



Mnjaru v Chai Savings and Credit Co-operative Society Ltd (Cause E887 of 2023) [2024] KEELRC 420 (KLR) (29 February 2024) (Ruling)

Neutral citation: [2024] KEELRC 420 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E887 OF 2023
L NDOLO, J
FEBRUARY 29, 2024**

BETWEEN

DOMINIC MNJARU CLAIMANT

AND

**CHAI SAVINGS AND CREDIT CO-OPERATIVE SOCIETY
LTD RESPONDENT**

RULING

1. By his Notice of Motion dated 31st October 2023, the Claimant seeks a conservatory order prohibiting the Respondent from replacing him as the Database and Systems Manager of the Respondent Society.
2. The Claimant further asks that he be reinstated to his position as Database and Systems Manager.
3. The Motion is supported by the Claimant's own affidavit and is based on the following grounds:
 - a. That the termination of the Claimant's services is unfair as the Respondent did not comply with the laid down procedure on suspension and investigation timelines as per the Respondent's Hr Policy;
 - b. That from a look at the further insubordination letter dated 2nd August 2023 deemed as the investigation report/outcome of the show cause letter dated 31st May 2023, it is clear that the grounds listed from 1-7 have mutated from the reason communicated as to why the Claimant was suspended on 31st May 2023;
 - c. That the grounds highlighted from 1-7 on the report of the investigations carried out by the Respondent contradict each other as grounds 1 and 2 speak of an attempt whereas ground 5 speaks of a successful installation with regards to grounds 1 and 2;



- d. That the investigations conducted were poorly done to the extent that the report contradicts the job description drawn by the Respondent with regard to the Claimant's position prior to termination;
 - e. That the Claimant, being alien to the multiple allegations captured in the investigation report, did a letter to the Respondent requesting for better particulars as to the source of the attempt allegations as the digital footprints of the attempt allegations are to be captured by the Respondent's ICT systems daily;
 - f. That no particulars were furnished to the Claimant, despite constant reminders before the disciplinary hearing;
 - g. That so gross is the violation of the Claimant's right to fair labour practices that damages would not be an adequate remedy and an order for specific performance is merited;
 - h. That the action for reinstatement and specific performance would be rendered nugatory unless conservatory orders are made;
 - i. That the balance of convenience is for a conservatory order restoring the status quo ante 5th September 2023;
 - j. That the application has been brought expeditiously and without undue delay.
4. The Respondent opposes the Motion by a replying affidavit sworn by its Human Resource and Administration Manager, Evans Omweri on 24th November 2023.
 5. Omweri depones that on 26th May 2023, the Respondent experienced a system downtime, which paralysed operations at the Head Office and Branches. He adds that upon investigation, it was discovered that the shutdown of the core banking system was occasioned by the Claimant without following the requisite protocols.
 6. The Claimant is accused of communicating directly with Microsoft Dynamics Africa on 30th May 2023 regarding licenses and other issues touching on the Respondent's business, without authority or approval of the Chief Executive Officer, as required under the Respondent's ICT Procedure Manual.
 7. The Claimant was issued with a show cause letter dated 31st May 2023 to which he responded on 1st June 2023. The Claimant was subsequently suspended from duty by letter dated 5th June 2023.
 8. The Claimant is further accused of attempting to hack the Respondent's system with malicious intentions. He was issued with a second show cause letter dated 2nd August 2023 on this issue. The Claimant responded by his letter dated 3rd August 2023.
 9. On 28th August 2023, the Claimant was invited to a disciplinary hearing scheduled for 4th September 2023, which he duly attended in the company of two witnesses, Brian Tarus and Geoffrey Mugunyi. The Claimant was subsequently issued with a termination letter dated 5th September 2023.
 10. The Claimant is said to have appealed the termination by his letter dated 15th September 2023, upon which he was invited to an appeal hearing scheduled for 6th October 2023 but re-scheduled to 11th October 2023. The Appeals Committee upheld the termination and the Claimant was duly notified.
 11. According to the Respondent, the Claimant has not met the threshold for grant of the orders sought.
 12. By his Motion, the Claimant seeks a prohibitive and a mandatory injunction against the Respondent, pending final determination of his claim.



13. The conditions under which such orders may be granted were established in *Giella v Cassman Brown Co. Ltd* [1973] EA 358 as follows:
 - a. That the applicant has established a prima facie case with a probability of success;
 - b. That if the orders sought are not granted, the applicant stands to suffer irreparable harm, which cannot be compensated by an award of damages; and
 - c. If the court is in doubt, it will determine the application on the balance of convenience.
14. First, the Claimant seeks to bar the Respondent from filling the position of Database and Systems Manager, previously held by him. The primary question to ask in this regard is whether the Claimant has laid out a prima facie case.
15. A prima facie case was defined by the Court of Appeal in *Mrao v First American Bank Kenya Limited & 2 others* [2003] KLR, 123 in the following terms:

“A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
16. The crux of the dispute between the Claimant and the Respondent is whether the termination of the Claimant’s employment was justifiable and fair. Looking at the pleadings filed by the parties, this is a highly contested matter which can only be determined at full trial. That said, it is difficult, if not impossible, at this interlocutory stage to determine which party is right or wrong. For this reason, I find and hold that the Claimant has not established a prima facie case.
17. As to whether the Claimant will suffer irreparable harm that cannot be redressed by an award of damages, the Respondent referred the Court to the decision in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR where it was held:

“...the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot adequately be compensated by an award of damages. An injury is irreparable where there is no standard by which the amount can be measured with reasonable accuracy or the injury or harm is of such a nature that monetary compensation, of whatever amount will never be adequate remedy.”
18. In its decision in *Olive Ann Wabura Thiong’o v World Wide Fund for Nature-Regional Office for Africa* [2016] eKLR this Court stated thus:

“...in determining where the balance of convenience lies, the Court must consider the effect of stopping the Respondent from filling the positions of Communications Manager which have been declared in the current staff establishment. In *Wilson K.C Shollei v Independent and Boundaries Commission* [2014] eKLR Onyango J held that stopping the recruitment of the Petitioner would be to interfere with the discharge of the mandate of the IEBC. I think an order barring an employer from carrying out a management mandate such as recruitment should be given after much reflection and with circumspection.”



19. The Court notes that the Claimant filed his application close to two months after the termination date. Enterprises run by employers are deemed to be going concerns that do not grind to a halt because an employee has left. While jobs are to be protected at all costs, no employee can claim a proprietary right over a position.
20. In the circumstances of this case, it would be unreasonable to expect the Respondent to keep the key position of Database and Systems Manager vacant during the entire period of the pendency of this claim.
21. Regarding the prayer for reinstatement, the only thing to say is that this is a substantive remedy that can only be granted after full hearing of the dispute. This position has been affirmed in many court decisions.
22. In *Kenya Tea Growers Association & another v Kenya Plantation & Agricultural Workers Union* [2018] eKLR the Court of Appeal affirmed the decision in *Alfred Nyungu Kimungui v Bomas of Kenya* [2013] eKLR where Rika J held as follows:

“Ordinarily, reinstatement of an employee is a substantive remedy, not a temporary relief. The law does not contemplate that reinstatement issues as a provisional measure. It is a primary remedy that should normally be granted upon the full hearing of the employer and the employee.”
23. In *Jael Achieng Onyango v Housing Finance Development & Investment* [2021] eKLR the Court stated as follows:

“The jurisdiction to order reinstatement of an employee is donated by Section 49(3)(a) of the *Employment Act* and Section 12(3)(vii) of the *Employment and Labour Relations Court Act*. The emerging jurisprudence from this Court and the Court of Appeal is that, before the Court can order reinstatement, it must be guided by the provisions of Section 49(4) of the *Employment Act*. In the case of *Kenya Airways Limited v Aviation Workers Union Kenya & 3 others* [2014] eKLR the Court of Appeal held that the relevant factors to be taken into account when considering reinstatement are provided under Section 49(4) of *the Act*...The said factors...can only be properly brought out by evidence during the hearing of the main suit and not at the interlocutory stage.”
24. The only thing that remains to be said is that by his application, the Claimant seeks to determine his entire claim at the interlocutory stage, which is a measure to be taken only in exceptional circumstances which have not been established in this case.
25. In the end, the Claimant’s application dated 31st October 2023 is declined with costs in the cause.
26. It is so ordered.

DELIVERED VIRTUALLY AT NAIROBI THIS 29TH DAY OF FEBRUARY 2024

LINNET NDOLO

JUDGE

Appearance

Mr. Owala for the Claimant

***Mr. Wafula for the Respondent**

