Ndalo v Consolidated Bank of Kenya Limited (Employment and Labour Relations Cause E292 of 2024) [2024] KEELRC 2221 (KLR) (19 September 2024) (Ruling)

Neutral citation: [2024] KEELRC 2221 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS CAUSE E292 OF 2024

BOM MANANI, J

SEPTEMBER 19, 2024

BETWEEN

TOM NDALO ..... CLAIMANT

AND

CONSOLIDATED BANK OF KENYA LIMITED ..... RESPONDENT

RULING

Background

1. The parties to this action had an employment relation from 1st August 2023 until 5th April 2024 when it was terminated due to alleged poor performance by the Claimant. The Claimant contends that the contract establishing the relation contained a probationary term of six months running from 1st August 2023 to 1st February 2024. He contends that the Respondent terminated the contract in April 2024, approximately two months after the probationary period had lapsed.

2. The Claimant's case is that since the probationary term in the contract had lapsed at the time that the Respondent terminated it (the contract), the latter was required to uphold the requirements of section 41 of the *Employment Act* when making the impugned decision. He contends that the Respondent could only have legitimately terminated the contract for valid cause and in accordance with fair procedure.

3. According to the Claimant, the Respondent did not have valid reason to terminate his services. He contests the Respondent's contention that he had failed to meet its performance threshold. According to him, he scored 52.95% during the evaluation of his performance which was above the Respondent's threshold of 50%. As such, his contract ought to have been sustained.

4. At the same time, the Claimant contends that he was not invited for a hearing before the contract was terminated. It is his case that the failure to accord him a hearing contravened section 41 of the

Employment Act and violated his right to fair administrative action which is protected under article 47 of *the Constitution*.

5. On the other hand, the Respondent contends that the Claimant did not meet its performance threshold to enable it confirm his contract. As such, his services were lawfully terminated.

6. The Respondent avers that the Claimant's probationary term spread across two financial years (2023 and 2024). Consequently, it was agreed that evaluation of his performance be split into two portions: one part to cover the probationary period that fell in 2023 and the other to cover the probation term which fell in 2024.

7. The Respondent contends that the Claimant's performance assessment for 2023 covered a period of four and a half (4.5) months. According to it, the Claimant scored 42.9 % during this period.

8. The Respondent further contends that the Claimant's performance evaluation for 2024 covered a period of one and a half (1.5) months. It contends that he was assessed at 63% for this duration.

9. According to the Respondent, because the Claimant's performance assessment strutted over two financial years, it became necessary to work out his average score over this duration in order to determine his true score. It contends that the Claimant's average score after undertaking the exercise was 47.9% which was below its threshold of 50%. Hence the decision not to confirm his contract.

The Application

10. Contemporaneous with the Statement of Claim, the Claimant filed the application dated 19th April 2024. In the motion, he prays for various orders including:-

    a. An order that the application is urgent.

    b. An order suspending the Respondent's letter of 5th April 2024 terminating his employment pending the hearing of the application inter-partes and thereafter the suit.

    c. An order reinstating him into employment pending inter-partes hearing of the application and thereafter the suit.

    d. An order restraining the Respondent from advertising, accepting applications or recruiting in a bid to fill the disputed position pending inter-partes hearing of the application and thereafter the suit.

    e. An order for costs of the application.

11. The application is supported by an affidavit and further affidavit both sworn by the Claimant. In the affidavits, the Claimant reiterates what has been alluded to earlier in this ruling.

12. The application is opposed by the Respondent. The Respondent relies on an elaborate replying affidavit sworn by its Acting Company Secretary and Head of Legal Department which essentially reiterates what has been mentioned earlier in this ruling.

Analysis

13. At this stage of the litigation, the court is not required or expected to make any definitive findings on what should be the subject of the main trial. I will bear this in mind as I determine the application.

14. The application is expressed to have been filed pursuant to the provisions of *the Constitution*, the *Employment and Labour Relations Court Act* and the rules thereunder. It is to be noted that the motion

does not suggest that it is premised on the provisions of the *Civil Procedure Act* and Civil Procedure Rules which anchor applications for interim injunction.

15. It is for this reason that the Claimant's counsel argues in his submissions that the motion is not one for injunctive orders. Rather, it is for conservatory orders. As such, counsel contends that the requirements for grant of orders of interim injunction are not strictly apply to it.

16. Article 23 of *the Constitution* empowers the court to grant a number of reliefs in proceedings where violation of a right is alleged. These include the grant of conservatory orders.

17. A conservatory order refers to a decision which is arrived at by a Court of law in order to maintain status quo or current status of affairs to ensure that circumstances in a dispute before it do not change while the matter is pending until the final judgement is delivered. This may be an order restraining or compelling the doing of certain acts or preserving a certain state of things pending the final decision in a dispute. The Supreme Court considered the nature of these orders in the case of Peter Munya v Dickson Mwenda Kithinji & 2 others (2014) eKLR.

18. Under the country's retired constitutional dispensation, employment disputes were considered as purely private law disputes. However, there is a sense in which these disputes no longer lie exclusively in this realm.

19. With the promulgation of *the Constitution* of Kenya 2010, the right to fair labour practice was granted a constitutional pedestal. As a result, employment relations have since acquired a quasi-public face. Consequently, they now benefit from protections that are anchored both in private and public law.

20. It is in this context that I hold the view that parties to an employment dispute can, where appropriate, seek constitutional remedies to their dispute including conservatory orders. This is particularly where the grievance raises allegations about violation of a constitutional right.

21. The court takes judicial notice of the fact that the Respondent is a State Corporation that is substantially owned by the national Government with the National Treasury holding more than 85% shares in it. Therefore and for all purposes and intents, it is a public agency against which a conservatory order can issue.

22. The basis for the dispute between the parties is not difficult to discern. It is: whether the Respondent had valid ground to terminate the Claimant's employment; and whether the decision to terminate the contract was rendered in accordance with the procedure which the law prescribes.

23. I do not propose to answer these questions definitively. All that I will do at this stage is to examine the record in a bid to determine whether there is preliminary evidence that suggests the presence or otherwise of these ingredients.

24. It is not in dispute that the contract between the parties provided for a probationary term of six months. It is also not in dispute that the said contract incorporated provisions of the Respondent's Human Resource Manual (see clause 10 thereof).

25. Whilst clause three of the contract does not speak to the extension of the probationary term beyond six months, clause 3.11 of the Human Resource Manual allowed such extension. However, such extension could only be done in writing with the reasons informing the decision clearly stated in the write up.

26. Clause 7 of the Human Resource Manual addresses the issue of performance of employees. Clause 7.2 of the instrument requires that:-

    a. Performance expectations be clear.

b. Performance expectations be specific, measurable and achievable.

27. In an employment relation, the employer has the duty to communicate to the employee his performance targets and the tools and methodology for measuring whether or not they have been met in a manner that is clear and incapable of varied interpretations. In this way, the parties to the contract will avoid controversy regarding whether the employer's expectations have been met.

28. In the instant case, the parties appear to be in agreement that the Claimant was to score at least 50% during evaluation of his performance in order to meet the threshold for confirmation of his contract as set by the Respondent. However, they disagree on the methodology that was to be deployed in determining the threshold.

29. As a result, the Claimant believes that he met the threshold by attaining 52.95% of the expected results. On the other hand, the Respondent believes that the Claimant's performance fell below the set threshold after he attained 47.9% of the expected outcome. It is apparent that the parties have applied different methods to arrive at their respective conclusions.

30. The foregoing points to the fact that the parties did not attain consensus ad idem on the method that was to be applied to measure the Claimant's output. And hence the dispute.

31. As such, the Claimant's contention that his contract was irregularly terminated despite having surpassed the performance threshold that had been set by the Respondent raises a legitimate issue which this court ought to interrogate and resolve. In the face of the apparent disagreement between the parties on the method that was to be deployed to determine the score by the Claimant, it will be improper at this preliminary stage for the court to hold that the method adopted by the Respondent was the legitimate one or that it is the one which the parties had indeed agreed on. As a result, I am satisfied that the Claimant has raised a matter which points to the possibility of the Respondent having violated his employment rights by depriving him of his legitimate expectation that his contract would be confirmed as opposed to being terminated having purportedly attained a performance score of more than 50%.

32. It is important to point out that neither the contract between the parties nor the Human Resource instrument which they both invoke in support of their respective cases provides for the grading mechanism which the Respondent adopted to navigate the lacuna which arose as a result of the Claimant's performance review period falling across two financial years. As such, the question whether the parties should have agreed on the method of assessing the Claimant's performance across these two seasons becomes relevant.

33. The other issue which the Claimant raises relates to whether at the time of the impugned evaluation, he was still on probation or whether his contract had been confirmed. The preliminary record shows that the evaluation was done after 1st February 2024. Having regard to the fact that the contract between the parties commenced on 1st August 2023, the six months' probation period technically lapsed on 1st February 2024.

34. The issue which arises is whether the evaluation which was undertaken after 1st February 2024 can be considered to have been done within the probation period in the absence of written evidence demonstrating that the period was extended. The answer to this question may impact on the legitimacy of the Respondent's decision to terminate the contract of service between the parties in the manner that it did.

35. Importantly, the Claimant avers that the Respondent did not accord him a hearing in terms of section 41 of the *Employment Act* prior to terminating his contract. The preliminary material on record does

not suggest that the Respondent convened a hearing for the Claimant's case as contemplated under the aforesaid provision of law. As such, the court has to interrogate this issue during trial of the case.

36. In effect, the Claimant has presented material which point to the possibility of his employment rights having been violated. To my mind, this presents a prima facie case with a possibility of success.

37. A prima facie case is not one that must succeed at the full trial. Rather, it is one which raises a complaint that points to possible violation of a right which requires rebuttal by the opponent during the trial.

38. In Mrao Ltd. v. First American Bank of Kenya Ltd & 2 others [2003] KLR, the court expressed itself on the matter as follows:-

> " In civil cases, a prima facie case 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the appellant's case upon trial. That is clearly a standard, which is higher than an arguable case."

39. The Respondent contends that the Claimant has not demonstrated that he is likely to suffer irreparable loss if the orders sought are not granted. As a consequence, the court should decline to issue the orders which he seeks.

40. As indicated earlier, the instant application is not premised on Order 40 of the Civil Procedure Rules which deals with orders of interim injunction. Rather, it is premised on article 23 of *the Constitution* which provides for inter alia, the relief of conservatory orders.

41. As the Supreme Court observed in Peter Munya v Dickson Mwenda Kithinji & 2 others (2014) eKLR, an applicant seeking conservatory orders need not demonstrate that he will suffer irreparable damage if the orders are not granted. The court will ordinarily issue such orders if it is in the interests of justice to preserve the status quo pending resolution of a dispute.

42. I hold the view that in order to make sense of the remedy of reinstatement in employment disputes, the court should be in a position to issue orders to preserve the position which the employee has lost pending resolution of the case. Otherwise, this remedy will be rendered a paper remedy. As such, the court should not be quick to decline a request for conservatory orders merely because the employee can be compensated in damages if he succeeds in his claim.

43. In expressing this view, this court observed as follows in the case of 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):-

> ''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.
>
> 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.
>
> 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."

44. In the instant dispute, the Claimant has sought for reinstatement as the primary remedy. As demonstrated above, he has been able to present a prima facie case before the court. As such, the interest of justice demands that the position that he seeks to be reinstated to be preserved pending determination of the case. Otherwise, his plea for reinstatement will be valueless. Yet, the law provides this as one of the possible remedies to an aggrieved employee.

45. Finally, I am of the view that the balance of convenience tilts in favour of holding off attempts to fill the disputed position until the instant dispute is resolved. I hold this view because whilst the Respondent may not be able to hire a substantive holder of the office right away, it is free to fill the position in acting capacity until the cause is resolved. This will ensure that it (the Respondent) is not handicapped during the currency of this dispute.

46. On the other hand, by preserving the position pending resolution of the dispute, the Claimant's right to pursue the relief of reinstatement will not go up in flames. The relief will remain alive until the suit is determined.

Determination

47. Having regard to the foregoing, I am minded to issue the following orders in respect of the instant application:-

    a. The Claimant's prayer to suspend the Respondent's letter dated 5th April 2024 terminating his services and to reinstate him to the position of Chief Commercial Officer of the Respondent pending trial is declined.

    b. Nevertheless, a conservatory order is hereby issued restraining the Respondent, either by itself or through its agents, from advertising, accepting applications or filling the position of Chief Commercial Officer within its rank and file on substantive basis until this dispute is resolved through trial.

    c. In order not to cripple the Respondent's operations, it (the Respondent) is permitted to fill the impugned position in acting capacity pending resolution of the dispute. Such appointment to be amenable for revocation should the court direct so after full trial of the cause.

    d. Costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED ON THE 19TH DAY OF SEPTEMBER, 2024

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....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