



**Kyalo v Kenya Water Institute & 2 others (Cause E510 of 2024)
[2024] KEELRC 2621 (KLR) (25 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2621 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E510 OF 2024
SC RUTTO, J
OCTOBER 25, 2024**

BETWEEN

FELIX NDIMU KYALO APPLICANT

AND

KENYA WATER INSTITUTE 1ST RESPONDENT

**THE CHAIRPERSON GOVERNING COUNCIL, KENYA WATER
INSTITUTE 2ND RESPONDENT**

THE DIRECTOR/CEO KENYA WATER INSTITUTE 3RD RESPONDENT

RULING

1. What comes up for determination is the Claimant/Applicant's Notice of Motion Application 5th July 2024 seeking the following orders;
 1. Spent.
 2. Spent.
 3. Spent.
 4. That pending the hearing and determination of this Claim, the Respondents either by itself, its directors, its servants, agents and or employees be restrained from advertising, shortlisting, interviewing, recruiting or in any other way filling the position of Internal Auditor job scale KW6 in the 1st Respondent's Kitui Campus.
 5. That pending the hearing and determination of this Claim, this Honourable Court be pleased to issue a reinstatement order reinstating the Claimant as Internal Auditor job scale KW6 in the Respondent's Kitui Campus.
 6. That costs of this Application be borne by the Respondent.



2. The Application is premised on the grounds on the face thereof and the Supporting Affidavit of Felix Ndimu Kyalo the Claimant/Applicant herein. Briefly, Mr. Kyalo avers that: -
- a. On or around 27th February 2024 he received a letter from the 1st Respondent transferring him from the Nairobi Campus to Kitui Campus in the capacity of an Internal Auditor with immediate effect.
 - b. On 2nd March 2024, the 3rd Respondent blocked his official email address and the rights to access the Enterprise Resource Planning (ERP) and restricted access to all records hence blocking him from diligently performing his duties as per his employment contract. That he could not undertake his duties and he is reasonably apprehensive that this was a well-orchestrated scheme by the 3rd Respondent to constructively dismiss him.
 - c. In the process of him organizing and familiarizing himself with his new work station and given the short notice, he realized that he was not in a good financial position to enable him settle down.
 - d. He proceeded to request for thirty (30) days working leave from his accumulated forty (40) days working leave. He informed his supervisor and the Human Resource manager in the 1st Respondent Kitui campus of his wishes and they agreed in principle that he can proceed and request for his thirty (30) days working leave on the ERP system on the staff portal which he requested on the 13th of March, 2024.
 - e. The leave days commenced on 15th March 2024 to 25th April 2024 whereupon he returned to work on 26th April 2024 and proceeded with his normal duties.
 - f. Out of the blue, he was issued with a Show Cause letter dated 22nd April 2024 to which he responded vide his letter dated 26th April 2024 in which he duly addressed all the allegations leveled against him.
 - g. He was served with an interdiction letter dated 30th April 2024 which was marred with false allegations and further required him to cease working for the 1st Respondent pending investigations.
 - h. He attended the disciplinary hearing and responded to all the allegations made in totality with sufficient proof that they were false and misleading.
 - i. Despite defending the allegations leveled against him, the 3rd Respondent without the authority of the 2nd Respondent and in total bad faith illegally terminated his employment on the 11th June 2024.
 - j. As per Clause 22 of his appointment letter and Clause 15.3 of the 1st Respondent Human Resource Policy and Procedures Manual, the authority to terminate vests on the 2nd Respondent hence any attempt to terminate his services in the absence of the approval and recommendation of the 2nd Respondent is null and void.
 - k. As per the duties and responsibilities of the 3rd Respondent he is not mandated to terminate services of employees and can only implement the decisions of the 2nd Respondent.
 - l. The actions of the 3rd Respondent were baseless and contrary to the express provisions of the [Employment Act](#), 2007, his Employment Contract and the 1st Respondent's Human Resource guidelines and procedure manual.



- m. He stands to suffer irreparable loss and damage if the order of reinstatement is not issued as he is now unemployed and cannot meet his day-to-day expenses for him and his family.
3. In opposition to the Application, the Respondents filed a joint Replying Affidavit sworn on 23rd July 2024 by Brian Wanyonyi Wechabe, the 1st Respondent's Corporation Secretary. Mr. Wanyonyi avers that:
- a. The transfer of the Claimant to Kitui Campus was a normal part of staff re-organization. That at no point did the Claimant raise issues with the transfer.
 - b. Given the fact that the Claimant was being transferred to Kitui in a different position from the one he was holding at the Nairobi Campus, it was standard procedure to restrict access to the email address in the outgoing position.
 - c. There is no nexus between accessing staff email address and access to the ERP system. That access to the ERP system is for all staff members who have unique identifiers and credentials that are known to each staff member individually.
 - d. There is absolutely no record of the Claimant alleged request to his supervisor to be allowed seven (7) working days leave of absence to enable him relocate from Nairobi to Kitui. This is confirmed by the Principal, KEWI Kitui Campus vide an internal memo dated 18th April 2024 addressed to the 3rd Respondent.
 - e. The Claimant had not applied for his leave procedurally. Furthermore, the authenticity of a letter dated 6th February 2024 that the Claimant had presented was doubtful due to the fact that the then Principal of Kitui Campus was not at the Campus on those dates.
 - f. Subsequent to receipt of the Memo dated 18th April 2024, the 1st Respondent, through the 3rd Respondent issued a Notice to Show Cause letter to the Claimant.
 - g. The Claimant responded to the Notice to Show Cause through a letter dated 26th April 2024, essentially insisting that he had done nothing wrong.
 - h. The Claimant was interdicted through a letter dated 30th April 2024.
 - i. There was evidence that the Claimant approached one Mr. Amos Owino Odhiambo, from a company that was managing the 1st Respondent's ERP system to assist him illegally access it for purposes of unprocedurally approving his leave request in the guise of it being the Principal of Kitui Campus who was giving the approval. Mr. Odhiambo admitted to the same.
 - j. As part of the 1st Respondent following due process, they invited the Claimant for a disciplinary vide a letter dated 22nd May 2024.
 - k. Upon considering the representations by the Claimant and the confession by his then co-conspirator it was considered that his conduct was too grave to ignore, hence his dismissal from employment. The reasons for termination of employment were clearly set out in the termination letter.
 - l. The Claimant's conduct amounted to gross misconduct and essentially made his continued employment with the 1st Respondent untenable.
 - m. At all times, the 3rd Respondent was acting with the blessings of the 2nd Respondent. This was informed by a resolution arising from a Governing Council meeting held on 27th November 2023 which confirmed this.



- n. The 3rd Respondent duly updated the Governing Council in a meeting held on 6th June 2024 of the termination of the Claimant's employment.
 - o. It is the 3rd Respondent who signed the Claimant's appointment letter. It would therefore have been in order to have him sign the termination letter.
4. On 25th July 2024, the Court gave directions on filing of written submissions. At the time of writing this Ruling, the Respondent had not filed their written submissions as the same were missing from the Court's physical record and the online portal. As such, the Court only considered the Applicant's written submissions.

Analysis and Determination

5. The Court has considered the Application, the grounds in support thereof, the Respondent's Replying Affidavit as well as the Applicant's submissions and the following issues stand out for determination;
- a. Whether the Applicant should be reinstated to his former position in the interim pending hearing and determination of the main suit;
 - b. Whether the Respondents should be restrained from advertising, shortlisting, interviewing, recruiting or in any other way filling the position of Internal Auditor job scale KW6 in the 1st Respondent's Kitui Campus.

Whether the Applicant should be reinstated in the interim

6. The Applicant has asked this Court to reinstate him as Internal Auditor job scale KW6 in the 1st Respondent's Kitui Campus pending hearing and determination of the suit herein. Arguing in favour of his reinstatement in the interim, the Applicant has submitted that there exists exceptional circumstances in this case in that there was no valid reason for his termination from employment. The Applicant further submitted that his claim is highly likely to succeed based on the facts and evidence tendered before this Court.
7. At the outset, it is worth pointing out that the reinstatement order sought by the Applicant is in the form of a mandatory injunction as it compels the Respondents to perform a specific action.
8. The Court of Appeal, had the occasion to address the various types of injunctions in the case of *New Ocean Transport Limited & Another v Anwar Mohamed Bayusuf Limited* [2014] eKLR and had this to say: -

“We appreciate that an injunction is an order of the Court directing a party to the proceedings to do something or refrain from doing a specified act. It is granted in cases in which monetary compensation does afford an inadequate remedy to an injured party. See Halsbury's Laws of England 3rd edition, vol. 21 at pg. 343. Basically there are 2 types of injunctions; positive and negative. The positive injunction would direct a party to do something whereas a negative one will restrain such a person from doing something. Among the positive injunctions will be mandatory injunction. This injunction orders some act to be done. Part of this family is the restorative injunction being sought by the applicants in the instant application. This type of injunction requires the person against whom it is directed to undo a wrongful act, to restore the status quo ante so that the damage does not continue. Then there is the mandatory injunction per se which compels a party to carry out some positive act to



remedy a wrongful omission. As for negative injunctions, these would include prohibitory, perpetual, interlocutory and Quia Timet injunctions.” Underlined for emphasis

9. Applying the foregoing authority to the case herein, it is clear that the order sought by the Applicant at this juncture, falls under the category of mandatory injunctions. This being the case, the next logical question to ask is, under what circumstances can a mandatory injunction issue?
10. The principles applicable in cases of mandatory injunctions were aptly captured in *Locabail International Finance Ltd v Agro. Export and Another* [1986] ALL E.R. 901, as follows: -

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the court thought that the matter ought to be decided at once or where the injunction was directed at simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high sense of assurance that at the trial, it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibitory order.”
11. This position was reiterated by the Court of Appeal in *Kenya Breweries Ltd & Another vs Washington O. Okeya* [2002] eKLR and *Nation Media Group & 2 Others vs John Harun Mwau* [2014] eKLR.
12. Fundamentally, a Court can only grant a mandatory injunction at an interlocutory stage, in clear cases and where special circumstances exist.
13. In the case herein, the Applicant has averred that the 3rd Respondent illegally terminated his services without the authority of the 2nd Respondent.
14. According to the Applicant, the authority to terminate his services vests on the 2nd Respondent hence any attempt to terminate his services in the absence of the approval and recommendation of the 2nd Respondent is therefore null and void.
15. This position has been refuted by the Respondents who aver that at all times, the 3rd Respondent was acting with the blessings of the 2nd Respondent. To this end, reference was made to a resolution arising from a Governing Council meeting held on 27th November 2023.
16. The Respondents further averred that the 3rd Respondent duly updated the Governing Council in a meeting held on 6th June 2024 of the termination of the Applicant’s employment.
17. In light of the foregoing, it is clear that the issues raised by the Applicant are contentious and can only be resolved upon hearing and evaluation of the evidence presented by all parties. Differently expressed, this case cannot be termed as straightforward.
18. In this regard, I cannot help but find that this is not a clear case and no special and exceptional circumstances, have been proved to exist as to warrant issuance of a mandatory injunction at this interlocutory stage.
19. I must also mention that the Applicant has sought an order of reinstatement in the main suit, hence if granted at this stage, the order would be final and would defeat the essence of hearing and determining the matter on its merits. In my view, prudence requires that such an order only issues at the time when the matter is finally heard and determined.



20. In addition, pursuant to the provisions of Section 12(3) of the *Employment and Labour Relations Court Act*, this court is clothed with powers to grant a wide range of orders ranging from award of damages; reinstatement; prohibitory orders; orders for specific performance and declaratory orders.
21. Indeed, the Applicant will stand to be granted either of the remedies set out above, in the event his Claim succeeds ultimately. Therefore, it cannot be said the Claimant will stand to suffer irreparable injury in the event he is not granted the reinstatement order in the interim.
22. It is also noteworthy that at the time of filing the Claim and the instant Application, the Applicant had been terminated from employment hence what he is now asking from the Court is to undo what has already been done. This can only happen in the ultimate and not at this stage.
23. The upshot of the foregoing is that the Applicant has not laid out a basis for grant of the order of reinstatement at this interim stage.

Whether the Respondents should be restrained from advertising, shortlisting, interviewing, recruiting or in any other way filling the position of Internal Auditor job scale KW6 in the 1st Respondent's Kitui Campus

24. It is apparent that the Applicant is seeking to conserve the position of internal auditor job scale KW6 in the 1st Respondent's Kitui Campus pending hearing and determination of the suit herein. In essence, the Applicant is seeking a conservatory order.
25. The Court in Nairobi Civil Appeal 151 of 2011 Invesco Assurance Co. Ltd vs MW (Minor suing thro' next friend and mother (HW) [2016] eKLR defined a conservatory order as follows: -

“A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter.”
26. The Supreme Court in the case of *Gatirau Peter Munya v Dickson Mwenda Kitbinji and 2 others, in Petition No. 2 of 2014* (eKLR), held as follows: -

“Conservatory orders” bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court in the public interest. Conservatory orders, therefore, are not unlike interlocutory injunction, linked to such private-party issues as “the prospects of irreparable harm” occurring during pendency of a case; or “high probability of success” in the applicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes and priority levels attributable to the relevant causes.”
27. Further, in *Board of Management of Uhuru Secondary School vs City County Director of Education & 2 Others* [2015] eKLR, the Court summarized the principles for grant of conservatory orders as follows: -
 - (i) The need for the applicant to demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he is likely to suffer prejudice.
 - (ii) The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.



- (iii) Thirdly, the Court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.
- (iv) Whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.
28. Worthy to note is that the above principles are not exhaustive and the Court may consider other parameters depending on the nature of the case.
29. Applying the above principles to the case herein, it is incumbent upon the Applicant to demonstrate a prima facie case with a likelihood of success and that in the absence of the conservatory orders, he is likely to suffer prejudice. Further, in issuing the orders, the Court ought to consider whether public interest will be served or prejudiced by such a decision.
30. On the first principle, the Applicant was required to prove that he has a prima facie case. A prima facie case was defined in *Mrao vs First American Bank of Kenya Limited & 2 Others (2003) KLR 125* to mean: -
- “ In a civil application includes but is not confined to a ‘genuine and arguable case’. It is a case 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 later.”
31. It is worth noting that potential arguability is not enough to justify a conservatory order but rather there must also be evidence of a likelihood of success. It has been established in a long line of authorities that at an interim stage, a Court must navigate a thin line by avoiding delving into the merits of the suit prematurely before hearing the parties but at the same time having an overview of the substance of the suit itself and whether a case is made on a prima facie basis to warrant conservatory orders.
32. In the instant case, the Applicant has submitted that his termination lacked substantive justification as required by statute hence was unfair and therefore should be rendered illegal and unlawful. The Applicant further submitted that he was a whistleblower who reported a fraudulent transaction and instead of being lauded for his honesty, he was victimized and dismissed from employment. It was further submitted that the Claim is highly likely to succeed based on the facts and evidence tendered before this Court.
33. As captured above, the Respondents common position is that the Applicant's conduct amounted to gross misconduct and essentially made his continued employment with the 1st Respondent untenable.
34. Having weighed the parties' rival positions, I cannot help but conclude that the Applicant on a prima facie basis, has not persuaded this Court that there is a basis to issue orders preserving the position of Internal Auditor job scale KW6 in the 1st Respondent's Kitui Campus.
35. Further, bearing in mind the fact that the 1st Respondent is a public institution, it is my considered view that it is not in the public interest to restrain the 1st Respondent from advertising, shortlisting, interviewing, recruiting or in any other way filling the position of internal auditor in its Kitui campus.

Orders

36. The total sum of my consideration is that the Application dated July 5, 2024, is declined with an order that costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF OCTOBER, 2024.



STELLA RUTTO

JUDGE

In the presence of

Mr. Mwachofi instructed by Mr. Okullo for the Claimant/Applicant

No appearance for the Respondents

Millicent Kibet Court Assistant

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

