



REPUBLIC OF KENYA



**Osimbo v Kenya Post Office Savings Bank & 7 others (Civil Appeal  
E037 of 2021) [2022] KECA 152 (KLR) (18 February 2022) (Judgment)**

Neutral citation: [2022] KECA 152 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL E037 OF 2021  
K M'INOTI, PO KIAGE & M NGUGI, JJA  
FEBRUARY 18, 2022**

**BETWEEN**

**GABRIEL OMOLLO OSIMBO ..... APPELLANT**

**AND**

**KENYA POST OFFICE SAVINGS BANK ..... 1<sup>ST</sup> RESPONDENT**

**SIMON P. NJOROGE ..... 2<sup>ND</sup> RESPONDENT**

**ISAAC KOECH ..... 3<sup>RD</sup> RESPONDENT**

**GODFREY K. NGUGI ..... 4<sup>TH</sup> RESPONDENT**

**PETER M. KARANJA ..... 5<sup>TH</sup> RESPONDENT**

**THOMAS K. KIBETT ..... 6<sup>TH</sup> RESPONDENT**

**SYLVESTER I. J. OBUON ..... 7<sup>TH</sup> RESPONDENT**

**ANNE W. KARANJA ..... 8<sup>TH</sup> RESPONDENT**

*(Being an appeal from the ruling and order of the Employment and Labour Relations  
Court at Kisumu (Nduma J) dated 28th January 2021 in Petition No. 16 of 2020)*

**JUDGMENT**

1. This appeal arises from the ruling of the Employment and Labour Relations Court (ELRC) (Nduma J.) dated 28<sup>th</sup> January 2021. The ruling related to an interlocutory application dated 4<sup>th</sup> May 2020 filed in Petition No. 16 of 2020. In the said application, the appellant, Gabriel Omollo Osimbo, had sought the following orders:

- i. That pending the hearing inter parties and determination of this application/ petition this Honourable Court be pleased to stay the petitioner's interdiction



of 6/06/2017 vide office letter Ref. KPOSB/RV & WR/53PF:862/2017 by the 1<sup>st</sup> and 4<sup>th</sup> respondent and the recommendation of the staff disciplinary committee sitting on 17/10/2017 which its outcome have not been communicated to the Petitioner to date.

- ii. That the Honourable Court be pleased to order the 1<sup>st</sup> respondent to pay the petitioner his half basic salary and full house allowance of Kshs. 65,163/= as from 1<sup>st</sup> January, 2018 to date totaling Kshs. 1, 824, 564 as at the end of April, 2020 as stipulated in both Post Bank Code of conduct clause 10.1.3 and CBA clause 38(a) which the 1<sup>st</sup> Respondent stopped paying the Applicant from 1<sup>st</sup> January, 2018 to date without informing the Applicant.
  - iii. That the Honourable Court be pleased to order the 6<sup>th</sup> Respondent to release to the Applicant Kshs. 300,000/= which he retained as part of the payment arising from the 13% CBA 2013-2014, 2015-2016, 2017 (CBA) pay rise which was paid to unionisable employees in December, 2017 and January, 2018 which the Applicant is a member and was paid only Kshs. 98,000/=out of the total Kshs. 398,000 due to him as pay rise arrears.
  - iv. That the Honourable Court be pleased to order the 1<sup>st</sup> Respondent to transfer the petitioner to his previous work station of Kisumu for fear of his life following the matter proceeding before the court as the Respondents are up to no good for the Applicant.
  - v. That costs and any other order the court may deem just and expedient.
2. The application was based on the grounds that vide a letter dated 6<sup>th</sup> February, 2017, the appellant was unlawfully interdicted and his salary and dues withheld. The interdiction was as a result of the report he made against a theft of Kshs. 1, 422, 900 at the 1<sup>st</sup> respondent's Busia Branch and the letters of complaints written against the 2<sup>nd</sup> respondent. The appellant alleged that the disciplinary procedures conducted by the respondents were unlawful and wrongfully executed as there is no provision under the Post Office Savings Bank Code of Regulations that when a cashier incurs a short (sic), the cashier is interdicted and the time frame within which the shortage incurred can be paid back. He further based his application on the ground that since his interdiction on 6<sup>th</sup> June, 2017, his half salary pay amounting to Kshs. 2,993,889 and full house allowance amounting to Kshs. 65,163 were withheld.
  3. The 1<sup>st</sup> respondent opposed the application through a replying affidavit sworn by Mr. Hannington Ouko, the 1<sup>st</sup> respondent's legal officer, filed on 19<sup>th</sup> June 2020. The 1<sup>st</sup> respondent averred that it employed the appellant as a clerical officer in 1992 vide a letter of offer of employment dated 11<sup>th</sup> March, 1992. He had risen through the ranks to the position of CRO/Cashier, a position he held until his termination on 27<sup>th</sup> December, 2017. From its records, the appellant was no longer its employee as he was interdicted on 6<sup>th</sup> June, 2017 and subsequently terminated on 27<sup>th</sup> December, 2017 after a lawful and due disciplinary process was undertaken against him and he was found to have incurred operational shortages. Further, the appellant had failed to adhere to the laid down operational procedure on regularizing irregular loss of customer's funds. The 1<sup>st</sup> respondent exhibited the termination letter and the minutes of the meeting held on 17<sup>th</sup> December 2017 to address the interdiction of the appellant.
  4. It was the 1<sup>st</sup> respondent's case further that the appellant was lawfully interdicted as investigation into his conduct commenced, a recommendation was made for him to appear before the staff disciplinary committee; he was accorded a fair hearing in accordance with the law; and the process culminated in the decision to terminate his employment with the 1<sup>st</sup> respondent.



5. In response to the appellant's averments regarding payment of his half salary during interdiction and payment of his dues pursuant to the June 2012/2013 Collective Bargaining Agreement (CBA), the 1<sup>st</sup> respondent averred that the appellant was duly paid his wages in accordance with the CBA then in force. The 1<sup>st</sup> respondent exhibited the copies of the appellant's pay slips showing payment of the half salary for the duration of the CBA.
6. It was the 1<sup>st</sup> respondent's further averment that the appellant should have challenged his termination and not his interdiction as the latter had been overtaken by events. The appellant had been indolent in challenging his interdiction, thus demonstrating to the court that the application was brought as an afterthought, without any cogent reasons, and was a waste of the court's time. Since his employment was terminated on 27<sup>th</sup> December, 2017, his request for his half pay from 1<sup>st</sup> January, 2018 to date was misplaced as he was no longer an employee of the 1<sup>st</sup> respondent.
7. In its ruling on the appellant's application, the ELRC observed that it was apparent from the averments before it that the application had been overtaken by events and a prima facie case to warrant the grant of the relief sought had not been made out by the appellant. It held that the issue of termination must be addressed on its merits upon the hearing of the appellant's petition pending before it. Further, the appellant having failed to meet the test laid out in *Giella –vs- Cassman Brown Co. Ltd. 1973 E.A. 358*, his application lacked merit. The ELRC accordingly dismissed the application with costs.
8. The appellant was aggrieved by the dismissal of his application. Through the firm of Athung'a & Co. Advocates, he filed a Notice of Appeal dated 8<sup>th</sup> February, 2021 and a rather prolix Memorandum of Appeal dated 9<sup>th</sup> March 2021 in which he raises some eighteen grounds of appeal.
9. At the hearing of the appeal on 21<sup>st</sup> September 2021, the appellant appeared in person. He indicated to the Court that he had filed written submissions which he wished to rely on. We note from the record that the appellant filed two sets of submissions, one dated 28<sup>th</sup> June 2021 and another headed "Oral Submissions" dated 21<sup>st</sup> September 2021. In both sets of submissions, the appellant reiterates his employment history and his complaint before the ELRC regarding his interdiction and subsequent dismissal from employment. He submits that he was unlawfully interdicted on 6<sup>th</sup> June, 2017 and was not given an opportunity by the ELRC to be heard when the court relied on the respondent's replying affidavit and submissions filed on 19<sup>th</sup> June, 2020 and dismissed his application dated 4<sup>th</sup> May 2020 yet the said replying affidavit was filed out of time and without leave of the court.
10. It is his submission further that there is no provision under the Post Office Savings Bank Code of Regulations that gives time frames within which shortages incurred by staff can be paid back; that when a cashier incurs shortages, the remedy for shortages is surcharge. That he had been interdicted following a shortage of Kshs. 39,000 which amount was fully paid and was captured in the bank's daily transactions.
11. The respondents did not file any submissions in opposition to the appeal, nor did they appear at the hearing though duly served.
12. We have considered the ruling of the ELRC, the appellant's grounds of appeal, and his submissions in support of his appeal. We observe that the appellant makes very detailed submissions regarding the process leading to his interdiction and the applicable law with respect thereto. These, we believe, are the subject of the petition pending before the ELRC. As that petition is yet to be heard on its merits, it is not within our remit to address the issues that the appellant raises in the petition which is yet to be heard and determined. The sole issue before us in this appeal is whether the ELRC erred in



dismissing the appellant's application for an injunction and in finding that the said application had been overtaken by events.

13. As the grant or denial of injunctive relief lies in the discretion of the court, it was incumbent on the appellant to show that in declining to grant the discretionary relief sought and in dismissing his application, the court did not properly exercise its discretion. As was held in the case of *Mbogo & Another vs Shab [1968] EA* at p.15:

“An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.”

14. The facts presented before the ELRC show that the appellant was interdicted by the 1<sup>st</sup> respondent on 6<sup>th</sup> June 2017. He did not challenge his interdiction until he filed Petition No. 16 of 2020 dated 16<sup>th</sup> February, 2021 in the ELRC. His application before the ELRC seeking stay of his interdiction is dated 4<sup>th</sup> May, 2020, only about a month shy of three years from the date of his interdiction.
15. We need not belabour the point that the appellant delayed inordinately in seeking redress regarding his interdiction. That delay, in itself, was sufficient to disentitle him to the discretionary relief that he was seeking. As the ELRC found, however, his application before it had been overtaken by events, the 1<sup>st</sup> respondent having moved further following his interdiction and terminated the appellant's employment on 27<sup>th</sup> December 2017.
16. The present appeal lodged by way of the Memorandum of Appeal dated 9<sup>th</sup> March 2021 raises a few technical issues concerning the admission of the 1<sup>st</sup> respondent's affidavit and submissions by the ELRC. However, the bulk of the grounds of appeal, from ground 6-18, ask us to delve into the merits of the 1<sup>st</sup> respondent's decision to interdict the appellant and the process that was used to arrive at the interdiction and subsequent dismissal.
17. A reading of the ruling of the ELRC shows that the court was not satisfied that the appellant had made out a case for grant of interim relief as required under the principles set in the case of *Giella v Cassman Brown (supra)*. He had filed the application more than two years after his interdiction. On the material before the ELRC, his application had been overtaken by events as his employment had been terminated on 27<sup>th</sup> December 2017. In the circumstances, we find that the ELRC made no error in determining that the issues that the appellant wished to raise relating to his interdiction and subsequent termination of his employment could best be addressed upon a hearing on merit of his petition dated 16<sup>th</sup> February 2020.
18. In the circumstances, we find no merit in the present appeal, and it is hereby dismissed.
19. As the respondents did not participate in the appeal or file any submissions with respect thereto, we make no order as to costs.

**DATED AND DELIVERED AT KISUMU THIS 18<sup>TH</sup> DAY OF FEBRUARY, 2022.**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**K. M'INOTI**



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**JUDGE OF APPEAL**

**MUMBI NGUGI**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**

