



**Kiganda v Kenya Utalii College & another (Miscellaneous Case
E079 of 2022) [2023] KEELRC 758 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 758 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS CASE E079 OF 2022**

**JK GAKERI, J
MARCH 23, 2023**

BETWEEN

DAVID AYUMBA KIGANDA APPLICANT

AND

KENYA UTALII COLLEGE 1ST RESPONDENT

**PROF CHARLES MUSYOKI AG PRINCIPAL & CHIEF
EXECUTIVE 2ND RESPONDENT**

RULING

1. Before the court for determination is a Notice of Motion by the Applicant dated November 8, 2022 seeking orders that:-
 1. Spent.
 2. Spent.
 3. The Honourable Court be pleased to cite for contempt the Ag. Principle/CEO of the 1st Contemnor, one Professor Charles Musyoki is in contempt of court orders and he should be committed to prison for six (6) months for disobedience of the orders of the court dated October 5, 2022.
 4. The court be pleased to declare the termination letter dated November 4, 2022 issued by the 2nd Contemnor to the applicant as irregular, null and void.
 5. The court be pleased to lift the interdiction of the applicant herein and be reinstated into service forthwith unconditionally.
 6. The costs of this application be provided for.



2. The Notice of Motion filed under Certificate of Urgency is based on Section 5(1) of the *Judicature Act* and all other enabling provisions of law and the Supporting Affidavit of the applicant dated November 8, 2022.
3. The affiant states that in its ruling delivered on October 5, 2022, the court directed the Respondent to finalize the disciplinary process of the applicant within 45 days thereof.
4. That the 2nd contemnor on his own volition ignored to initiate and complete the disciplinary process of the applicant which had exceeded 6 months under the Public Service Disciplinary Manual, 2016.
5. That the 2nd Contemnor arbitrarily terminated the applicant's employment by letter dated November 4, 2022 without subjecting the applicant to disciplinary hearing or review of the Adhoc disciplinary committee which had recommended the lifting of the interdiction and reinstatement of the applicant.
6. The affiant further avers that the actions of the 2nd Contemnor interfering with the decision of the Adhoc Committee is irregular, unlawful and null and void.
7. That the 2nd Contemnor continued to perpetrate injustices against the applicant and the same amounts to abuse of office.
8. That the interdiction complained of was made on September 27, 2021 and it was difficult for the Respondents to re-constitute another disciplinary panel, the best option would be to lift the interdiction and set aside the termination letter dated November 4, 2022.
9. The Applicant avers that hearing is a right of an employee (cited as employer) and the court had jurisdiction to intervene if the same was done irregularly.
10. That the only sanction against the 2nd Contemnor was civil jail as he was aware of the order of the court.
11. That the applicant and his family are living in a college (house) and owing to the abrupt termination of employment, the Respondents should be restrained from evicting the applicant pending the hearing and determination of this matter.
12. That it was in the interest of justice that the orders sought be granted.

Respondents case

13. In their Replying Affidavit sworn by Professor Charles Musyoki dated December 1, 2022, the Respondents avers that the 45 days given by the court to conclude the disciplinary proceedings lapsed on November 17, 2022.
14. That by the time the applicant filed the earlier application on May 30, 2022, the Adhoc Committee appointed by the then Principal of the Respondent had just tabled its report for consideration.
15. The affiant states that he declined recommendation No. 4 of the Adhoc Committee Report via an Internal Memo dated April 27, 2022 and implemented the other three (3) and acted in good faith, in the interest of both parties and within the timelines stipulated by the court in its ruling dated October 5, 2022 with no ill-motive as he was not the Respondents' Principal/CEO when the Applicant was cited for misconduct and acted in the best interest of the College and the applicant had not appealed the decision to terminate his employment or exhausted internal mechanisms.
16. The affiant states that the direction given by the Duty Judge on November 8, 2022 that the matter be placed before Justice Dr. J. Gakeri on November 10, 2022 and the application were not served upon the Respondent at all until after the matter had been disposed of by the court by Hon. Lady Justice Anne Mwaure having been listed before the trial court. That the judge acted erroneously in sitting on



- appeal against her own orders and issued ex parte orders on a mention before service had been effected and the Respondents heard.
17. The affiant states that under the prevailing jurisprudence, a matter fixed for mention can only be heard with consent of both parties and no substantive orders can issue on a mention.
 18. That once a contract of employment is terminated, the housing benefit lapses and since the applicant was paying for housing at Kshs.20,000/=, he ought to continue paying rent and had already been informed.
 19. The affiant deposes that since the decision to terminate the applicant was made before the court was moved, there was no decision to stay and violations can be remedied after a full hearing of the claim challenging the termination of employment and the alleged interdiction stood lifted on termination of employment on November 4, 2022.
 20. That the applicant misconstrued the court's ruling to mean that the disciplinary matter had to be determined in his favour and had not demonstrated irreparable harm he is likely to suffer if the orders sought were not granted.
 21. That the applicant desires the court to micro-manage the Human Resource function of the Respondent.
 22. The affiant states that the applicant had not filed a statement of claim and seeks to obtain final orders at the interlocutory stage contrary to the law and procedure.
 23. That enjoining the affiant as the 2nd Respondent was actuated by malice and personal vendetta.
 24. Finally, the affiant states that the application is incurable and fatally defective as leave to commence contempt proceedings was never sought.
 25. The affiant prays for dismissal of the application with costs.

Applicant's submissions

26. The applicant's counsel identified three (3) issues for determination, namely; whether the 2nd Respondent is in contempt of court orders and should be cited, procedure employed in termination of employment and costs.
27. As regards the 1st issue, counsel submitted that since the Respondent was represented in court, it was aware of the order and the requirements for contempt proceedings were satisfied as set out in Samuel M. N. Mweru & another V National Land Commission and 2 others (2020) eKLR, namely, terms of the order, knowledge of the terms, failure of the Respondent to comply and deliberate conduct of the Respondent.
28. Reliance was also made on the decision in Justus Kariuki Mate & another V Martin Nyaga Wambora & another (2015) eKLR on service on the order.
29. That the Respondent did not conclude the disciplinary process as directed and merely terminated the applicant's employment.
30. Counsel submitted that the 2nd Respondent's failure to implement recommendation No. 4 of the Adhoc Committee Report was in bad faith and not sufficient to expunge the contempt as he was bound by the committee's decision.
31. The court was urged to hold the 2nd Respondent guilty of contempt of its orders and commit him to civil jail for 6 months as court orders had to be obeyed.



32. The decision in *Margaret Wambogo Nyaga V Clerk to Embu County Council & 2 others* (2010) eKLR was relied upon to buttress the submission.
33. As regards the procedure employed by the Respondent, counsel submitted that the Respondent acted arbitrarily and without a basis as the process had not been concluded and the applicant was denied the opportunity to answer or controvert the allegations.
34. That the 2nd Respondent's decision was based on ill-will against the applicant and a desire to get rid of him.
35. On costs, counsel relied on Section 27 of the *Civil Procedure Act* to urge that the court had discretion to award costs but the discretion had to be exercised judiciously as affirmed in *Cecilia Karuru Ngayu V Barclays Bank of Kenya & another* (2016) eKLR.
36. That since the Respondent caused the applicant to file the application, it should bear the costs.

Respondents submissions

37. According to the Respondent's counsel, the issues for determination are;
 - i. Whether the authorised officer complied with the ruling of the court.
 - ii. Whether the applicant is entitled to housing.
 - iii. Whether the court can quash the termination letter and lift the interdiction and reinstate the applicant.
38. On the ruling dated October 5, 2022, counsel submitted since the court directed the Respondent to conclude the disciplinary process within 45 days, the Respondent reached a conclusion and terminated the applicant's employment within the 45 days as the decision was made and communicated on November 4, 2022.
39. That the applicant appeared to have misapprehended the court's ruling to signify a reinstatement.
40. Counsel submitted that the Respondents were not in contempt of the court's ruling.
41. As regards stay of termination letter, interdiction and reinstatement, counsel submitted that since the applicant's employment was terminated on November 4, 2022 and the instant application made on November 8, 2022, there was no decision capable of being stayed and no interdiction was pending as termination of employment had already taken place and reinstatement was a final order which presupposes hearing of both sides on merit.
42. Reliance was made on the decision in *Obuya Bagaka V Kenya School of Government* to reinforce the submission on stay of decisions already made as approved by the Court of Appeal in *Obuya Bagaka V Kenya School of Government* (2019) eKLR.
43. The sentiments of Rika J. in *Joab Mehta Oudia V Coffee Development Board of Trustee* (2014) eKLR were also relied upon to urge that the court cannot stay termination of employment by the employer as it would amount to an interference with a decision already made by management in its discretion.
44. The sentiments were also relied upon to urge that there was no justification for interim reinstatement and stay of termination orders among others.
45. That reinstatement at this stage would be setting a negative precedent.



46. Similarly, the sentiments of Mbaru J. in Anthony Omari Ongera V Teachers Service Commission (2017) eKLR were relied upon to urge that reinstatement was a final order available in exceptional cases.
47. The Supreme Court decision in Gatirau Peter Munya V Dickson Mwenda Kithinji & 2 others (2014) eKLR was cited to underscore the place of conservatory orders.
48. The court was urged to uphold the jurisprudence enunciated by the judicial authorities cited.
49. As regards entitlement to housing after termination of employment, reliance was made on the sentiments of Majaja J. in Richard Were & 11 others V Permanent Secretary, Ministry of Health & 3 others (2013) eKLR to urge that the right to housing lapses as soon as the contract of employment comes to an end as it is dependent on the employment contract.
50. The court was urged to vacate the orders made on November 10, 2022.
51. Finally, counsel submitted that the application lacked merit and should be dismissed.

Determination

52. The issues that commend themselves for determination are;
 - i. Whether the 2nd Respondent is guilty of contempt of the court order made on October 5, 2022.
 - ii. Whether the court can at this juncture quash the termination letter, lift the applicant's interdiction and reinstate him.
 - iii. Whether the applicant is entitled to housing after termination of employment.
53. As regards compliance or otherwise of the court order dated October 5, 2022, the starting point is the order or direction given or issued by the court.
54. In determining the applicant's application dated May 30, 2022, the court directed that;

“The Respondent shall conclude the disciplinary process against the Applicant within 45 days from the date hereof failing which the interdiction shall be deemed to have lapsed.”
55. In addition, the Respondent was directed to pay the costs of the application.
56. Documentary evidence on record reveal that after the directions were given, the Respondent took no active steps to comply with the directions until 4th November when it terminated the Claimant's employment by a letter of even date.
57. The letter accuses the applicant of undermining the management authority of the College and disruption of College operations between June 18, 2019 and September 13, 2021.
58. Without delving into the merits of the main suit, the alleged conduct of the applicant was investigated by an Adhoc Committee appointed by the then Principal/CEO of the College and all its members including the Secretary, signed the report on December 17, 2021 contrary to the Respondents averments that the Committee had just concluded its investigation by the time the applicant filed his earlier application on June 2, 2022, that was not the case.
59. The appointing authority had the Committee's report from December 2021.



60. The Committee's recommendations would appear to have caught the Respondent's Principal/CEO off-guard and disclosed that he implemented the same selectively.
61. The pith and substance of the applicant's prayer is that the 2nd Respondent committed contempt of court as it terminated the applicant's employment as opposed to concluding the disciplinary process.
62. As submitted by the applicant's counsel, in order to succeed in contempt proceedings, it must be proved that;
- i. The terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the Respondent or defendant.
 - ii. The Respondent or defendant had knowledge of or proper notice of the terms of the order.
 - iii. The Respondent or defendant has acted in breach of the terms of the order and
 - iv. The Respondent or defendant's conduct was deliberate.
63. It is common ground that the Respondent was aware of the terms of the order and did not contest its clarity.
64. The salient question is whether the Respondent acted in breach of the order and acted deliberately.
65. The only action the Respondent took for which it is being accused was to terminate the applicant's employment. Did that act breach the court's direction "to conclude the disciplinary process against the applicant within 45 days . . .?"
66. According to the Concise Oxford English Dictionary, 12th Edition at page 297,
Conclude means;
"Bring or come to an end, formally settle or arrange, arrive at a judgement or opinion by reasoning."
67. Similarly, according to Black's Law Dictionary, 10th Edition at page 350
Conclude means;
"To ratify or formalize (a treaty convention or contract), to sign (a contract, letter etc) for the sale of real property."
68. From the foregoing, it is clear that the term conclusion literally signifies bringing something to an end. It means winding up, terminate, finish, close or stop.
69. As phrased by the court in its ruling delivered on October 5, 2022, the court order or direction was non-prescriptive in that it merely ordered the Respondent to conclude the process within a specified time frame. While the court would have expected the Respondent to comply with its Human Resource Instruments and the law, it had no control over the process which is a managerial prerogative.
70. How the Respondent was to undertake the process was within its discretion.
71. In other words, the Respondent had the discretion to conclude the disciplinary process as it desired, the consequences notwithstanding.



72. Was termination of the applicant’s employment a way of bringing the process to a conclusion? The court is persuaded it was. The consequences of how the discretion was exercised is a different issue altogether.
73. In sum, the court is satisfied and finds that the applicant has failed to demonstrate that the Respondents were in breach of the court order to conclude the process within 45 days.
74. The Respondent acted within the 45 days and its action concluded the process at that point in time whether lawfully or unlawfully.
75. With regard to declaring of the termination letter dated November 5, 2022, as irregular and void, the jurisprudence is rather clear.
76. As submitted by the Respondents, the application herein was filed on November 8, 2022 about 4 days after the termination of employment had taken place. There was no decision to stay then as one had already been made.
77. The only avenue available to the applicant is to challenge that decision substantively as explained by the Court of Appeal in *Obuya Bagaka V Kenya School of Government (2019) eKLR* as follows;
- “From the record, we note that the decision to dismiss the appellant was made by the Respondent’s counsel on October 14, 2016 and the appellant filed the Petition and Notice of Motion on November 8, 2016. Accordingly, the learned judge did not err in finding as she did that by the time the appellant filed the petition and the Notice of Motion, the decision to dismiss him had already been made by the Appellant’s council. There was therefore no decision to stay and any violations could be remedied pursuant to full hearing to the Petition . . .”
78. The court dismissed the appeal with costs.
79. Similarly, as regards reinstatement, the court is guided by the sentiments of Rika J. in *Joab Mehta Oudia V Coffee Development Board of Trustee (Supra)* that;
- “ . . . There is no justification for interim reinstatement, stay of termination or orders barring the Respondent from proceeding to fill the position that was held by the Claimant. The law presumes that the wronged employee would be in a position to move the court expeditiously on the merit, and if deserving have the substantive orders of reinstatement or re-engagement. Nothing is lost to the Claimant as the law allows him to receive back wages in addition to these remedies.”
80. Relatedly, reinstatement is for the most part a final remedy and typically granted at the conclusion of hearing the suit on merit.
81. Interim reinstatement may however be granted in cases of exceptional or unique circumstances and the same has not been demonstrated in this case.
82. The court is guided by the sentiments of the court in *Ahmed Aden Dive V Natif Jama and County Government of Garissa*, cited by Mbaru J. in *Anthony Omari Ongera V Teachers Service Commission (Supra)* as follows;
- “The rationale (of not reinstating an employee at the interlocutory stage) is that the order for reinstatement is a specific performance order with finality. To issue such an order in the interim is essentially to deny the other party a chance to their defence unless there are



exceptional circumstances that the court is appraised of to warrant the grant of the same in the interim.”

83. Although there is room for interim reinstatement in exceptional circumstances having regard to the circumstances of the case, it generally denies the offending party the opportunity to present its case fully before the final order is made and courts are generally reluctant to do so in the interlocutory stage.
84. In this case, the applicant has not demonstrated the exceptional circumstances to warrant the grant of the order of reinstatement which is still available when the suit is heard and determined on merits.
85. On lifting of the interdiction, it is common ground that the applicant was interdicted to pave way for investigation which the Respondent undertook through an Adhoc Committee and the report was forwarded to the appointing authority on the basis of which the Principal/CEO made certain decisions including the termination of employment on November 4, 2022 which effectively concluded the disciplinary process and rendered the interdiction ineffectual.
86. As contended by the Respondent, the interdiction transitioned to a termination on November 4, 2022.
87. As regards housing, the Respondents submitted that the applicant’s right to remain in the staff house given by the Respondent was extinguished on termination of employment. The applicant did not submit on the issue. The Respondent urged the court to vacate the order given by the court on November 10, 2022.
88. Section 31 of the [Employment Act, 2007](#) is emphatic that an employer must at his expense provide reasonable housing accommodation for each of his employees either at or near to the place of employment or pay a housing allowance.
89. This is one of the statutory rights enshrined in Part V of the [Employment Act, 2007](#) as part of the basic minimum conditions of employment.
90. A plain reading of the provisions of Section 31 leaves no doubt that the right to housing is only available to employees or during the subsistence of the employment contract.
91. It would appear to follow that the right to housing is only exercisable during the currency of employment and terminates with termination of employment as was held in *Eric V. J. Makokha & others V Lawrence Sagini and others* (1994) eKLR.
92. Finally, the court is in agreement with the sentiments of Majaja J. in *Richard Were & 11 others V Permanent Secretary, Ministry of Health & 3 others* (Supra) on extinguishment of the benefit of housing on termination of employment.
93. Since the applicant is no longer an employee of the Respondent, the Respondent is under no obligation to continue housing him.
94. However, the court granted an order against eviction pending the hearing and determination of the application herein and the Respondent has acted accordingly by requiring rent for the premises as it is entitled.
95. Since the applicant’s request was for all intents and purposes interim, pending the hearing and determination of this application, the court’s hands are tied as it cannot extend the order. The order lapses on determination of this application. If the Respondent is desirous of evicting the applicant after this ruling, it must accord him sufficient notice.



96. Finally, the question as to whether the Respondents observed due process in the termination of the applicant which the Claimant's counsel submitted on will inevitably arise when the applicant challenges the termination of employment in a substantive claim.
97. For the foregoing reasons, the court is satisfied that the Notice of Motion dated November 8, 2022 is unmerited and is accordingly dismissed.
98. Parties to bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 23RD DAY OF MARCH 2023

DR. JACOB GAKERI

JUDGE

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 has 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.

DR. JACOB GAKERI

JUDGE

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