



Abwao v Teachers Service Commission (Employment and Labour Relations Cause E018 of 2024) [2025] KEELRC 1162 (KLR) (4 April 2025) (Ruling)

Neutral citation: [2025] KEELRC 1162 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS CAUSE E018 OF 2024**

MA ONYANGO, J

APRIL 4, 2025

BETWEEN

ELISHA KIPLAGAT ABWAO CLAIMANT

AND

TEACHERS SERVICE COMMISSION RESPONDENT

RULING

1. The application before this court for determination is a Notice of Motion dated 21st May 2024 brought by the Claimant under Article 47 & 159 of the [Constitution of Kenya](#), sections 12(3)(vii) & (viii), 13 and 20 of the [Employment and Labour Relations Court Act](#), Rule 17 of the [Employment and Labour Relations \(Procedure\) Rules](#) 2016 and all enabling provisions of the law. The Claimant seeks for orders that: -
 - i. Spent
 - ii. Pending the hearing and determination of this application, an order be and is hereby issued directing the Respondent to immediately reinstate the Claimant on the terms and conditions of employment subsisting as of 23rd August 2023 or other terms and conditions this court may deem fit to grant.
 - iii. Pending hearing and determination of this Application, an order be and is hereby issued directing the Respondent to immediately reinstate the Claimant/Applicant's name in the register of teachers.
 - iv. Pending the hearing and determination of this Suit/Claim, an order be and is hereby issued directing the Respondent to immediately reinstate the Claimant/Applicant on the terms and conditions of employment subsisting as of 23rd August 2023 or other terms and conditions that this honourable court may deem fit to grant.



- v. Pending hearing and determination of this suit/Claim, an order be and is hereby issued directing the Respondent to immediately reinstate the Claimant/Applicant's name in the register of teachers.
 - vi. The Claimant/Applicant be at liberty to apply for such further or other Orders and/or Directions as this Honourable Court may deem fit and just to grant.
 - vii. The costs of this Application be provided for.
2. The application is premised on grounds set out at the foot of the application and is supported by an affidavit sworn by the Claimant on 21st May 2024. The grounds are that the Claimant was the Respondent's employee until the unfair and unlawful termination of his employment vide a letter dated 23rd August 2023; that the termination of the Claimant's employment by the Respondent was solely based on the unfounded and malicious allegation that he allegedly sodomised a pupil by the name R.M; that the Respondent neither carried out any investigations into the malicious and unfounded allegation nor accorded the Claimant an opportunity to be heard and present evidence to rebut the allegation; that the Respondent also ignored the finding by the Director of Public Prosecutions that there was no evidence to sustain a charge for the malicious allegation of sodomy; that the Respondent acted ultra vires in pronouncing the Claimant guilty of the alleged act of sodomy which is a preserve of a criminal court of competent jurisdiction and thus unfairly and unlawfully terminated the Claimant's employment; that the Claimant was dismissed from service and may not be able to secure employment elsewhere owing to the fact that the Respondent unlawfully and irregularly deregistered him from the register of teachers; that the Claimant has moved this court within the prescribed timeline as provided by section 12(3)(vii) of the *Employment and Labour Relations Court Act*, that the Claimant's circumstances are unique and exceptional warranting reinstatement owing to the nature of the Respondent as an employer across the country and no foreseeable friction between the Claimant and the Respondent thus no party will be prejudiced if the orders sought are granted. Lastly, that the Claimant is willing to comply with the directions of this court.
 3. The application was opposed by the Respondent vide the Grounds of Opposition dated 11th June 2024. The Respondent contends that the prayers set out in the application are final in nature capable of disposing of the entire claim before hearing thereby denying the Respondent the right to the due process of the law and the right to a fair hearing and equal protection of the law as enshrined in the *constitution*. It is also the Respondent's contention that the Claimant has come to court with unclean hands, is guilty of material non-closure and deliberate distortion of facts with the intention of misleading the court hence undeserving of any equitable remedies. The Respondent further contended that in discharging its statutory duty it is mandated to protect the interests of children and ensure their education is protected from persons who are out to take advantage of their tender age and vulnerability, thus the need to subject the Claimant to discipline process following allegations of immoral behavior with a learner.
 4. While urging that the application should not be allowed, the Respondent avers that the Claimant has failed to provide a cogent, rational and objective basis for the prayers set out in the motion. It is the Respondent's case that it stands to suffer prejudice and injustice in the event that the orders sought are granted.
 5. The application was canvassed by way of written submissions. In the Claimant's submissions dated 12th November 2024, the issues for determination were identified to be whether the Claimant has demonstrated exceptional circumstances for reinstatement into employment and whether he should be reinstated to employment and register of teachers pending hearing and determination of the suit.



6. On the first issue, the Claimant submitted that he has established a *prima facie* case as the Respondent while acting on the allegations made against the Claimant, assumed jurisdiction of a criminal court and adjudicated the Claimant guilty without the benefit of a hearing contrary to the decision in the case of *Douglas Murithi Mogiri v Teachers Service Commission* [2016] eKLR. It is the Claimant's contention that he was not charged with any criminal offence. That after police investigations, it was found that there was no evidence linking him to the offence.
7. In addition to the averment that he had established a prima facie case, the Claimant asserted that since the Respondent has already dismissed and deregistered him from the register of teachers, he has no chances of employment.
8. On the second issue whether the Claimant should be reinstated to employment and register of teachers pending hearing and determination of the suit, the Claimant contended that in employment matters, an order for reinstatement in the interim is not strange and courts have held that the same can be granted in special circumstances such as the Claimant's case.
9. In concluding, the Claimant submitted that he has satisfied all the conditions for a party seeking a reinstatement order and urged the court to grant him the prayers he sought in his application.
10. The Respondent filed its submissions dated 2nd December 2024 in which it contended that the orders sought by the Applicant are final and capable of disposing off the entire claim at the interlocutory stage. The Respondent submitted that an order of reinstatement is only available where the termination of the employee has been shown to be unfair and unlawful. According to the Respondent, an order for reinstatement at interlocutory stage will deny it the opportunity to demonstrate that the termination was fair and lawful as contemplated by section 45(2) of the *Employment Act* and actualized by Rule 17(10) of the *Employment and Labour Relations Court (Procedure) Rules*.
11. The Court was referred to the cases of *Abmed Aden Hire v Natif Jama and County Government of Garissa* Petition No. 121 of 2016 cited in *Anthony Omari Ongera v Teachers Service Commission* [2017] KEELRC 1251 (KLR), *Keter v Family Bank Limited* (Cause E009 of 2022) [2022] LEELRC 12844(KLR), *Gatebi v Savanna Brands Company Ltd* (Cause E650 of 2022) [2023] KEELRC 600(KLR) and *Dolly Nyambura Mwangi v Faulu Micro Finance Bank Limited* (Cause 581 of 2019) [2020] EELRC 253 (KLR)
12. The Respondent prayed that the Claimant's application be struck out.

Determination

13. Having considered the application and grounds in support thereof, the replying affidavit and the rival submissions by the parties, the issues for determination are whether the orders sought by the Claimant can be granted at this interim stage and whether the same should be granted as prayed.
14. In support of his prayer for reinstatement, the Claimant contends that he was unlawfully and unfairly terminated from employment based on unfounded and malicious allegations. He avers that the said allegations were not investigated prior to the termination of his employment and subsequent deregistration from Register of teachers.
15. Section 49(3) of the *Employment Act* provides for reinstatement as follows:
 - (3) Where in the opinion of a labour officer an employee's summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to—



- (a) reinstate the employee and treat the employee in all respects as if the employee's employment had not been terminated; or
 - (b) ...
- 16. Further, section 12(3) of the *Employment and Labour Relations Court Act* provides as follows:
 - (3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—
 - (i) interim preservation orders including injunctions in cases of urgency;
 - (ii) a prohibitory order;
 - (iii) an order for specific performance;
 - (iv) a declaratory order;
 - (v) an award of compensation in any circumstances contemplated under this Act or any written law;
 - (vi) an award of damages in any circumstances contemplated under this Act or any written law;
 - (vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or
 - (viii) any other appropriate relief as the Court may deem fit to grant.
- 17. The averments by the Claimant to the effect that the termination of his employment was unfair or unlawful is a matter for determination after hearing evidence of the parties. The court cannot at this stage determine whether or not the termination was unfair. The law is explicit that it is only upon determining that termination was unfair that the court can order reinstatement.
- 18. Further, reinstatement is not automatic upon a finding that the termination of employment is unfair. The court must further consider all the factors in section 49(4) of the *Act* and must specifically find that there are exceptional circumstances justifying the grant of the prayer of reinstatement.
- 19. This court in the case of *Duke Oriku Machini v Regis School Runda & another* [2022] eKLR held as follows:
 - “20. In cases of termination of employment, reinstatement is not an automatic remedy. Section 49(4) of the *Employment Act* sets out considerations to be taken into account by the Court before ordering reinstatement.
 - 21. For the Court to established the likelihood of the Claimant being reinstated he must demonstrate that he is entitled to reinstatement under Section 49(4). This can however only be done at the hearing. It is not possible to determine the same at this stage.”
- 20. The prayer for reinstatement of the Claimant to the Register of Teachers would likewise be premature before hearing the evidence of the parties as to the circumstances upon which the Claimant was deregistered.



21. Consequently, the prayers sought by the Claimant cannot issue at this interlocutory stage because the court is not properly seized of the material evidence to enable it make a determination as to whether or not the Claimant is entitled to an order of reinstatement.
22. The application dated 21st May 2024 is accordingly dismissed with no order as to costs.
23. It is so ordered.

DATED, DELIVERED AND SIGNED AT ELDORET THIS 4TH DAY OF APRIL, 2025.

M. A. ONYANGO

JUDGE

