



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & KANTAL, J.J.A)

CIVIL APPEAL NO. 417 OF 2019

BETWEEN

ENERGY REGULATORY COMMISSION.....APPELLANT

AND

JOHN SIGURA OTIDO.....RESPONDENT

(An appeal from the Judgment and Order of the High Court, Employment and Labour Relations Division at Milimani Nairobi (B. Ongaya, J.) dated 10th April 2019 in *E.L.R.C Cause No. 294 of 2018*.)

JUDGMENT OF THE COURT

1. By an amended Memorandum of Claim dated 23rd April 2018 filed in the *Employment and Labour Relations Court (E.L.R.C)*, the respondent, who was the appellant's head of security since 2015, claimed that on 6th September 2017 he was unlawfully interdicted for more than six months and subsequently summarily dismissed vide a letter dated 11th April 2018. He challenged the appellant's actions and claimed:-

“i. Unpaid ½ salary and all allowances from 06.09.2017 up to 11.04.2018.

ii. Unpaid full salary as from 11.04.2018 to date and upon reinstatement.

iii. A one month's salary in lieu of notice being Kshs.236, 500.00

iv. Unpaid ½ salary for 6 months at Kshs.88, 400.00 as provided for under section 49(1) (c) of the Employment Act being Kshs.530, 400.00.

v. Unpaid Airtime of Kshs.3, 500.00 per month for 6 months being Kshs.21, 000.00.

vi. Compensation for unlawful interdiction and dismissal of 12 months' gross salary.

vii. Costs of the claim and interests thereon from the date of filing.”

The respondent also sought reinstatement to his former position and payment of full salary and allowances from 11th April 2018.

2. The respondent stated in his memorandum of claim that he was interdicted on allegations of gross misconduct based on extortion. The appellant referred the matter to the Directorate of Criminal Investigations to conduct. Although the respondent was exonerated, the appellant refused to lift the interdiction but instead dismissed him summarily, which actions he claimed were unlawful.

3. In its response to the claim, the appellant stated that on 23rd February 2018 the E.L.R.C (*Radido, J.*) determined that the respondent's interdiction was procedural and upheld it as having been carried out lawfully.

4. Regarding the summary dismissal of the respondent, the appellant averred that its internal disciplinary process was not incumbent upon the result of investigations by the Directorate of Criminal Investigations.

5. In the impugned judgment, the Court held that the respondent was unprocedurally dismissed from his employment; that the appellant had not established that it had a valid reason for terminating the respondent's employment and ordered his reinstatement. The Court further ordered the appellant to pay the respondent all salaries and allowances that had been withheld from 6th September 2017 to 11th April 2018 as well as all the salaries and allowances from 11th April 2018 to the date of the judgment, (10th April 2019) and to continue paying him monthly salaries and allowances thereafter in accordance with the contract of service.

6. Being aggrieved by the said judgment, the appellant preferred an appeal to this Court. The appellant's memorandum of appeal is rather prolix, it raises 17 grounds of appeal, the main ones as summarized in the appellant's written submissions being that: the judgment was arrived at despite numerous instances of abuse of court and judicial process; that the trial court sat on its own appeal, that the trial court granted interim orders with consequential effects, that were contradictory to the orders issued by a court of concurrent jurisdiction thereby abridging settled principles of law; that the trial court arrived at determinations void of any evidentiary material or probative value; that the trial court assumed the position of an employee by conducting an internal administrative process; and that the judgment was arrived at despite consistent material non-disclosure.

7. When the appeal came up for hearing, **Mr. Muyuri** appeared for the appellant and relied on his written submissions which he briefly highlighted. The respondent was represented by **Mr. Mandala** who also highlighted his written submissions.

8. Before we deal with the grounds of appeal, it is necessary that we briefly set out the factual background of the appeal. On 15th September 2017 the respondent filed **E.L.R.C Cause No. 1851 of 2017** against the appellant alleging, *inter alia*, unfair, illegal, irregular and unlawful interdiction. He filed an application seeking reinstatement pending hearing and determination of an application for stay of the interdiction. The respondent had been interdicted on account of gross misconduct based on allegations of extortion made against him but the Directorate of Criminal Investigations in his report dated 11th December 2017 found no evidence to link him with the alleged offence and concluded as follows:-

“Recommendation

In the view of the above allegations, the investigations conducted so far does not link the ERC employee with any criminal act as alleged in the said two letters of complaint by Stanley Oduor Okati who refused to substantiate the same allegation in form of a formal statement, saying that he only complained to ERC and not the DCI. It is true that he was charged for operating a business in Kisumu but the matter was withdrawn upon production of licence which was issued thereafter and remains questionable since he was in active violation of the ERC Act at the time of arrest.

There is no tangible evidence to sustain allegations of the alleged extortion and any ethical conduct against the said employee (JOHN OKWISIA SIGURA OTIDO.)”

9. That recommendation notwithstanding, the appellant, issued a show cause letter to the respondent on 12th March 2018 requiring him to respond thereto within seven days, but he failed to do so. The appellant invited the respondent to a disciplinary hearing before its Finance and Administration Committee on 4th April 2018 but the respondent failed to show up. Consequently, the appellant summarily dismissed the respondent from its employment with effect from 11th April 2018.

10. The respondent's application for reinstatement pending hearing and determination of his application for stay of the interdiction was heard and dismissed by Radido, J. in a ruling delivered on 23rd February 2018. On 13th March 2018, the respondent filed another suit and application under certificate of urgency seeking the same orders that had been rejected by Radido, J. The appellant opposed the application and filed a preliminary objection stating that the reliefs sought were *res judicata*, having been determined in the ruling delivered on 23rd February 2018 in ELRC Cause No. 1851 of 2017.

11. The respondent opposed the preliminary objection. He argued, *inter alia*, that the previous suit (ELRC Cause No. 1851 of 2017) was withdrawn before it was fully heard and concluded. He stated that the notice of withdrawal of the claim was dated 5th March 2018 and filed in Court on 7th March 2018 but it was not until 9th May 2018 that an order of withdrawal of the suit was made.

12. The Court held that at the time of filing the present suit the previous one had not effectively been withdrawn; the previous suit had not been heard and determined on its merits; the issue of staying or lifting of the respondent's interdiction pending the final determination of the dispute had been determined by Radido, J. and in any event the issue had been overtaken by events following the summary dismissal; that the respondent was guilty of material non-disclosure in that at the time of filing the subsequent suit he did not state that he had filed the previous suit; that the respondent was not deserving of any interim orders and vacated the interim orders that had preserved the suit position. However, the learned judge held that in view of the changed circumstances the new suit would be heard fully.

13. The suit proceeded to hearing and upon conclusion of oral testimony, whilst parties were preparing for submissions, the respondent filed an application seeking stay of the appellant's advertisement of the position of head of security which he had been dismissed from. Although the learned judge had earlier dismissed a similar application, he went ahead to grant an order to preserve the suit position, notwithstanding strong objection raised by the appellant that the Court was *functus officio* and could not sit on its own appeal. In its final judgment, the trial court held that the respondent's summary dismissal was unfair and ordered his reinstatement and payment of unpaid salaries and allowances as earlier stated.

14. We now turn to consider the grounds of appeal. The first main ground is that the judgment was arrived at despite numerous instances of abuse of court process. The appellant submitted that the respondent, upon disallowance of his application for stay by Radido, J. in ELRC No. 1851 of 2017 filed a similar application in ELRC Cause No. 294 of 2017; that although the respondent purported to file a notice of withdrawal of the first suit, that did not mean that the suit had been withdrawn as no order to that effect had been made. The appellant cited this Court's decision in ***Jingo Tours and Safaris Ltd v Jamal Shariff Swaleh & 2 Others [2019] eKLR***.

15. The appellant's counsel further submitted that the respondent's conduct of knowingly and dishonestly using the legal process to accomplish an interior purpose amounted to abuse of court process as held in **Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others [2019] eKLR**.

16. In response, the respondent's counsel submitted that a party has a right in law to withdraw a claim before it is heard, subject to payment of costs to the other party; that the trial court endorsed the respondent's request for withdrawal of Cause No. 1851 of 2017 on 8th May 2018 before the main claim proceeded to hearing; that such discontinuance of a suit is permitted under **Order 25 rule 1** of the **Civil Procedure Rules**; that such withdrawal cannot be held to be an abuse of the court process, and neither is it *res judicata*.

17. Secondly, the appellant's counsel submitted that it is settled law that once a Court makes a concise decision in respect of matters in controversy it cannot meritoriously reconsider the decided issues as that would amount to the Court sitting on its own appeal. In support of that submission, counsel cited this Court's decision in **Sanitam Services (E.A.) Limited v Rentokil (K) Limited & Another [2019] eKLR**. He faulted the learned judge for preserving the suit position, though he had earlier vacated the interim orders to that effect.

18. In response, the respondent's counsel submitted that **section 16** of the **Employment and Labour Relations Court Act** provides for review of judgments, orders or decrees; that the respondent, upon seeing an advertisement by the appellant to recruit his position during the pendency of the suit approached the court to secure the position pending hearing of his claim, which, in his view, cannot be referred to as a Court sitting on its own appeal.

19. The third issue that was raised by the appellant was on the role of the Court in disciplinary procedure and reinstatement under the law. The appellant's counsel submitted that the settled position is that Courts will not interfere in disciplinary processes instituted by an employee unless an employee can show that the process has been undertaken without regard to the procedure set out in the terms and conditions of service; that the court ought to interrogate the procedure integrity of the disciplinary process pursuant to the employer's manual, terms and conditions; that the learned judge ought to have allowed the disciplinary process to run its course and thereafter interrogate any procedural irregularities, if at all; that the respondent having failed to attend the show cause hearings, the court should not have substituted itself with the appellant. This Court's decision in **Judicial Service Commission v Gladys Boss Shollei & Another [2014] eKLR** was cited for that proposition.

20. Responding to that line of submission, the respondent's counsel stated that the court did not direct the appellant to desist from carrying out its disciplinary procedure; and that the appellant's own Human Resource Manager, Elizabeth Njau, was categorical that the respondent's dismissal was unprocedural and did not accord with the Human Resource Manual.

21. The fourth issue that was raised by the appellant is that of reinstatement of the respondent. Citing this Court's decision in **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR**, counsel submitted that Courts should be guided by the factors stipulated in **section 49(4)** of the **Employment Act** and the Common law principle that specific performance in an employment contract should not be ordered except in very exceptional circumstances. He faulted the learned judge for finding that the respondent's dismissal was unfair and for ordering his reinstatement contrary to the settled principles aforesaid.

22. On all those grounds, the appellant's counsel urged this Court to allow the appeal; set aside the trial court's judgment and award it costs of the appeal and costs of the suit before the trial court.

23. In response, the respondent's counsel submitted that **section 12 (3)** of the **Employment and Labour Relations Court Act** read together with **section 49** of the **Employment Act** enable a court to order reinstatement in appropriate cases; that the trial court in ordering reinstatement of the respondent exercised its discretion judiciously, having taken into consideration all the relevant factors as highlighted in its judgment. Counsel urged this Court to dismiss the appeal in its entirety.

24. We start with the issue of alleged abuse of the court process.

What is the meaning of "**abuse of the court process**"? That term has been the subject of consideration in a number of decisions by this Court and other Courts. In **Muchanga Investments Ltd vs Safaris Unlimited (Africa) Ltd & 2 Others** (supra) this Court observed that it is difficult to comprehensively list all possible forms of conduct that constitute abuse of judicial process. The Court cited the Nigerian case of **Sarak v Kotoye [1992] 9 NWLR 9Pt 264** where abuse of judicial process was defined as follows:-

"The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice..."

25. The same Court went on to cite examples of abuse of judicial process which include: -

"(a) Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.

b. Instituting different actions between the same parties simultaneously in different courts even though on different grounds.

c. Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's notice."

26. The appellant's complaint against the respondent as far as the issue of abuse of court process is that he instituted E:LRC Cause No. 1851

of 2017 where he filed an application seeking, *inter alia*, “**a temporary stay of execution of the 2nd respondent’s letter dated the 16th November 2017.**”; that when the Court (Radido, J.) declined to grant the orders sought, without any formal withdrawal of the suit, the respondent filed ELRC Case No. 294 of 2017 seeking similar orders before a different judge, and without disclosing that the court in the initial application had declined to grant the orders sought.

27. Although the respondent filed a notice of withdrawal of the first suit on 7th March 2018, it was not until 9th May 2018 when the order of withdrawal of the suit was made. In his verifying affidavit to the statement of claim, the respondent stated:

“3. That there is no other claim pending and there has been no previous proceedings in any court between the claimant and the respondent over the same matter.”

28. Obviously the above deposition was not only false but amounted to perjury and constituted material non-disclosure. Whereas **order 25 rule 1** of the **Civil Procedure Rules** grants liberty to a plaintiff by notice in writing to discontinue his suit, the notice ought to be served on all parties before any other suit is instituted. That was not done.

29. The learned judge did not condone the respondent’s conduct.

The learned judge expressed himself as follows:-

“The Court has considered the material non-disclosure and returns that the claimant is not deserving of the interim orders herein that the vacancy flowing from the claimant’s summary dismissal be preserved pending further orders by the Court as given on 30.30.05.2018 and issued on 05.06.2018.”

30. In view of that finding, grounds 15 and 16 in the memorandum of appeal that fault the learned judge for failing to appreciate that the respondent was guilty of abuse of court process and other procedural improprieties have no basis. We find and hold that the respondent’s conduct as stated above amounted to abuse of court process which the learned judge deprecated in his ruling dated 22nd June 2018.

31. The second issue for our consideration is whether the learned judge, having declined the respondent’s application to preserve the suit position in the aforesaid ruling, only to grant the very order much later, amounted to re-opening and varying its orders, thereby sitting on appeal of his earlier decision. The appellant further argued that the issue was *res judicata* and ought not to have been entertained at all.

32. The respondent’s application for stay of the advertisement of the position formerly occupied by the respondent was made on 29th January 2019. The position had been declared vacant and advertised on 23rd January 2019. The position had been declared vacant advertised on 23rd January 2019. Ex parte orders were granted by **Wasilwa, J.** who directed that application be heard inter parties on 14th February 2019.

33. The appellant opposed the application. It raised a preliminary objection, and filed grounds of objection and a replying affidavit. The appellant argued, *inter alia*, that the court was *functus officio*, having earlier determined that same application; and that the court could not sit on its own appeal. The record of appeal shows that the learned judge did not pronounce himself on the issues raised by the appellant.

34. Having noted that the suit had been fully heard and apart from the application what remained was highlighting of submissions, the learned judge ordered the parties to maintain the *status quo* with regard to the vacancy until further orders on 26th March 2019. Come that day, the learned judge fixed a date for delivery of judgment on 10th April 2019. By so doing, the learned judge failed to determine the issues raised by the appellant in its opposition to the said application.

35. When the respondent appeared before Wasilwa, J. on his application for preservation of the suit position, he did not disclose that Ongaya, J. had earlier vacated similar orders. That was material non-disclosure on the part of the respondent. When the application came up before Ongaya, J. for interparties hearing, he simply extended the orders that had been issued exparte. We agree with the appellant that the trial court was *functus officio* and by entertaining an application for orders that it had vacated, that was tantamount to sitting on appeal over its own decision.

36. We now turn to consider whether the learned judge erred in law by placing himself in the shoes of the appellant as the employer by making a determination on the merits of the interdiction and dismissal of the respondent as opposed to interrogation of the legality of the process.

37. In the ruling by Radido, J. on 23rd February 2018, the learned judge held that the respondent’s interdiction was procedurally carried out and proceeded to dismiss his two applications that sought stay of the interdiction letter. No appeal was preferred against that finding. In the subsequent suit that was filed after withdrawal of ELRC No.1851 of 2017, the respondent sought to challenge the summary dismissal, stating, *inter alia*, that the appellant failed to issue him with a notice to show cause and as such failed to afford him an opportunity to appear before the disciplinary committee to respond to the allegations that had been leveled against him.

38. Following the court’s validation of the respondent’s interdiction, the appellant gave the respondent several opportunities to attend the disciplinary proceedings but he refused to attend.

39. The appellant convened a meeting on 11th April 2018 where it deliberated on all the issues that had led to the respondent’s interdiction and concluded that the respondent was guilty of all the charges contained in the show cause letter.

Consequently, the appellant decided to summarily terminate the respondent’s employment.

40. We do not agree that the respondent was not given an opportunity to defend himself against the allegations that had been levelled against him. We echo the holding by the ELRC in **Jackson Butiya v Eastern Produce Limited, Industrial Court Cause No. 335 of 2011** that:-

“An employee who squanders the internal grievance handling mechanisms provided by an employer cannot come to Court and say “I refused to talk with those people and therefore I was not heard, order them to pay me.” It is not the role of the Court to supervise the internal grievance handling processes between employers and employees. The role of the Court is to ensure that such processes are undertaken within the law.”

The respondent, having failed to present himself before the disciplinary body of the appellant as required, cannot fault the appellant for the decision taken.

41. The respondent believed that since the Directorate of Criminal Investigations had written to the appellant stating that there was no tangible evidence to sustain the allegations that had been made against him the appellant had no basis for imposing any disciplinary action against him. The trial court agreed with the respondent. We must however state that disciplinary processes are not necessary dependent on criminal processes. A person may be acquitted in a criminal case yet be dismissed by his employer on the same facts as presented in the criminal trial. See this Court’s decisions in **Mobile Link (K) Limited v Tabitha Masege [2017] eKLR**, and **David O. Owino v Kenya Institute of Special Education [2013] eKLR**.

42. It was open for the trial court to consider the merits of the allegations that led to the respondent’s interdiction. That issue had been dealt with Radido, J. and determined in favour of the appellant. It was res judicata and Ongaya, J. erred in re-visiting the same.

43. We agree with the appellant that the learned judge erred in law in considering the merits of the interdiction which had been heard by the Court, and without consideration of the fact that the same grounds led to the dismissal of the respondent, particularly so after he squandered the opportunity to be heard before his dismissal.

44. Having arrived at the above conclusion, we do not think that it is necessary for us to consider the issue of reinstatement of the respondent. Whereas the trial court was empowered to order reinstatement of the respondent to the position he occupied before his dismissal, if his dismissal was wrongful, which we have found was not, it is trite law that reinstatement should not be ordered except in very special circumstances. See **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others** (supra). No exceptional circumstances were demonstrated to warrant such an order.

45. For the reasons aforesaid, we allow this appeal, set aside the trial court’s judgment and substitute therefor an order that the appellant lawfully terminated the respondent’s services.

The appellant is awarded the costs of this appeal.

Dated and delivered at Nairobi this 29th day of January, 2020

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

S. OLE KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR