



Godana v Kenya Tea Development Agency Holdings Limited (Cause E432 of 2022) [2023] KEELRC 932 (KLR) (6 April 2023) (Ruling)

Neutral citation: [2023] KEELRC 932 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E432 OF 2022
AN MWAURE, J
APRIL 6, 2023**

BETWEEN

GUYO GODANA CLAIMANT

AND

KENYA TEA DEVELOPMENT AGENCY HOLDINGS LIMITED . RESPONDENT

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

RULING

1. The claimant/Applicant in his application dated the September 20, 2022 sought the following orders:
 - a. Spent
 - b. Spent
 - c. Spent
 - d. Spent
 - e. That pending hearing and determination of the claim, this Honourable Court be pleased to preserve the subject matter of the claim herein through a conservatory order staying and /or suspending the recruitment and / or replacement of the office of the claimant being the office of the General Manager- Operations.
 - f. That this honourable be pleased to preserve the subject matter of the application herein through a conservatory order staying and /or suspending the recruitment and replacement of the Office of the claimant being the office of the operations director.
 - g. That pending hearing and determination of claim filed herewith, this honourable court be pleased to issue a conservatory order against the Respondent staying and /or suspending the



impugned decision of the board, their agents and or servants as conveyed by the termination letter dated August 3, 2022 and the Appeal as conveyed vide letter dated September 15, 2022.

2. The Application is supported by the grounds on the face of the application and the grounds on the affidavit of the applicant. In the affidavit, the applicant deposes that there was no substantive and procedural fairness as provided under section 41 and 43 of the *Employment Act 2007* and was contrary to the provisions of the law and the Company's Human Resource Manual. He says that it is in the interests of justice that an injunctive order be issued to halt irreparable loss, injustice and damage to him through unlawful termination.
3. The Respondent in the replying affidavit dated the 8th day of July 2022 says that the disciplinary hearing complained of is yet to happen and therefore no decision on applicant's conduct has been made yet. He further says that the applicant seems dissatisfied with the process adopted by an administrative body in its decision making one, right from suspension, investigations, to being cited to show cause.
4. The Respondent further says that it faced difficulties in its operations but investigations were conducted and concluded and a report was prepared by the Respondent's security manager on June 3, 2022 which revealed the applicant had a case to answer.
5. The claimant submits that he was subjected to an unlawful and unfair disciplinary hearing which was never agreed by the parties. He says that Respondent having invented its own disciplinary procedures rules in the form of the claimant appearing before the Board both in the disciplinary hearing and the Appeal violated the claimant's right to a fair hearing and fair administrative action. The unlawful decision of the board should therefore be stayed and / or suspended.
6. The claimant argues that if the position is filled, then he will therefore end up with a paper decree incapable of execution in the event he is successful in the claim. He states that there can be no amount of damages adequate for lengthy and intentional violation of the law. The claimant relied on the case of *Stephen Chase Kisaka versus Emirates Airlines Limited* (2015) eKLR where the court stated that 'In the case before court, the submission by the Applicant is that he was subjected to flawed disciplinary process and that for this reason he has a prima facie case with a probability of success. The Respondents contended that he can still be awarded damages if he succeeds in this case but that alone will not be a bar to this court from denying him orders sought based on the holding of Judge Ringera (as he then was) in *Suleiman vs Amboseli Resort Limited* (2004) 2 KLR 589 cited above.

"It the applicant contention that one of the prayers he seeks is reinstatement and if the position is filled, then he would not be able to benefit from the fruit of his judgment if the court decides in his favour. The Respondents have also not established before this Court that granting of the order sought will cause them any prejudice. Their only submission is that the applicant can be compensated by damages. This submission in my view misses the view focus on the fact that the Respondent is moneyed enough and that should not be panacea to flout the law simply because he is able to compensate by damages. To take this narrow view is to agree that the poor can never get justice. It is therefore this court's finding that the applicant has established their case and I allow the application in terms of prayer 1, 2, 3 and 4."

7. It is further argued that considering the claimant has proven that the Respondent has modus operandi of violating its own Human Resource Manual, the *Constitution* and the laws governing employment, the balance of convenience favours restraining it from completely defeating this suit by filling the position of the General Manager- Operations or Operations Director. Considering the seniority of the positions aforesaid, either position cannot have more than one office holder. There are also special



circumstances that warrant grant of the orders sought. The applicant has given 26 years of his life while working for the Respondent. At his age securing alternative employment at the same level will therefore be impossible. If the positions of operations director or General Manager Operations are filled, the claimant's prayer for reinstatement will be defeated. The balance of convenience therefore tilts in favour of the claimant.

8. I did not see the submissions in the file for the Respondent.

Determination

9. The court has gone through the letter of termination dated the 3rd of August, 2022. The letter is explicit that the claimant was terminated effective 3/08/2022. Prayer 7 is seeking for suspension of the impugned decision of the board, being the decision to terminate him. The applicant is in essence asking to be reinstated but by use of different terms.
10. My understanding of the prayers so framed in the subject application is that the applicant is seeking in the interim reinstatement to the position of the General Manager. In addition, he is also asking that the position not be filled by the Respondent in the interim.
11. Section 49 (3) (a) of the *Employment Act* provides for reinstatement if the termination or summary dismissal is found to be unfair. However, section 12 (3) (vii) of the *Employment and Labour Relations Court Act* provides that an order for reinstatement is only permitted within 3 years of the separation. Under section 49(4) (c) and (d) of the *Employment Act*, an order for reinstatement can only be issued upon considering its practicability and if there are any exceptional circumstances.
12. The Court of Appeal in *Kenya Tea Growers Association vs Kenya Plantation & Agricultural Workers Union* [2018] eKLR held that:

“We agree entirely with the statement by Rika, J in *Alfred Nyungu Kimungii vs Bomas of Kenya* [2013] eKLR that “Ordinarily, reinstatement of an employee is a substantive remedy, not a temporary relief. The law does not contemplate that reinstatement issues (sic) as a provisional measure. It is a remedy that should normally be granted upon the full hearing of the employer, and the employee.”

13. In *Mohammed Bayaa Adan vs Kenya Meat Commission* 2021 eKLR the court held that “The order of reinstatement requires specific performance. It means restoration of an employment contract so as to ensure continuity of an employment relationship. It places an employee back in service, on same terms and conditions of employment; reverting to the situation before dismissal. The effect of an order of reinstatement is to restore an employment contract without loss of benefits. The Court of Appeal in the case of *Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 Others* [2014] eKLR held that:

“Before the court can issue the remedy of reinstatement there are factors to be considered and that; ... the Court is required to be guided by factors stipulated in section 49(4) of the Employment Act which includes the practicability of reinstatement or re-engagement and the common law principle that specific performance in a contract of employment should not be offered except in very exceptional circumstances. The Court should also balance the interest of the employee with the interest of the employer.”



14. The court in *Mohammed Buya (supra)* went ahead and said that

“Employment having terminated on April 14, 2021 and due process and fairness of the same challenged herein, without going into the merits of the same, to stay the decision contained in the respondent’s letter of April 14, 2021 to the claimant and to reinstatement the claimant at this stage would deny the court material evidence which ordinarily would be available in a full trial”.
15. The prayers by the applicant is for the court inter alia to suspend his termination vide the letter dated August 3, 2022. He also prays that the court should suspend recruitment of any other person to this position.
16. The applicant is praying on one hand that his termination letter dated August 3, 2022 be impugned and at the same time is praying that the recruitment of a replacement of any other person be stayed.
17. The court is not clear if the prayers are capable of being implemented if the termination letter was issued on August 3, 2022 so impugning such a letter so many months later is not clear if it is capable of being implemented anyway. It is not clear if the applicant is still in employment or not.
18. Even if the termination letter is impugned it is not certain to the court if the same is overtaken by events or not.
19. Definitely the court finds the respondent failed to give a valid reasons for terminating the applicant and he also failed to follow the procedure mandated in section 41 and 45 of the *Employment Act*. The reasons for terminating employment must be a valid reason and yet it seems the respondents were not convincing on the reason they terminated the applicant. The respondents have also not communicated why they took one year to take him through the disciplinary hearing.
20. The court however is not dealing with the substantial suit as to whether the termination of the applicant was validly conducted or not. The applicant came to court by way of an application by notice of motion praying for conservatory orders one to be reinstated to his job and secondly to halt the filling up of his job through recruitment. The court is therefore not dealing with the main claim where it would have had the benefit of listening to the evidence and pleadings and made a substantial determination.
21. The court is reluctant to consider a substantial remedy of reinstatement of an employee vide an application dated September 20, 2022. The Court of Appeal in the case of *Kenya Tea Growers association vs Kenya plantation & agricultural Workers Union* (2018) eKLR held that “we agree entirely with the statement by Rika J in *Alfred Nyungu Kimungiti vs Bomas of Kenya* (2013) eKLR that:

“Ordinarily reinstatement of an employee is a substantive remedy not a temporary relief. The law does not contemplate that reinstatement issue is a Provisional measure. It is a remedy that should normally be granted upon the full hearing of the employer and employee.” The court further said “guided by the foregoing precedent I am of the view that interlocutory reinstatement should only issue for a good cause of exceptional circumstances and if the same is practical.”
22. You will notice I have referred to reinstatement even though applicant really was praying for orders against recruitment of a General Manager. A termination letter was served on the applicant in August 2022 and the court is not informed if another general manager has been recruited or not. I am unable to



grant these prayers at this point as the court is not seized of the accurate position whether the applicant has already left employment and whether another individual has been recruited to the position. Of course this honourable court had suspended the recruitment of a new general director by its court order dated October 6, 2022 but cannot stop the organisation recruiting for the position beyond here and so the same order is hereby vacated.

23. The parties have an opportunity to proceed with the main suit without delay.
24. In the meantime the court has declined the application dated September 20, 2022 for the foregoing reasons.
25. Costs will be in the cause.
26. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 6TH DAY OF APRIL 2023.

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of Court fees.

