



REPUBLIC OF KENYA



KENYA LAW
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Ogutu v Kenya Export Promotion and Branding Agency (Cause E551 of 2024) [2025] KEELRC 699 (KLR) (6 March 2025) (Ruling)

Neutral citation: [2025] KEELRC 699 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E551 OF 2024
BOM MANANI, J
MARCH 6, 2025

BETWEEN

MARY ADHIAMBO OGUTU CLAIMANT

AND

KENYA EXPORT PROMOTION AND BRANDING AGENCY ... RESPONDENT

RULING

Introduction

1. Through a Memorandum of Claim dated 19th July 2024, the Claimant instituted this action to challenge the Respondent's decision to downgrade her job grade from 3 to 5. She contends that sometime in March 2018, the Respondent transferred her from its headquarters to Mombasa and downgraded her position from job group 3 to job group 7. She further contends that she challenged the downgrading but before her appeal was heard, the Respondent served her with a letter terminating her employment in public interest.
2. The Claimant contends that she challenged the decision to terminate her contract in public interest. As a result, the Respondent reinstated her back into employment.
3. She contends that although the Respondent reinstated her back to employment, it did not return her to the position of Manager. She asserts that the effect of this development was to keep her at job group 7.
4. The Claimant avers that she sought the intervention of other government agencies to redress her grievances against the Respondent. As a consequence, the Respondent moved her to job group 5.
5. It is her case that as a result of the changes in her job group and the Respondent's refusal to reinstate her back to job group 3, she has suffered loss of various benefits and emoluments as set out in the Memorandum of Claim. In addition, she accuses the Respondent of effecting illegal deductions to her emoluments.



6. The Claimant contends that the Respondent's actions are a violation of her right to fair labour practice and a breach of the law on employment. As such, she seeks a declaration that the Respondent has violated her right to fair labour practice. In addition, she seeks orders, inter alia, compelling the Respondent to make good her back pay and to compensate her for violation of her rights.
7. Subsequent to institution of the suit, the Claimant filed the instant application dated 4th October 2024 seeking the following orders:-
 - a. That the application be certified as urgent.
 - b. That the application be heard on priority basis and service thereof be dispensed with in the first instance.
 - c. That pending hearing of the application inter-partes, the Respondent be ordered to stop the disciplinary process initiated against her through the letter of show cause dated 25th September 2024.
 - d. That the court issues an order stopping the Respondent from taking retaliatory action against her on account of filing this suit.
 - e. That the court issues an order allowing uninterrupted continuance of her employment to the Respondent pending determination of the suit.
 - f. That the court gives directions regarding costs of the application.
8. The Claimant contends that after she instituted this case against the Respondent, it initiated disciplinary action against her through a show cause letter dated 25th September 2024. She contends that the Respondent's actions were motivated by the fact that she had mounted this case against it. She accuses the Respondent of making wild accusations against her which she believes to be unlawful, unfair and intended to punish her for filing the suit.
9. The Claimant contends that the Respondent gave her 21 days to respond to the show cause letter. She contends that the disciplinary process contemplated by the Respondent had a preconceived outcome.
10. The Claimant contends that the Government of Kenya had issued a circular allowing public servants with pre-existing medical conditions to work from home. Yet, the Respondent ignored this directive and accused her of absconding duty. She contends that she considers the Respondent's actions suspect since she had been working and drawing salary since the Covid 19 pandemic without any complaints by it (the Respondent).
11. The Claimant further contests the Respondent's assertion that she has been using abusive language against other members of staff. She contends that the Respondent has relied on past incidents which go as far as the year 2019 to anchor this assertion. In her view, this is a clear manifestation of the fact that the Respondent was on a mission to unjustly punish her.
12. The application was placed before the trial court on 17th October 2024 when it (the court) directed that the Respondent be served with it (the application) by 18th October 2024. Meanwhile, the matter was set down for mention on 23rd October 2024 for further directions.
13. On 23rd October 2024, the parties attended court when the Respondent's counsel informed the court that the Respondent had been served with the application on 17th October 2024. As such, it (the Respondent) required time to respond to it (the application).



14. Further, counsel intimated that the Respondent had conducted a disciplinary trial against the Claimant on 22nd October 2024 and finalized the matter after the Claimant declined to attend the process. As such, the application, as it stood, had been overtaken by events.
15. On his part, the Claimant's counsel informed the court that after he served the Respondent with the application on 17th October 2024, the latter hurriedly invited the Claimant for a disciplinary hearing on 22nd October 2024 in an apparent attempt to defeat the court proceedings scheduled for 23rd October 2024. Counsel intimated that the Respondent decided to proceed with the disciplinary case notwithstanding knowledge that the Claimant was unwell and hospitalized.
16. In response, the Respondent's counsel averred that the disciplinary proceedings mounted on 22nd October 2024 were legitimate. She contended that the Claimant was invited to the session but ignored the invite under the guise of sickness.
17. Counsel argued that a disciplinary process at the workplace is distinct from the court process. As such and in her view, the Respondent had the liberty to proceed with the disciplinary case notwithstanding that the Claimant had instituted the current court proceedings.
18. In the replying affidavit which was subsequently filed by the Respondent, it contends that the application is unmerited since the Claimant has not met the threshold for grant of orders of interim injunction. The Respondent contends that its decision to take disciplinary action against the Claimant was founded on legitimate grounds.
19. The Respondent contends that the Claimant has a history of misconduct at the workplace. It avers that the Claimant has habitually used disagreeable language against her colleagues thus poisoning the work environment. It further asserts that the Claimant has habitually absented herself from the work station without permission.
20. The Respondent avers that in 2019, it warned the Claimant against engaging in misconduct at workplace. It contends that it informed her that she risked dismissal from employment if she continued to misconduct herself. It contends that despite this warning, the Claimant continued to commit acts of absenteeism, use of abusive language and insubordination.
21. The Respondent avers that in view of the Claimant's conduct, it issued her with a show cause letter dated 25th September 2024 requiring her to justify why disciplinary action should not be taken against her for misconduct within twenty one (21) days of the letter. However, she ignored the letter and did not respond to it within the set timeframe.
22. The Respondent contends that in view of the Claimant's failure to respond to the show cause letter, it convened a meeting on 17th October 2024 at which a decision was taken to subject her to a disciplinary hearing. It avers that it invited the Claimant for a disciplinary hearing on 22nd October 2024. It further contends that the letter inviting the Claimant for the disciplinary hearing set out details of the accusations against her.
23. The Respondent avers that in response to the invite, the Claimant emailed it on 18th October 2024 contending that she had already moved to court in respect of the matter through her application of 4th October 2024 which was scheduled for directions on 23rd October 2024. As such, she asserted that she was not going to attend the session scheduled for 22nd October 2024. It avers that the Claimant also shared her belated response to the show cause letter through the aforesaid email.



24. The Respondent avers that it responded to the Claimant advising her that the proposed disciplinary hearing was distinct from the court process. As such, it (the hearing) was going to proceed as scheduled and that she was free to attend the session in the company of a colleague or any other witness.
25. The Respondent avers that on the morning of the hearing, the Claimant sent it a hospital note suggesting that she had been unwell and had sought medication on 21st October 2024. According to it, the note was understood to mean that the Claimant was treated and released from hospital on 21st October 2024. As such, she was in a position to be at work on 22nd October 2024.
26. The Respondent contends that on 22nd October 2024, its Disciplinary Committee waited for the Claimant to show up but she did not. As a consequence, it proceeded with the disciplinary case in her absence resulting in the decision to terminate her employment.
27. The Respondent contends that notwithstanding the Claimant's absence, it took into account her response to the notice to show cause. As such, it contends that the process that resulted in the termination of her contract was fair.
28. The Respondent reiterates that the disciplinary process having terminated and the Claimant's contract having been closed, this application is overtaken by events. As such, the court should not issue the orders sought.

Analysis

29. The court gave directions for the application to be heard through written submissions. In compliance with these directions, the parties have filed their respective submissions.
30. The application was filed on 11th October 2024. It is said to have been filed pursuant to article 41 of *the Constitution* of Kenya, 2010 as read with Order 51 rule 1 of the Civil Procedure Rules.
31. Article 41 of *the Constitution* entrenches the right to fair labour practice. On the other hand, Order 51 rule 1 of the Civil Procedure Rules sets out the general manner in which interlocutory applications should be instituted in court.
32. Save for the commentary under Order 51 of the Civil Procedure Rules on the procedure for instituting interlocutory applications, neither of the provisions quoted by the Claimant speak to the application before the court. Importantly, it has been underscored that the Employment and Labour Relations Court has regulations which guide practice before it. As such, provisions of the *Civil Procedure Act* and Rules do not apply to it (the Employment and Labour Relations Court) unless otherwise permitted by the Employment and Labour Relations Court (Procedure) Rules (see *Benedict Ojou Juma & 10 others v A. J. Pereira & Sons Limited* [2016] eKLR and *Prisca Jepngétich v Generation Career Readiness Social Initiative Limited* [2021] eKLR).
33. The rules that apply to the practice before the Employment and Labour Relation Court are the Employment and Labour Relations Court (Procedure) Rules, 2024. They were published on 16th August 2024 through Gazette Notice No. 161.
34. Part VIII of these rules speaks to interlocutory applications and interim injunctions. Read together with section 12 of the *Employment and Labour Relations Court Act*, these rules provide the procedure to move the Employment and Labour Relations Court for the temporary relief that the Claimant seeks in her application.



35. It is noteworthy that the instant application was filed in October 2024 long after the aforesaid rules had been published. As such, the Claimant ought to have moved the court under these rules as opposed to the provisions she has set out in the application.
36. What is the effect of moving the court under inapplicable provisions of law? In *Inderjit Singh Saimbhi v Mohinder Singh Saimbhi & Another* [2010] eKLR, the court observed that an application which is filed pursuant to wrong provisions of law is incompetent.
37. The foregoing notwithstanding, several courts have shown reluctance to throw out motions solely on the ground that they were instituted under the wrong provisions of law. Such applications have generally been saved on account of article 159 of *the Constitution* (see for instance *Manyasa v Chairman, Secretary, Board of Management Our Lady of Mercy Girls Secondary School Busia* (Civil Application 194 of 2020) [2021] KECA 9 (KLR) (23 September 2021) (Ruling)). That being the case, I will consider the application on its merits.
38. As noted earlier, the Claimant sought orders to stop the Respondent from processing disciplinary action against her pending determination of the suit. She also sought orders to restrain the Respondent from taking retaliatory action against her for filing the instant suit. In addition, she sought orders to maintain her employment status pending determination of the suit.
39. The prayers in the application are premised on the presence of an employment relation between the parties. Further, they (the prayers) presuppose that the disciplinary proceedings against the Claimant are yet to be undertaken.
40. As both parties confirm, after the court scheduled the application for directions on 23rd October 2024, the Respondent proceeded to conduct the impugned disciplinary hearing on 22nd October 2024, a day before the court session. The Respondent processed the disciplinary case to conclusion and dismissed the Claimant from employment.
41. The events which took place on 22nd October 2024 changed the character of the relation and dispute between the parties. By them (the events of 22nd October 2024), the disciplinary proceedings against the Claimant were processed to conclusion thereby obliterating the initial position that they (the proceedings) were pending determination. Similarly, by the events, the employment relation between the parties was terminated.
42. As such, it was expected that the Claimant would amend her pleadings and application to reflect the new status of the parties and perhaps pray for reversal of the process. However and as the court record demonstrates, no such amendments were made to the pleadings and the application. As such, the application was prosecuted in its original form.
43. In their submissions to court and perhaps in recognition of the changed terrain as a result of the events of 22nd October 2024, the Claimant's advocates attempted to depart from the reliefs that had originally been sought in the application. They now asked the court to set aside the actions by the Respondent in order to arrest the disciplinary process pending determination of the case.
44. The court cannot set aside the Respondent's decision of 22nd October 2024 to terminate the Claimant's employment without a formal request in that regard. Such order can only issue if the Claimant had reconfigured her pleadings and application through amendment. However, this was not done.
45. The Claimant has accused the Respondent of having acted in a rush in a bid to beat the pending court proceedings. This may well have been the case. However, absent evidence of breach of law, the court is not entitled to read much into the Respondent's actions.



46. The legal position is that disciplinary processes by an employer are distinct from the court process. As such, the fact that an employee has a pending case in court is not, of itself, a bar to the employer processing a disciplinary case against him. As such, the decision by the Respondent to convene the impugned disciplinary session in respect of the Claimant's case whilst this case was pending in court was not, ipso facto, irregular.
47. The consequence of the foregoing is that the Claimant's prayers to: stop the Respondent from processing the disciplinary action against her; and to preserve her employment status were overtaken by events the moment the Respondent terminated her services on 22nd October 2024. As such and absent amendments to the Memorandum of Claim and application, the court cannot issue the orders sought as to do so will be to act in vain. It would be futile for the court to purport to stop a disciplinary process which has already happened. Similarly, it would be futile for the court to issue an order purporting to preserve a non-existent employment relation between the parties since the Claimant's employment contract was terminated on 22nd October 2024.
48. Had the Respondent not proceeded as it did, will the application have succeeded on the merits? This is what I propose to consider in this part of the decision.
49. The starting point in this respect is the truism that the employer enjoys the prerogative to manage the workplace. This function, which includes the power to manage the human resource element at the workplace, is not to be interfered with except for cogent reasons. Consequently, courts of law are required to exercise restraint whilst deciding whether to intervene in the exercise of this function by an employer as to do otherwise will be tantamount to usurping the employer's mandate to manage the workplace.
50. Alluding to this reality, the court in the case of *Ndinda v Ethics and Anti-Corruption Commission (Petition E209 of 2021)* [2022] KEELRC 4088 (KLR) (4 April 2022) (Ruling) expressed itself as follows:-
- "Courts have exercised restraint when called upon to intervene and stop disciplinary processes. In *MTM v KIE Limited and another* (2020) eKLR, the court ruled that courts will interfere with the internal disciplinary action only when the process is flawed and the interference will be to put on truck the disciplinary process but not do away with it altogether. In *Kenya Airline Pilots Association v Kenya Airways PLC* [2021] eKLR the court held that courts cannot intervene in the employer's internal disciplinary proceedings until they have run their course, except in exceptional circumstances where grave injustice might result or where justice might not be by other means attained."
51. As such, for the court to intervene in a disciplinary process at the workplace, the employee must demonstrate, on prima facie basis that the employer is conducting the process in breach of the law, an internal rule or the agreement between the parties in a manner that is likely to occasion grave injustice to him (the employee). Has the Claimant met this threshold?
52. The Claimant contends that the Respondent instituted the impugned disciplinary process against her as a form of retaliation after she instituted the instant case against it (the Respondent). However, there is nothing on record to support this contention.
53. The reasons why the Respondent instituted the disciplinary case against the Claimant are discernible from the letter of show cause addressed to her dated 25th September 2024. According to the letter, the Respondent accused the Claimant of the following:-
- a. Absconding duty. She is said to have absconded duty since January 2020.



- b. Insubordination. She is accused of defying the Respondent's directive of 23rd September 2022 to resume duty.
 - c. Use of abusive language. She is accused of having addressed her workmates using disagreeable language on diverse dates including 5th July 2022, 6th July 2022, 9th February 2023, 22nd March 2024 and 23rd March 2024.
54. The notice to show cause does not fault the Claimant for instituting the instant proceedings. It does not suggest, as the Claimant contends, that the Respondent sought to punish her for instituting this case. As such, the contention by the Claimant in this respect is not supported by evidence.
55. The Claimant has also accused the Respondent of being vindictive against her by seeking to punish her for infractions which occurred in the year 2019 or thereabouts. However, the notice to show cause letter suggests otherwise. From the said letter, it is apparent that the Respondent is aggrieved by the Claimant's conduct spanning from 2020 to the date of the letter (25th September 2024).
56. From the record, the Respondent had, prima facie, actionable workplace grievances which it required the Claimant to address. As such and in the face of the aforesaid grievances, the court is unable, at this preliminary stage, to come to the conclusion that the Respondent's action was motivated by other factors.
57. The record shows that the Respondent having come to the conclusion that the Claimant had committed workplace infractions, issued her with a letter of show cause setting out details of the accusations. Further, it called upon her to offer her response to the accusations before it convened a disciplinary hearing for her case.
58. The foregoing does not suggest that the Respondent acted outside the law. All indicators suggest that what the Respondent did falls within the requirements of section 41 of the Employment Act in the sense that it informed the Claimant of the accusations against her and required her to respond to them.
59. All that was expected of the Claimant was to attend the process and offer her explanation. Indeed, the matters which she speaks to in her affidavit in support of the instant application ought to have been presented to the Disciplinary Committee as part of her defense to the accusations levelled against her.
60. Instead of submitting to the jurisdiction of the Disciplinary Panel, the Claimant initially informed the Respondent that because the matter was in court, the session ought to be adjourned on this account. However, the Respondent was under no obligation to adjourn the session solely on the ground that the matter had been escalated to court. As was mentioned earlier, workplace disciplinary proceedings are distinct from the court process. As such and absent an order stopping the proceedings, the employer is entitled to carry on with a disciplinary process notwithstanding that there is a pending court case relating to the matter.
61. Whether the Claimant was unwell on the day of the disciplinary proceedings and whether the Respondent ought to have adjourned the hearing on this ground is a contested matter of fact. Whilst the Claimant avers that she was unwell and therefore unable to attend the session, the Respondent contends that the medical records she shared with it indicated that she had been unwell but was attended to and discharged on 21st October 2024 and was therefore in a position but ignored to appear before the Disciplinary Committee on 22nd October 2024. The court can only resolve this contested fact through full trial. Therefore, it cannot rely on it to fault either of the parties at this preliminary stage in the proceedings.



Determination

62. The upshot is that the court finds that the Claimant has not demonstrated that the Respondent acted in breach of the law whilst instituting the impugned disciplinary process to warrant stoppage of the process.
63. Importantly, the disciplinary process having terminated on 22nd October 2024 through dismissal of the Claimant from employment, the application dated 4th October 2024 has been overtaken by events.
64. As such, the application is not merited and is declined.
65. Costs of the application to abide the outcome of the suit.

DATED, SIGNED AND DELIVERED ON THE 6TH DAY OF MARCH, 2025

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Applicant

.....for the Respondent

ORDER

In light of the directions issued on 12th 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

