



**Mukhwami v Kenya Electricity Transmission Limited (Cause E017 of 2024) [2024] KEELRC 1036 (KLR) (7 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1036 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E017 OF 2024  
BOM MANANI, J  
MAY 7, 2024**

**BETWEEN**

**ERIC LILUNGO MUKHWAMI ..... CLAIMANT**

**AND**

**KENYA ELECTRICITY TRANSMISSION LIMITED ..... RESPONDENT**

**RULING**

1. The parties to the instant action had an employment relationship which was terminated on 18<sup>th</sup> October 2023 after a disciplinary process that was conducted by the Respondent against the Claimant. The Respondent accuses the Claimant of having committed an act of gross misconduct when he submitted an academic transcript that was allegedly forged to secure employment.
2. On the other hand, the Claimant disputes the contention that he presented forged academic results in order to secure employment. He contends that he relied on genuine documents to secure his employment. It is his case that the Respondent may have mixed up two of the transcripts that are under consideration thereby coming up with the narrative that they were forgeries.
3. The Claimant also accuses the Respondent of having failed to grant him the opportunity to defend himself against the aforesaid accusations before the decision to terminate the contract between the parties was arrived at. He asserts that the Respondent failed to share with him some of the reports on the basis of which it concluded that he had presented forged academic papers.
4. Together with the Statement of Claim, the Claimant filed an application dated 11<sup>th</sup> January 2024 in which he seeks for orders of: reinstatement to his employment pending the hearing of the case; injunction to restrain the Respondent from filling the position in dispute pending the hearing of the case.
5. The application is opposed by the Respondent. According to the Respondent, the orders sought cannot issue because:-



- a. As a matter of law, the court should not issue orders of interim reinstatement unless there are exceptional reasons to justify such orders.
- b. The position that was held by the Claimant has since been filled.
- c. The application is supported by a defective affidavit.

## Analysis

6. I have considered the arguments by both parties in support of and opposition to the application. On the question relating to the annexures to the application, it is apparent that all the annexures (ELM 1 to 15) were not securely sealed by the Commissioner for Oaths in line with rule 9 of the *Oaths and Statutory Declarations Rules*. This rule provides as follows:-

“All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner and shall be marked with serial letters of identification.”
7. By virtue of Order 19 of the *Civil Procedure Rules*, the court is permitted to receive affidavit evidence. In my view, the purpose of rule 9 of the *Oaths and Statutory Declarations Rules* is to ensure that documents that accompany such evidence are properly secured and identified by the Commissioner for Oaths. And hence the need for the documents to be securely sealed by the Commissioner for Oaths. Otherwise, it will be impossible to vouch for the authenticity of such evidence. The requirement under rule 9 of the *Oaths and Statutory Declarations Rules* is therefore not an idle one.
8. Indeed, a perusal of annexures ELM 01 to ELM 15 confirms that they have not been sealed in accordance with rule 9 of the *Oaths and Statutory Declarations Rules*. They do not bear the signature and seal of the Commissioner for Oaths who attested the Claimant’s signature. As such, I have little hesitation in finding that the said annexures have not been properly secured under the seal of the Commissioner for Oath.
9. The Claimant argues that this noncompliance is not material. It is his case that it is a minor issue which can be resolved by ordering him to file a proper affidavit.
10. I do not agree with this position. As pointed out earlier, the annexures in question were presented as evidence. The Claimant wishes the court to rely on them to return a verdict that is favourable to him. Yet, their authenticity cannot be vouched for. Thus, this cannot be a minor issue as the Claimant suggests.
11. Even if the court was minded to permit the Claimant to file a fresh compliant affidavit, this could only have been done before the application was heard. As matters stand now, the application has already been heard and is pending ruling. As such, the opportunity to file a compliant affidavit has been lost.
12. There is a series of decisions in which annexures that offend this rule have been struck out. These include *Kenya National Union of Nurses v Kiambu County Public Service Board & 5 others* (2019) eKLR and *Mabel Imbuga v Jomo Kenyatta University of Agriculture and Technology* [2021] eKLR which were cited by the Respondent.
13. On my part, I do not see the reason why I should depart from these findings. Consequently, I strike out all the exhibits attached to the Claimant’s supporting affidavit dated 11<sup>th</sup> January 2024.
14. That being the position, it becomes apparent that the Claimant’s application is premised on a bare affidavit without supporting documents. As such, there is no sufficient material to support the prayers in the application.



15. The other critical matter that is raised by the Respondent is that the position which is in dispute has already been filled by one Ali Mchomo. As such, there is currently no position to which the court can order the reinstatement of the Claimant.
16. This averment is made in the replying affidavit of Reginah Kemboi, the Respondent's General Manager, Human Resource and Administration. It is noteworthy that in his subsequent affidavits, the Claimant does not deny this fact. He only asserts that the court has the jurisdiction to order reinstatement and that the Respondent ought to have known that there was the possibility of such an order issuing.
17. Whilst it is true that the court has powers to order reinstatement of an employee at the interlocutory stage, it must be appreciated that it (the court) must remain alive to the employer's prerogative to continue in business. This reality means that notwithstanding knowledge of the fact that the court may order reinstatement, the business needs of the employer may dictate that it takes steps to ensure continuity of its activities. This may include hiring a replacement of the employee whose services have been terminated.
18. If the employer has replaced such employee and this fact is brought to the court's attention, then the court must move with caution not to issue orders that will occasion hardship to the employer by for instance ordering reinstatement of the employee to a position that is no longer available. Having regard to the foregoing, I am reluctant to shut my ears to the reality that the position that the Claimant seeks to be reinstated to may no longer be available.
19. I agree with the Respondent's position that reinstatement should issue sparingly particularly at the interlocutory stage of a case. In my view, such order should only issue where preliminary evidence suggests that the employer acted outside the law.
20. In the instant case, the issue that led to the removal of the Claimant touches on his qualifications for the position that he was holding at the time of his appointment. The dispute centers on the Claimant's integrity. These are serious matters which the court cannot simply wish away. Reinstatement in such case should only come after full trial after the parties have had the opportunity to fully ventilate on the disputed facts.

#### **Determination**

21. The upshot is that I decline to issue the orders sought in the application 11<sup>th</sup> January 2024.
22. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED ON THE 7<sup>TH</sup> DAY OF MAY, 2024.**

**B. O. M. MANANI**

**JUDGE**

**In the presence of:**

..... for the Claimant

..... for the Respondent

**ORDER**

In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived



compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**B. O. M MANANI**

