



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 685 OF 2019

JONAH OCHIENG OSORE.....CLAIMANT

VERSUS

OFFICE OF THE DEPUTY PRESIDENT.....1st RESPONDENT

PUBLIC SERVICE COMMISSION.....2nd RESPONDENT

RULING

1. On 19 June 2018, the Principal Administrative Secretary, Office of the Deputy President wrote to Jonah Ochieng Osore (applicant) to inform him that his contract as Deputy Director, Research which had expired on 27 November 2017 had been renewed for a period of 5 years (effective 28 November 2017).

2. Four months later, on 11 October 2018, the Principal Administrative Secretary notified the applicant that he was being interdicted pending the determination of criminal offences he was facing before the Milimani Magistrates Courts.

3. About a year later, on 22 August 2019, the Principal Administrative Secretary wrote to the applicant to inform him that his contract had been terminated with effect from 30 September 2019.

4. The applicant swiftly moved the Court on 11 October 2019 seeking orders

1. ...

2. ...

3. PENDING THE HEARING AND DETERMINATION OF THIS CLAIM, the Honourable Court be pleased to suspend the decision of the Respondents contained in the letter dated 22nd August 2019 by the 1st Respondent and reinstate the applicant's half salary and all other benefits accruing to an interdicted employee.

4. PENDING THE HEARING AND DETERMINATION OF THIS CLAIM, the Honourable Court be pleased to quash, invalidate and annul the decision by the Respondents contained in the letter dated 22nd August 2019 by the 1st Respondent.

5. ...

5. When the application was placed before the Duty Court on 14 October 2019, it directed that it be served upon the Respondents for *inter partes* hearing on 6 November 2019.

6. The Respondents filed a replying affidavit sworn by the 1st Respondent's Director of Human Resource in opposition to the application on 6 November 2019, the same day the Court took oral arguments.

7. The facts, in this case, are not in dispute. When the Respondents interdicted the applicant, he was informed that you have been interdicted from exercising the duties of your office with effect from 14th September 2018 being the date you appeared before court pending the determination of these charges.

8. The applicant's case at this point in time is that the termination of the contract before the conclusion of the criminal trial he was facing was *ex facie* illegal, in light of the promise in the interdiction letter, and section K.6(2) of *Human Resources Policies and Procedures Manual for the Public Service*.

9. In resisting the application, the Respondents countered that the criminal proceedings and an employer's internal disciplinary process had distinct objectives and purposes, and that drawing from the legal principle set out by the Court of Appeal in *Kibe v Attorney General* (2003) eKLR, it was open to them to exercise the option to terminate the contract despite the pendency of the criminal charges.

10. The Respondents also contended that pursuant to clause 6(1) of the employment contract, they could bring the relationship to an end notwithstanding the pendency of the criminal charges against the applicant.

11. The applicant was expected to demonstrate a *prima facie* case within the meaning of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696.

12. The applicant was serving a fixed-term contract. It was ordinary employment. The remuneration he would have earned had he served the full contract can be computed to the last cent.

13. The orders sought by the applicant would effectively restore the employment contract (amount to *reinstatement*), which the Respondents have purportedly repudiated.

14. *Reinstatement*, by dint of section 49(3)(a) of the Employment Act, 2007 is a final remedy, granted after a hearing on the merits.

15. In the view of the Court, allowing the orders sought at this interlocutory stage would be tantamount to granting an order of specific performance in ordinary employment whereas any damages suffered may be computed precisely.

16. Considering that any loss to the applicant would be capable of precise calculation, and that *reinstatement* is ordinarily granted after a hearing on the merits, the Court finds that this is not a suitable case to allow any of the orders sought.

17. The application dated 9 October 2019 is dismissed.

18. Costs in the cause.

Delivered, dated and signed in Nairobi on this 6th day of December 2019.

Radido Stephen

Judge

Appearances

For applicant Mr. Achach instructed by Ochieng Achach & Kaino Advocates

For Respondents Ms. Oyugi, State Counsel, Office of the Attorney General

Court Assistant Lindsey