



Dahiye v Kenya Accreditation Service & another (Employment and Labour Relations Cause E377 of 2024) [2024] KEELRC 2227 (KLR) (19 September 2024) (Ruling)

Neutral citation: [2024] KEELRC 2227 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E377 OF 2024
BOM MANANI, J
SEPTEMBER 19, 2024**

BETWEEN

ABDIHER MOHAMUD DAHIYE CLAIMANT

AND

KENYA ACCREDITATION SERVICE 1ST RESPONDENT

THE BOARD OF DIRECTORS KENYA ACCREDITATION SERVICE 2ND RESPONDENT

RULING

Background

1. The Claimant has instituted these proceedings to challenge the Respondents’ decision to send him on retirement at the age of 60 years. He contends that as a person living with disability, he is entitled to retire at the age of 65 years. As such, it is his view that the Respondents’ decision to send him on retirement at age 60 was unlawful.
2. Although the impugned decision was subsequently recalled after the Public Service Commission authorised extension of the Claimant’s retirement age to 65 years, he contends that the Respondents’ action prevented him from seeking appointment to the position of Principal Accreditation Officer Medical Laboratories which was due to be filled. He accuses the Respondents of having invoked the retirement clause in the 1st Respondent’s Human Resource Instrument in order to exclude him from the recruitment process for the position. As such, he contends that the Respondents’ action was discriminatory.
3. In the premises, the Claimant seeks the following orders: -
 - a. A declaration that the letter of retirement issued to him by the Respondents was illegal, unfair and constituted constructive discrimination against him as a person living with disability.



- b. An order requiring the Respondents to pay him the sum of Ksh. 2,924,609.60 as damages for discrimination.
 - c. An order of permanent injunction to restrain the Respondents from interfering with his employment contract.
 - d. Costs of the case.
4. Contemporaneous with the Memorandum of Claim, the Claimant filed an application dated 20th May 2024. In the application, he, inter alia, seeks an order that the Respondents pay him the sum of Ksh. 974,869.90 being his salary for the months of April 2023 to July 2023.
 5. The Claimant avers that the Respondents irregularly withheld the aforesaid amount from him as he sought to resolve the stalemate surrounding his retirement age. He argues that the Respondents unilaterally stopped paying him his salary when he hit 60 years in violation of the regulations by the Public Service Commission regarding the retirement age for persons living with disabilities. As such, he prays that the two be ordered to release the withheld amounts to him.
 6. The application is opposed by the Respondents. In the replying affidavit dated 24.6.2024, the Respondents contend that the Public Service Regulations which the Claimant relies on to push his case require persons living with disability who wish to retire at age 65 to register at least three (3) years before retirement age of 60 years. Contrary to this requirement, the Claimant applied for registration about two (2) years before he attained the mandatory retirement age of 60 years. As such, the Respondents could not retain him in employment past the mandatory retirement age without the approval of the Public Service Commission.
 7. The Respondents argue that the Claimant was notified of the need to internally appeal the decision to retire him at age 60 so that the matter could be pursued with the Public Service Commission. However, he failed to do so. Instead, he absconded duty as from April 2023.
 8. The Respondents contend that unknown to them, the Claimant discreetly approached the Public Service Commission to approve extension of his retirement to 65 years. They contend that the Claimant only emerged with the approval several months down the line forcing them to reinstate him. However, since he was not on duty between April 2023 when he allegedly absconded duty and August 2023 when he got the aforesaid approval from the Public Service Commission, he is not entitled to be remunerated for this period.
 9. Further, the Respondents argue that the question whether the impugned salary is payable is a substantive matter which requires full trial. As such, it cannot be the subject of an interlocutory application.

Analysis

10. I have considered the contrasting positions by the parties on the contested issue. In my view, whether the contested salary is payable to the Claimant cannot be the subject of an interlocutory application.
11. I take this view because the Respondents contend that the Claimant did not work during the period for which he claims salary. Further, they blame him for having failed to seek the approval of the Public Service Commission regarding his late registration as a person living with disability in order for him to continue working flawlessly beyond the mandatory retirement age of 60 years. Put differently, the Respondents' position is that the Claimant's actions precipitated the current state of affairs.



12. The objections by the Respondents cannot be ignored. They deserve consideration during full trial. As such, I cannot summarily grant the request for the impugned salary arrears at this interlocutory stage.
13. Importantly, although the Claimant is seeking the aforesaid sum through this interlocutory application, there is no mention of it in the Memorandum of Claim. In effect, the claim is not anchored on the pleadings filed by the Claimant. It is doubtful that the court has jurisdiction to grant interlocutory reliefs which are not founded on the main claim.

Determination

14. Having regard to the foregoing, I decline to grant the application dated 20th May 2024.
15. In view of the fact that the Claimant is a person living with disability, I am willing to hear his case on priority basis. As such, I direct the registry to allocate him a date for trial in January 2025 once the diary for 2025 is opened since the diary for 2024 is full.
16. Costs of the application shall abide the results of the main trial.

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

B. O. M. MANANI

JUDGE

In the presence of:

.....for the Claimant/Applicant

.....for the Respondents

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

