



**Mutira v Institute of Certified Public Accountants of Kenya (ICPAK) (Employment and Labour Relations Cause E310 of 2023) [2024] KEELRC 408 (KLR) (28 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 408 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**EMPLOYMENT AND LABOUR RELATIONS CAUSE E310 OF 2023**  
**BOM MANANI, J**  
**FEBRUARY 28, 2024**

**BETWEEN**

**JANET KAARI MUTIRA ..... CLAIMANT**

**AND**

**INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS OF KENYA  
(ICPAK) ..... RESPONDENT**

**RULING**

**Background**

1. On 22<sup>nd</sup> January 2020, the Respondent advertised for the position of Assistant Manager, Human Resource and Administration. From the preliminary evidence on record, the Claimant applied and was interviewed for the position.
2. On 28<sup>th</sup> November 2022, the Respondent appointed the Claimant to the position of Manager Human Resource and Administration. The preliminary evidence on record shows that the Claimant signed the letter of appointment on 30<sup>th</sup> November 2022 signifying her acceptance of the position. Her signature was witnessed by one Clare Asiko Abuodha, the Respondent's legal officer.
3. From the aforesaid letter, the Claimant indicated that she was to report on duty as from 13<sup>th</sup> December 2022. There is no suggestion that she did not. As a matter of fact, there is preliminary evidence which suggests that she was put on the Respondent's payroll for the position of Manager Human Resource and Administration and drew a salary. This fact is self-evident from the annexure marked JKMS on the Claimant's affidavit dated 14<sup>th</sup> April 2023.
4. On 9<sup>th</sup> February 2023, the Respondent wrote to the Claimant terminating her aforesaid appointment. Apart from indicating that it (the Respondent) had invoked clause 10 in the contract of service which allowed the parties to terminate the contract by giving two months' notice, the Respondent did not give the reason for its decision.



5. Importantly, the letter of termination suggests that the Claimant had already occupied the position of Manager Human Resource and Administration before the Respondent terminated the contract. This is self-evident from the content of paragraphs 3 and 4 of the letter which asked the Claimant to do a handover. It will be an absurdity to require an individual to hand over an office which he/she has not assumed.
6. Aggrieved by this turn of events, the Claimant filed the instant suit to challenge the Respondent's decision. Accompanying the suit is the application dated 14<sup>th</sup> April 2023 which seeks *inter alia*, the following orders:-
  - a. An order to restrain and or prohibit the Respondent together with its agents and servants from advertising, recruiting, interviewing or otherwise taking steps to replace the Claimant as the Respondent's Manager Human Resource and Administration pending trial and determination of the case.
  - b. An order to restrain and or prohibit the Respondent together with its agents and servants from interfering with the Claimant's contract of employment pending the hearing and determination of the case.
  - c. An order reinstating the Claimant to the position of Manager Human Resource and Administration without loss of benefits pending disposal of the case.
  - d. Costs of the case.
7. On 26<sup>th</sup> April 2023, the court issued the following orders in the matter:-
  - a. An order of injunction restraining the Respondent from advertising and or filling the substantive position of Manager Human Resource and Administration within its ranks pending hearing and determination of the application dated 14<sup>th</sup> April 2023 inter-partes.
  - b. An order allowing the Respondent to make appointment to the position in acting capacity in order not to paralyze its operations on condition that whoever was so appointed would be able to vacate office should the court make an order reinstating the Claimant to the position after hearing and determination of the aforesaid application.
8. On 16<sup>th</sup> June 2023, the Respondent filed the application dated 6<sup>th</sup> June 2023 asking the court to vary and or set aside the orders that were issued on 26<sup>th</sup> April 2023. The basis of the latter application is that the orders of 26<sup>th</sup> April 2023 are incapable of implementation as there is a substantive holder of the impugned position.
9. The court directed that the two applications be heard concurrently. It was further directed that the applications be heard by way of written submissions.

### **Analysis**

10. There is no doubt that the Respondent advertised the position of Assistant Manager Human Resource and Administration. The parties are in agreement that the Claimant applied for and was interviewed for this position.
11. There is no dispute that on 28<sup>th</sup> November 2022, the Respondent offered the Claimant and the Claimant accepted the position of Manager Human Resource and Administration. This is despite the Claimant having been interviewed for a different position. The preliminary evidence demonstrates that



- the Claimant signed the letter of appointment on 30<sup>th</sup> November 2022 and committed to report on duty as from 13<sup>th</sup> December 2022.
12. As indicated earlier, there is no suggestion that the Claimant did not report on duty as proposed. On the contrary, there is evidence that she was remunerated in January 2023, an indication that she did report to work.
  13. On 9<sup>th</sup> February 2023, the Respondent terminated the aforesaid engagement between the parties. As indicated earlier, apart from invoking the termination clause in the contract of service, the Respondent did not disclose the reason for its decision. It is only after the Claimant moved to court to challenge the decision that the Respondent disclosed that the contract was terminated because the Claimant had been appointed into a position that already had a substantive holder.
  14. In an effort to justify the above averment, the Respondent has placed before the court email correspondence emanating from one Edith Owino and her LinkedIn profile describing her as “Head of Human Resource and Administration, ICPAK”. However, it is noteworthy that the contract of engagement between the said Edith Owino and the Respondent has not been tendered in evidence. Further, it is noteworthy that there is no affidavit evidence by the said Edith Owino to verify the Respondent’s assertions.
  15. Importantly, the Claimant filed an affidavit dated 30<sup>th</sup> June 2023 in response to the Respondent’s motion in which she states that the position she was appointed to (Manager, Human Resource and Administration) is different from the position held by Edith Owino (Head of Human Resource and Administration). The Claimant states that the Manager, Human Resource and Administration reports to the Head of Human Resource and Administration. This evidence has not been controverted by further affidavit evidence by the Respondent.
  16. It is curious for the Respondent to argue that the position that the Claimant was employed into was already occupied without accounting for where the Claimant worked from the date of her appointment to the date of termination of her contract. Is it that there were two office holders for the same position executing the same duties concurrently for that period? Is it that the two individuals were separately remunerated for executing the same tasks during the period that the Claimant remained in office?
  17. It is also curious that the Respondent hired the Claimant into an office that already had a substantive holder without its officers flagging the purported anomaly. For instance, how did the Respondent’s legal officer end up witnessing the execution of a letter that appointed the Claimant into a position which allegedly already had a substantive holder?
  18. The above state of affairs casts aspersions on the position that the Respondent has taken in the dispute. The court is unable to accept the Respondent’s position without an in-depth inquiry into the dispute.
  19. For the above reasons, I decline to allow the application by the Respondent. Accordingly, I dismiss it (the application) with costs to the Claimant.
  20. As regards the application dated 14<sup>th</sup> April 2023, it is clear that the parties entered into an employment relation on 28<sup>th</sup> November 2022. As a matter of fact, the Respondent affirms that the contract between the parties became binding once the Claimant signed the letter of appointment. This affirmation is self-evident in paragraph 10 of the Respondent’s affidavit dated 6<sup>th</sup> June 2023 and paragraph 7 of the statement of defense.
  21. Having entered into the employment contract, the parties could only terminate it in accordance with the applicable law. The Respondent argues that it terminated the contract in accordance with clause



- 10 of the letter of appointment which entitled either party to terminate the contract by issuance of a two months' notice to terminate during the probationary period. The Respondent argues that the parties are bound by this clause and the Claimant cannot therefore challenge the impugned decision.
22. On the other hand, the Claimant states that the contract could only be terminated in accordance with the provisions of section 41 of the Employment Act. This provision requires the employer to provide reasons for terminating a contract of service. Further, it (the provision) obligates the employer to terminate the contract in accordance with due process.
23. Although section 42 (1) of the Employment Act suggests that a contract of service can be terminated without compliance with section 41 of the Act, it is noteworthy that this provision was found to be contrary to the Constitution in the case of Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party) [2021] eKLR. Therefore, it is no longer open to employers to terminate probationary contracts without providing reasons for their decision and without subjecting the affected employees to the disciplinary process that is contemplated under section 41 of the Act.
24. A cursory look at the letter of termination that was issued to the Claimant suggests that the Respondent did not state the reason for its decision to terminate the contract between the parties. Further, the preliminary record before court does not suggest that the Claimant was subjected to a disciplinary hearing as required under section 41 of the Employment Act. In the premises, it is evident that the Claimant has a *prima facie* case against the Respondent.
25. I am alive to the principle in the case of Giella v Cassman Brown that for an applicant for injunctive orders to be granted the orders, he ought to demonstrate that damages will not be adequate to compensate him should he succeed in the cause. Nevertheless, I agree with the expression in Olympic Sports House Limited v School Equipment Centre Limited [2012] eKLR that damages cannot be a substitute for the loss which is occasioned by a clear breach of the law.
26. The law keeps evolving. In my humble view, it is not possible that principles that were developed many years back should not evolve to serve emerging social needs.
27. In employment matters for instance, it is very easy for the employer to argue that whatever grievance that an employee has, it can be quantified and compensated in damages. Therefore, courts should refrain from issuing injunctions in such disputes.
28. If the court were to accept this as the standard practice, remedies such as reinstatement will never have practical meaning. All that the employer will do in order to avoid the remedy is to fill the position under the guise that should the employee succeed at some future date, he will be compensated in damages. As a result, such remedies will be rendered paper remedies. They will be worthless.
29. In a scenario where an employee has sought reinstatement and he has a *prima facie* case, the court should be able to preserve the position pending determination of the dispute if requested to do so irrespective of whether the employee can be compensated by an award of damages. Only then will this remedy have meaning.
30. In the premises and having regard to the circumstances of this case, I am minded to preserve the disputed position pending determination of the dispute.

## Determination

31. In the result, I make the following orders:-
- a. The application by the Respondent dated 6<sup>th</sup> June 2023 is devoid of merit.



- b. Accordingly, it is dismissed with costs to the Claimant.
- c. The application by the Claimant dated 14<sup>th</sup> April 2023 is allowed in the following terms:-
  - i. An order of injunction is hereby issued restraining the Respondent, its agents, servants and employees from advertising and or filling the substantive position of Manager, Human Resource and Administration within its rank and file pending the hearing and determination of this action.
  - ii. In order not to paralyze the operations of the Respondent during the pendency of this cause, the court allows it (the Respondent) to make an appointment to the said position in acting capacity, if it so desires, subject to the understanding that whoever is so appointed shall be able to vacate office should the court make a final determination reinstating the Claimant back into employment.
  - iii. The court declines to make an order reinstating the Claimant into the impugned position before this cause is heard and determined on the merits.
  - iv. Costs of the application are granted to the Claimant.

**DATED, SIGNED AND DELIVERED ON THE 28<sup>TH</sup> DAY OF FEBRUARY, 2024**

**B. O. M. MANANI**

**JUDGE**

In the presence of:

.....for the Claimant

.....for the Respondent

**ORDER**

In light of the directions issued on 12<sup>th</sup> 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**

**JUDGE**

