



**Gatebi v Savannah Brands Company Ltd (Cause E650 of 2022)
[2023] KEELRC 600 (KLR) (13 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 600 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E650 OF 2022
JK GAKERI, J
MARCH 13, 2023**

BETWEEN

CATHERINE WAMBUI GATEBI CLAIMANT

AND

SAVANNAH BRANDS COMPANY LTD RESPONDENT

RULING

1. Before me for determination is an amended Notice of Motion Application dated October 3, 2022 filed under Certificate of Urgency seeking Orders:
 1. That this Application be certified as urgent and the same be heard *ex-parte* in the first instance.
 2. That-pending theinter partes hearing and determination of this-Application, this Honourable- Court be pleased to issue a-conservatory order-staying any further disciplinary-process by the Respondent against the Claimant-.
 - 2A. That this Honourable Court do hereby issue an order quashing the Respondent's Letter of dismissal dated September 27, 2022.
 3. That pending the hearing and determination of this Claim, this Honourable court-be-pleased-to issue-a conservatory order staying any further disciplinary process by the Respondent-against the Claimant.-
 - 3A. That pending the hearing and determination of this application, this Honourable Court do issue an order directing the Respondent to reinstate the Claimant to her employment to the position she held prior to her summary dismissal.
 4. That pending he hearing and determination of this application an order issued lifting the suspension of the claimant from the service of the Respondent



- 4A. That pending the hearing and determination of this Claim, this Honourable Court do issue an order directing the Respondent to reinstate the Claimant to her employment to the position she held prior to her summary dismissal.
 - 5A. That this Honourable Court do hereby direct the Respondent to pay the Claimant her withheld salary for September 2022.
 6. That pending the inter-parties hearing and determination of this Application, the Honourable court be pleased to issue an order restraining the Respondent and/or any other person or entity whether by themselves or by their agents, from accepting any applications and subsequently recruiting and filling the position of Customer and Trade Marketing Manager- Savannah Brands Company Ltd.
 7. That pending the hearing and determination of this Claim, the Honourable court be pleased to issue orders restraining the Respondent and/or any other person or entity whether by themselves or by their agents from accepting any applications and subsequently recruiting and substantively filling the position of Customer and Trade Marketing Manager-Savannah Brands Company Ltd.
 8. That in the alternative to prayers 2A, 3A, 4A, 6 and 7 above this Honourable Court do hereby directs the Respondent to pay the Claimant her full terminal dues.
 9. That the Honourable Court be pleased to make such further Orders and/or Directions that are necessary for the ends of justice.
 10. That costs of this Application be provided for.
2. The application is stated under Section 3 & 12(3) of the *Employment and Labour Relations Court Act* No 20 of 2011, Rule 17 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* and all other enabling provisions.
 3. The application is supported by the affidavit of Catherine Gatebi and on the following grounds;
 - i. The Applicant avers that she was employed by the Respondent on the February 21, 2022 as a customer and trade marketing manager and was confirmed in the same position on July 21, 2022 where the CEO and the applicants line manager praised her for performance. She worked diligently until August 15, 2022 when she was issued with a Notice to Show Cause letter dated August 10, 2022.
 - ii. The show cause letter stated that a decision to subject the claimant to disciplinary hearing had been arrived at after the management meeting held on the July 8, 2022.
 - iii. The applicant states that in the show cause letter she was accused to have been behind an alteration of the contract entered between the Respondent and Ashaki.
 - iv. The claimant in pursuit of preparing for her defence she requested vide a letter dated August 16, 2022 for the minutes of the meeting held on the July 8, 2022 and also for a copy of the contract entered between the Respondent and Ashakis, in the said letter she also indicated that some of the allegations in the show cause letter did not form part of her job description.
 - v. The applicant stated that the respondent refused, failed or ignored to supply her with the documents requested



- vi. That on the September 6, 2022 the Respondent proceeded to issue the claimant with a suspension letter pending disciplinary hearing on the September 20, 2022 that was latter re-scheduled for September 22, 2022.
 - vii. The applicant contends that the Respondent proceeded to conduct the disciplinary hearing in the absence of the claimant and issued the claimant with a dismissal letter dated September 27, 2022.
 - viii. The applicant is apprehensive that the allegations contained in the show cause letter were brought in bad faith and are malicious and the respondents unlawful and unfair actions prejudiced the applicants right to fair hearing, fair administrative action, fair labour practices, right to human dignity and has tarnished the good name and integrity of the claimant.
4. The affidavit of Catherine Gatebi reinforces the facts and the law relied upon to urge the application.
 5. The Claimant/Applicant's Further Affidavit sworn on November 11, 2022 buttresses the application and the affiant states that the Respondent withheld the claimant's salary for the month of September 2022.
 6. She further avers that during the disciplinary hearing the panel declined to grant the applicants counsel audience and stated that the process was internal which led to the claimant leaving the meeting and thereafter informed that a decision was reached and she was summarily dismissed.
 7. The affiant states that following the unlawful dismissal she has endured extreme hardship catering for amenities and has suffered mental pain and anguish.

Respondent's Case

8. In response to the application the respondent filed a its Replying Affidavit sworn by Christine Opiyo, the Human Resource Director of the Respondent on October 27, 2022.
9. The affiant confirms that the applicant was employed by the respondent on the February 21, 2022 in the position of Customer and Trade Marketing Manager.
10. She stated that due to the nature of the Respondents business the applicant was expected to always work with due diligence and utmost honesty and was required to report matters of concern to the head of commercial.
11. The affiant further stated that the Applicant was called upon to respond to Show Cause letter dated August 10, 2022 on allegations of misconduct which she responded vide a letter dated August 16, 2022.
12. That upon receipt of the response to the show cause letter the applicant was invited to attend a disciplinary hearing on the September 7, 2022 at 11:00 but on the September 6, 2022 vide an email the applicant sought for 14 days to prepare for the hearing and the disciplinary hearing was rescheduled to September 20, 2022.
13. The affiant stated that on the September 19, 2022 the applicant made a belated request to be furnished with documents barely 24hrs to the disciplinary hearing, the respondent on the September 20, 2022 responded that there was no record of the meeting held on the July 8, 2022 hence no minutes were available as requested but availed the altered copy of the complaint by client Account Number 7 and performance review conducted on the July 7, 2022 vide the same letter and the disciplinary hearing was rescheduled to September 22, 2022 at 11:00 to allow the applicant go through the documents and prepare adequately for the hearing.



14. The affiant states that on the 21st September the Respondent was served with the pleadings in respect of this matter set for hearing on September 28, 2022 but there were no orders issued by the court.
15. That on the 22nd September at 10:56 the applicant addressed another email to the Respondent raising a further concern about being supplied with documents and be allowed time to prepare.
16. The affiant states that the disciplinary hearing proceeded as scheduled and the applicant was in attendance accompanied by her advocate Mr. Allan Otieno who raised several concerns prior to the hearing claiming the claimant was not furnished with documents and was not granted enough time to present her witnesses nor granted enough time to respond to the show cause letter. He also requested that one panellist be relieved from the panel alleging she had personal bias to the applicant.
17. The respondent on the other had also raised a few concerns that the disciplinary hearing was an internal matter where the applicant was required to respond to the allegations and that the advocates participation be limited since a court case has been filed raising the same issues.
18. The affiant states that the applicant requested that the meeting be adjourned for her to look for an alternative witness which was declined as the matter had been adjourned three other times at the instance of the applicant quest who had been supplied all the documents she had requested and granted sufficient time to prepare for the hearing.
19. The applicant and her advocate walked out of the meeting despite being informed that the hearing would still proceed her absence notwithstanding.
20. The affiant states that the orders sought to quash the dismissal letter in the application is a substantive order that can only be granted after hearing the matter not at the interlocutory stage.
21. The affiant further states that the order for reinstatement is not tenable as the applicants exit from the Respondent was under acrimonious circumstances following her conduct exhibited towards the disciplinary panel consisting of persons she is expected to work with.
22. The affiant states that the application filed by the applicant is misguided as the applicant was granted a fair chance to respond to allegations and defend herself but choose to walk out of the disciplinary hearing therefore is not entitled to the reliefs sought.

Rejoinder

23. In rejoinder the applicant retaliates the contents of the supporting affidavit that the respondent failed to supply her with the documents she required in order to prepare for her defence.

Applicant's submissions

24. The applicant identified three issues for determination;
 - i. Whether the Respondent followed due process in dismissing the claimant.
 - ii. Whether the claimant's dismissal was justified
 - iii. What reliefs should this honourable court grant?
25. On the first issue that applicant submitted that the disciplinary process was marred with irregularities as the claimant was not supplied with the documents she requested for and therefore was not in a position to defend herself appropriately which was in contravention of Article 50 (1) of the *Constitution of Kenya, 2010*.



26. The applicant relied on the holding in *Mwangi Stephen Muriithi v National Land Commission & 3 others* (2018) where the court held as follows;

“Having perused the documents placed before this court I am convinced that the petitioner was neither furnished with details of the complaint before the 1st Respondent nor granted access to the critical documents before the 1st Respondent. I find that in the circumstances of this case, it would be unfair then to expect or conclude that in the absence of such critical information the petitioner was granted a fair hearing as envisaged under Article 50 of the constitution....”

27. The applicant further submitted that the respondent proceeded to summarily dismiss the applicant without according her an opportunity for an appeal.

28. On the 2nd issue the claimant relied on Section 43 of the *Employment Act* that:

In any claim arising out of termination of Contract the employer shall be required to prove the reason or reasons for termination and where the employer fails to do so the termination shall be deemed to have been unfair within the meaning of Section 45.

29. The applicant submitted that the grounds of her dismissal as spelt out in the dismissal letter would not occasion a reasonable employer to arrive at a dismissal on account of such grounds considering that the applicant had not been issued with any previous warnings.

30. The applicant submitted that the summary dismissal was unwarranted and unjustified.

31. The applicant urged the court to allow the application as prayed.

Respondent’s Submissions

32. The respondent isolated one issue for determination, namely; whether the applicant’s Application was merited and what further orders the court was entitled to make.

33. The Respondent submitted that prayer 2A of the amended application that seeks an order to quash the Respondent’s letter of dismissal dated September 27, 2022 was a substantive prayer with the potential of disposing off the main suit without allowing the court to appreciate the evidence and ascertain whether the dismissal was merited.

34. The respondent submitted that to invite the court to make such a finding would amount to inviting the court to decide a substantive issue at an interlocutory stage in violation of sound legal principles. Reliance was made on the holding in *Vivo Energy Kenya Limited vs Maloba Petrol Station & 3 others* (2015) eKLR.

35. The Respondent further submitted that Prayer No3A sought an order for reinstatement which is also a substantive prayer to be determined after hearing the main suit. Reliance was made on the holding in *Jael Achieng Onyango v Housing Finance Development & Investment* where Justice Makau held;

“ . . . in my view the contention constitutes the main issues for determination during trial of the main suit when evidence from both parties will be tendered. I therefore decline to order reinstatement at this interlocutory stage because I am not properly seized of the material evidence to enable me make an informed decision on the said relief..”

36. The respondent further submitted that Prayer 6 and 7 of the amended Notice of Motion sought to prevent the respondent from recruiting or filling the position of Customer and Trade Marketing



Manager. The respondent submitted that granting such an order would curtail the exercise of managerial discretion of the Respondent to run its business.

37. The Respondent submitted that the applicant was seeking a restraining order in the nature of an injunction and did not meet the threshold in the case of *Giella vs Cassman Brown*.
38. Finally, the respondent submitted that in prayer number 5A and 8, the applicant prayed for payment of salary withheld and terminal dues. The respondent submitted that the claimant's salary and terminal dues as per the dismissal letter was to be paid upon clearance and the Applicant having cleared on October 30, 2022, it was processing the claimant's terminal dues and the same could not be construed as refusal to pay and as such, the prayer was premature, unnecessary and ill-timed.

Analysis and Determination

39. Having carefully considered the pleadings, affidavits and the rival submissions by the parties the issues for determination are;
- i. Whether the Application is merited.
 - ii. Whether the applicant is entitled to the reliefs sought?
40. What is before the court for determination in a Notice of Motion application filed under Rule 17 of the *Employment and Labour Relations Court (Procedure) Rules, 2016*.
41. Rule 17 of the *Employment and Labour Relations Court (Procedure) Rules* provides for interlocutory orders in the following terms:
17. Interlocutory application and temporary injunctions
 1. An interlocutory application shall be made by notice of motion and shall be heard in open Court.
 2. A party shall, after filing a motion, notify all the parties of the motion.
 3. The Court may, for good cause, hear an application ex parte and make an order upon terms as to costs and subject to such undertaking, if any, as the Court considers just:

Provided that a party affected by that order may apply to set it aside.
 4. An ex parte injunction may be granted only once for not more than fourteen days and shall not be extended thereafter except once by consent of the parties or by the order of the Court for a period not exceeding fourteen days.
 5. In a suit where an injunction is sought, a claimant or applicant may at any time in the suit, apply to the Court for an interim or temporary injunction to restrain the respondent from committing a breach of contract or an injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.
 6. Where an application is made to the Court under paragraph (5) for a temporary or interim injunction, the Court may, by order, grant an injunction on such terms as it deems fit.
 7. Any order for injunction may be discharged, varied or set aside by the Court on application by any party dissatisfied with such order.



8. A notice of motion shall state in general terms the grounds of the application and where the motion is supported by an affidavit, both the notice of motion and a copy of the affidavit shall be served on the other party.
9. A party may respond to an application by filing grounds of opposition verified by an affidavit.
10. Notwithstanding anything contained in this Rule, the Court shall not grant an ex parte order that reinstates into employment an employee whose services have been terminated.

42. Being an application for injunctive orders, it is essential to delineate the threshold in determining if the application is merited as was set out in the celebrated decisions in *Annielo Giella v Cassman Brown & Co. Ltd* (1973) EA 358 and *Nguruman Ltd v Jan Bonde Nielsen & 2 others* (2014) eKLR as follows;

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- a. Establish his case at a prima facie level,
- b. Demonstrate irreparable injury if a temporary injunction is not granted, and
- c. Ally any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent.

It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount subsequently.”

43. To establish if the applicant has a prima facie case, the court is guided by the holdings in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (2003) KLR 125 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 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 evidence must show an infringement of a right and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”

44. The Court of Appeal adopted this definition in *Nguruman Ltd V Jan Bonde Nielsen* (supra).

45. In the instant case the applicant seeks to challenge the disciplinary process and seeks the following orders;

- a. An order quashing the Respondents letter of dismissal letter dated September 27, 2022.
- b. An order directing the Respondent to reinstate the claimant to her previous employment position.
- c. An order directing the Respondent to pay the claimant withheld salary.
- d. An order restraining the Respondent from recruiting another person to the position held by the applicant.



46. Although based on the material before the court, the Applicant has established an arguable case, the same cannot stand as a prima facie case, for purposes of this application as the orders sought are substantive in nature and cannot be issued at this stage unless the court is apprised of the evidence of both parties.
47. Similarly, the Applicant seeks an order for reinstatement to the position she held prior to the summary dismissal. This is a substantive order capable of disposing the suit at interlocutory stage before parties are heard substantively.
48. In the case of *Anthony Omari Ongera v Teachers Service Commission* [2017] eKLR Mbaru J. made the following observations in respect to the rationale for reinstatement -

“The rationale is that the order of reinstatement is final in nature and should only issue in exceptional cases which warrant specific performance. In the case of Ahmed Aden Hire versus Natif Jama and County Government of Garissa, Petition No 121 of 2016; the Court in analysing the provisions of Section 49 of the *Employment Act* and Rule 17(10) of the Court Rules with regard to the orders of reinstatement held that;

The rationale [of not reinstating an employee at the interlocutory stage] is that the order of 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 apprised of to warrant the grant of the same in the interim. In Alfred Nyungu Kimungui versus Bomas of Kenya [2013] eKLR; though the decision was made on 28th May 2013 before the new Rules of procedure came into force on 5th August 2016, the context is not lost where the Court held that;

The *Employment Act 2007* places the burden of justifying termination decision, and showing the fairness of procedure, on the employer. In rare cases where interim reinstatement may be granted, the termination must be shown to be patently unfair, that even the ultimate remedies of compensation or reinstatement with back wages, would not have redressed the injury suffered by the employee in the pendency of the full hearing. Certain forms of termination grounds, the kind that result in automatically unfair termination such as pregnancy, race, gender or religious discrimination, may warrant the rare exercise of the Court’s discretion in issue of interim reinstatement. This is more so particularly under the new liberal Constitution of Kenya, which frees the hands of the Courts in administration of justice.”

49. The court is in agreement with these sentiments.
50. Needless to emphasize, the Applicant has not demonstrated any unique or exceptional circumstances that would justify the grant of an order for reinstatement at this stage of the proceedings.
51. Secondly, the applicant must establish that she stands to suffer irreparable injury if the orders sought were not granted. This requirement was aptly captured in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, in the following words:

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable



remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

52. Further;

" . . . In other words, damages recoverable in law is an adequate remedy as the respondent is capable of paying no interlocutory order of injunction should normally be granted however strong the applicant's claim appear at this stage . . . "

53. Based on the evidence on record, the Applicant has not demonstrated the irreparable harm she stands to suffer that would not be remedied by way of damages should the court not grant the orders sought.

54. Significantly, the Applicant has in her prayers sought for an alternative, for the court to order the Respondent to pay the claimant the full terminal dues. This is an unequivocal indication that the applicant is also amenable to being compensated monetarily. The dispute being one found on employment, which is grounded on remuneration for work done, the law has prescribed a standard by which an employee whose employment is unfairly terminated may be compensated.

55. From the foregoing, it would appear to follow that the balance of convenience is not in favour of granting the orders sought by the applicant.

56. Similarly, the court is persuaded that the Respondent's arguments that the prayers sought in the application are of a substantive nature and have the potential of disposing off the main suit are well founded. The orders, as sought are premature as the court is obligated to ascertain whether the dismissal was consistent with the provisions of Section 43, 45 and 47 of the Employment Act, 2007 before granting the orders.

57. Finally, and needless to belabour, the orders sought in the application are similar to the orders sought in the memorandum of claim dated 15th September, 2022 filed on even date and the court cannot issue such orders at interlocutory stage as it would be contrary to the provision of Article 50 of the Constitution of Kenya and all other provisions of law on fair hearing. It is essential that the court analyses the evidence adduced by the parties before arriving at a just determination of the issues before it.

58. Relatedly, as held by the Court of Appeal in Kenya Airways Ltd V Aviation & Allied Workers Union (Kenya) & 3 others (2014) eKLR, the remedy of reinstatement is discretionary.

59. The court is further guided by the sentiments of Rika J. in Joab Mehta Oudia V Coffee Development Board of Trustees (2014) eKLR as follows;

"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 to court expeditiously on the merit and if deserving, have the substantive orders of reinstatement or re-engagement. Nothing is lost to the employee as the law allows him to receive back wages in addition to these remedies. (See Sosten Kipruto Kerich V Monarch Insurance Co. Ltd (2015) eKLR).

60. In the circumstances, it is the finding of the court that the application has not met the threshold for grant of the orders sought and is accordingly dismissed. In order to ensure expeditious dispensation



of justice, I direct that the matter be mentioned before the Deputy Registrar on March 29, 2023 to confirm compliance and issue hearing date.

61. Costs shall abide the outcome of the main suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 13TH 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 March 15, 2020 and subsequent directions of April 21, 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

