legal aid representation so that rules of procedure are followed in the matter.

No valid claim for notice pay, compensation for unfair dismissal and related claims

- 13.5 The second defendant denied that the claimant's contract of employment was unlawfully terminated. It contended that the employment was lawfully terminated as there were valid reasons and lawful procedures were followed. I refer to paragraphs 4, 5, 6 and 7 of the second defendant's defence. The particulars of the second defendant's defence as pleaded were:
- 13.5.1 the second defendant was robbed of K14, 373, 314.00 which was left in office drawers by the claimant and her colleague
- 13.5.2 the leaving of the cash in office drawers was against the second defendant's standard operating procedures. The cash was supposed to be locked in a cash vault.
- 13.5.3 the second defendant internally investigated the robbery and the claimant was one of the people who was questioned during the investigations. I now produce the investigation report which is marked **LK6**.
- 13.5.4 the findings of the investigations necessitated the calling of the claimant to a disciplinary hearing.
- 13.5.5 the second defendant called the claimant to a disciplinary hearing on 22nd November 2019 where she was found guilty of misconduct. Consequently she was summarily dismissed from employment, that is, she was summarily dismissed. I now produce the invitation to a disciplinary hearing and the notice of termination of employment marked **LK7** and **LK8** respectively.
- 13.6 The second defendant further denied that the claimant was entitled to notice pay as the dismissal from employment was a summary dismissal, as such, she was not entitled to payment in lieu of notice or notice of termination of the contract. I refer to paragraph 4 of the second defendant's defence."

Both the Claimant and the 2nd Defendant filed their respective supplementary sworn statements in support of their respective positions.

As already stated, this application has been brought under Order 12, rule 23, of the CPR which rule provides as follows:

"23. (1) The claimant may apply to the Court for a summary judgment where the defendant has filed a defence but the claimant believes that the defendant does not have any real prospect of defending the claim."

(2) Summary judgement shall not apply to a claim for libel, slander, false prosecution, false imprisonment, seduction or an Admiralty action in rem."

Order 12, rule 25 (2) and rule 26 of the CPR are also relevant and they are couched in the following terms:

"(2) Where the Court is satisfied that –

(a) the defendant has no arguable defence to the claim or part of the claim as presented in the application; and

(b) there is no need for a trial of the application or that part of the application, the Court shall –

(i) give judgment for the applicant for the application or part of the application; and

(ii) make any other order the Court deem appropriate."

26. The Court shall not enter summary judgment against a defendant where it is satisfied that there is a relevant dispute between the parties about a fact or an arguable question of law."

In order for the claimant to get a summary judgment under the CPR, the claimant must demonstrate that the defendant has no real prospect of defending the claim (see Order 12, rule 23(1), of the CPR) and that there is no relevant dispute between the parties about a fact or an arguable question of law see (Order 12, rule 26, of the CPR). As was observed by the learned authors of **S. Goulding Odgers on Civil Court Actions**, (24th ed., Sweet & Maxwell, 1996), at page 129:

"If the evidence of the defendant is incredible in any material respect it cannot be said that there is a fair or reasonable probability that the defendant has a real or bona fide defence and judgment will be given to the plaintiff." Thus, the mere assertion of a given situation

does not, on its own, show a reasonable defence. The court must assess whether or not the defendant's assertions are credible."

In the present case, the 2nd Defendant claims in its statement of defence that the Claimant was dismissed from employment because there were valid reasons as established through a disciplinary hearing. The 2nd Defendant submitted that the requirements of sections 57 of the Employment Act were satisfied in that the Claimant was found guilty of misconduct, namely, gross negligence and unauthorized absence from work.

To my mind, the matters raised by the 2nd Defendant are sufficient for the Court to find that there is a relevant dispute between the parties regarding, among other matters, the question whether or not the Claimant's employment was unfairly terminated contrary to section 57 of the Employment Act. In short, I do not agree with the Claimant's assertion that *"The second Defendant's defence is a mere sham calculated to delay the course of justice"*. In the premises, summary judgement cannot be entered: see Order 12, rule 26, of CPR. The application is, therefore, dismissed.

Pronounced in Court this 23rd day of March 2022 at Lilongwe in the Republic of Malawi.



Kenyatta Nyirenda
JUDGE