



REPUBLIC OF KENYA



**KENYA LAW**  
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**Otieno v Herald International School & 2 others (Cause  
E530 of 2022) [2023] KEELRC 742 (KLR) (22 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 742 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E530 OF 2022  
JK GAKERI, J  
MARCH 22, 2023**

**BETWEEN**

**SAMUEL ODHIAMBO OTIENO ..... CLAIMANT**

**AND**

**HERALD INTERNATIONAL SCHOOL ..... 1<sup>ST</sup> RESPONDENT**

**GURJIT BANSAL-MANAGING DIRECTOR ..... 2<sup>ND</sup> RESPONDENT**

**LAKYINDER KAUR BANSAL-PRINCIPAL ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. Before the court for determination is a notice of motion by the claimant/applicant dated July 27, 2022 under certificate of urgency seeking orders that:
  1. Spent.
  2. Pending hearing and determination of the memorandum of claim dated July 16, 2022, the claimant be reinstated forthwith.
  3. Payment in lieu of notice. one month's salary Kshs 50,000/=.
  4. Withheld monthly salary Kshs 50,000/=.
  5. Withheld House allowance Kshs 7,500/=.
  6. Costs of this suit be provided for.
2. The application is based on the grounds set out on its face and supported by the Affidavit sworn by the Claimant on July 27, 2022.
3. The affiant deposes that he was employed by the Respondent as a Teacher on February 24, 2020 at Kshs 50,000/= and his employment was terminated on July 9, 2021.



4. The affiant further states that on termination of employment, he was only paid for 9 days, without notice pay and other terminal dues.
5. That he served the Respondent with commitment and dedication and did nothing to warrant termination of employment without notice.
6. The affiant deposes that on July 9, 2020 on reporting to work, the 2<sup>nd</sup> Respondent informed him that his employment contract had been terminated and would be called to collect his dues after approval by the Board of Management and no reason was given. He was directed to clear and leave the compound.
7. The affiant states that Respondent did not comply with the law.

### **1st, 2nd and 3rd Respondent's Case**

8. In their Replying Affidavit, the Respondents aver that the Claimant's application is frivolous and vexatious.
9. It is the Respondents' case that the 1<sup>st</sup> Respondent is a newly established educational institution still in its infancy and the Claimant was employed as a teacher under a verbal agreement in February 2020 at Kshs 20,000/= per month.
10. The Respondents further avers that on May 8, 2020, the 1<sup>st</sup> Respondent and members of staff including the Claimant/Applicant held a meeting and agreed on a salary reduction of 30% and the Claimant's salary fell to Kshs 14,000/=.
11. That the Claimant's salary was consolidated and he had no claim for house allowance.
12. The affiant deposes that it faithfully remitted the Claimant's NSSF Contributions and had established policies for the conduct of teachers and students.
13. The Respondents aver that there were many complaints against the Claimant ranging from absenteeism from work without leave or lawful excuse, neglect to perform his duty, use of abusive or insulting language, failing to obey authority and sexually harassed female teachers and had been warned by word of mouth.
14. It is the Respondent's case that the 1<sup>st</sup> Respondent had a reason to dismiss the Claimant from employment and he refused to collect the certificate of service.
15. The Respondents further aver that the Claimant was seeking final orders in the interim which will amount to summary judgement thereby determining the suit prematurely as the reliefs are similar to those sought in the main suit.
16. The Respondents pray for dismissal of the suit with costs.
17. In his Supplementary Affidavit, the Claimant admits that he was given a letter of termination of employment dated July 9, 2021, a fact he had not disclosed earlier.
18. That he was also given a recommendation letter thereafter and paid Kshs 13,300/= for the 9 days worked in July 2021.
19. The Claimant deposes that he was never issued with a payslip or invited for a disciplinary hearing.

### **Claimant/Applicant's Submissions**

20. The Claimant identified two issues for determination, namely; whether termination of his employment was wrongful, unfair and unlawful and entitlement to the reliefs sought.



21. As regards the first issue, the applicant urged that the provisions of Section 41, 43 and 45 of the [Employment Act, 2007](#) were not complied with to imbue procedural fairness on the process of termination.
22. The decision in [Mary Chemweno Kiptui V Kenya Pipeline](#) (2014) eKLR was relied upon to buttress the submission.
23. As regards the reliefs sought, the applicant submitted that the Notice of Motion dated July 27, 2022 and Memorandum of Claim sought certain reliefs he itemised with specific figures amounting to Kshs 880,000/= not quantified in the Notice of Motion or Claim. The submissions included two additional claims namely; leave days and NSSF refunds. The applicant appear to have abandoned the remedy of reinstatement which is set out in the Notice of Motion and urges the court to order the Respondent to issue a certificate of service.
24. The applicant, finally, urged the court to grant the Notice of Motion.

### **Respondents submissions**

25. The Respondents counsel submitted that the Claimant/Applicant was seeking similar orders in the main suit and if the instant application was granted, there would be no case to hear and determine.
26. Reliance was made on the decisions in [East African Portland Cement Co Ltd V Attorney General & another](#) (2013) eKLR, [Olive Mwihaki Mugenda & another V Okiya Omtata Okiiti & others](#) (2016) eKLR as well as [Ashok Kumar Bajpai V Dr \(Smt\) Ranjama Bajpai](#) AIR 2004 among others to buttress the submission that major reliefs ought not be granted at the interlocutory stage.
27. As to whether the application is frivolous, vexatious and could delay the suit, counsel submitted that it was intended to delay the suit. The decision in [DT Dobie & Co V Muchina](#) (1982) KLR 1 was relied upon to urge that a suit should not be summarily dismissed unless it was plainly hopeless and weak and beyond redemption by amendment.
28. Counsel submitted that the application lacked a legal foundation and raised no triable issues.
29. That it was vexatious and intended to harass the Respondent.
30. As regards costs, counsel submitted that since the applicant adduced no evidence to justify the orders sought, at this stage, and the Respondent had tendered relevant case law. Counsel argued that the applicant should pay costs.

### **Determination**

31. The singular issue for determination is whether the instant application is merited.
32. It is common ground that the Claimant/Applicant was an employee of the Respondent from February 2020 to July 9, 2021 and filed a Memorandum of Claim dated July 27, 2021 seeking various reliefs.
33. It is also not in dispute that the reliefs sought in the application and the main suit are substantially similar but for the remedy for reinstatement which is sought in the Notice of Motion but not in the main suit.
34. The gravamen of the Claimant/Applicant's case is that the Respondents terminated his employment without notice and did not comply with the provisions of the [Employment Act, 2007](#).
35. It is evident that the bulk of the reliefs sought by the Notice of Motion are dependent on the facts of the case which are yet to be canvassed including the remedy of reinstatement.



36. In *Olive Mwibaki Mugenda & another V Okiya Omtata Okoiti & 4 others* (supra), the Court of Appeal stated as follows;

“Analysis of the persuasive decisions from India shows that if a trial court is inclined to grant final orders at the interlocutory stage, this can only be done in exceptional circumstances and the reasons for granting such final orders must be stated . . .”

37. Significantly, decisions from India are clear that courts ought not to grant final orders at the interlocutory stage and courts in Kenya have adopted a similar view.

38. In *Ashok Kumar Bajpai V Dr (Smt) Panjama* (supra), the court expressed itself as follows;

“ . . . It is evident that the court should not grant interim relief which amounts to final and in exceptional circumstances where the court is satisfied that ultimately the Petitioner is bound to succeed and fact-situation warrants granting such reliefs, the court may grant the relief but it must record reasons for passing such an order and make it clear as what are the special circumstances for which such a relief is being granted to a party.”

39. In *Olive Mwibaki Mugenda & another V Okiya Omtata Okoiti & 4 others* (supra), the court stated;

“Applying the decisions of this court in *Vivo Energy Kenya Ltd V Maloba Petrol Station Ltd & 3 others* (2015) eKLR and *Stephen Kipkebut t/a Riverside Lodge & Rooms V Naftali Ogola* (2009) eKLR, it has often been stated that an order which results in granting of a major relief claimed in the suit ought not to be granted at an interlocutory stage . . . Situations emerge where the granting of an interim relief would be tantamount to granting the final relief itself. And then there may be converse cases where withholding of an interim relief would be tantamount to dismissal of the main petition itself; for by the time the main matter comes up for hearing, there would be nothing left to be allowed as the relief to the petitioner though all the findings may be in his favour. In such cases, the availability of a very strong prima facie case. . . The court may grant an interim relief though it amounts to granting the final relief itself. Of course, such would be rare and exceptional cases.”

40. Finally, the court is guided by the sentiments of Rika J in *East Africa Portland Cement Co Ltd V Attorney General & another* (supra) that;

“ . . . Interim Orders are not suitable if by their grant, they finally determine the substantive dispute. The courts must be wary of prejudgement of substantive merits.”

41. In the instant application, the reliefs sought, namely; reinstatement, pay in lieu of notice, withheld salary, Kshs 50,000/= and withheld house allowance are all dependent on the evidence to be adduced before the court for the court to appreciate the circumstances in which the claims arose and thus the Claimant’s entitlement.

42. Significantly, the remedy of reinstatement is not only a final remedy but discretionary as well and the court is enjoined to exercise its discretion judiciously and not capriciously.

43. As matters stand, the court has no basis to grant any of the reliefs sought as no evidence has been adduced.



44. But more importantly, the applicant has not demonstrated any urgency in the matter as he was dismissed from employment on July 9, 2021 and filed the Notice of Motion and suit on July 27, 2022, more than one (1) year later.
45. Relatedly, the applicant has on a balance of probabilities failed to demonstrate that there are special or exceptional circumstances to justify the grant of interim relief.
46. The court is constrained to agree with the Respondent counsel's submission that the Claimant has not presented compelling circumstances to warrant the grant of final orders at this stage.
47. It is the finding of the court that the Application dated July 27, 2022 is premature and is accordingly dismissed.
48. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 22<sup>ND</sup> 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

