



Somba v Kenya Tea Development Agency Holdings Ltd (Employment and Labour Relations Cause E431 of 2022) [2023] KEELRC 968 (KLR) (6 April 2023) (Ruling)

Neutral citation: [2023] KEELRC 968 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E431 OF 2022**

AN MWAURE, J

APRIL 6, 2023

BETWEEN

THOMAS SOMBA CLAIMANT

AND

KENYA TEA DEVELOPMENT AGENCY HOLDINGS LTD RESPONDENT

RULING

1. The application filed on application vide the notice of motion dated 2nd September 2022 for the following orders.
 - i. That this application be certified as urgent and the same be heard ex parte in the first instance.
 - ii. That pending hearing and determination of this application inter partes, this honourable court be pleased to preserve the subject matter of the application herein through an interim conservatory order stating and/or suspending the recruitment and/or replacement of the office of the claimant being the office of the security manager
 - iii. That pending hearing and determination of this application inter partes, this honourable court be pleased to issue interim conservatory order against the respondent staying and/or suspending the impugned decision of the board, their agents and or servants as conveyed by a termination letter dated 3rd August, 2022.
 - iv. 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 stating and/or suspending the recruitment and/or replacement of the office of the claimant being the office of the security manager.
 - v. 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 determination letter dated 3rd August 2022.

- vi. That costs of the application be borne by the respondent.
2. The respondent is a limited company owned by Private persons and KTDA is wholly owned subsidiary of the respondent. The applicant was the security manager of KTDA management services limited under the enterprise risk management department.
3. There is a disciplinary matter relating to applicant's services as security manager KTDA management services.
4. On 4th May 2021 a group of people accompanied by police stormed Muranga Tea Factory claiming to be factory's board of directors and took the premises and control of the factory and removed management officers and factory unit manager from his residence. On 25th May 2021 the operations of the Tea Factory showed down due to absence of key staff. Farmers were gripped with anxiety and confusion.
5. On 26th May 2021 calm returned to the factory and full operations were restored.
6. On 25th June 2021 applicant was sent on compulsory leave by the respondent for 90 days effective from 25th June 2021 without any explanation.
7. He says on 16th September 2021 he was asked to apply for annual leave of 21 days from 23rd September 2021.

Then on 8th October 2021 he was issued with a suspension letter and was asked to hand over company's property by 13th October 2021.

8. Further on 20th June 2022 the applicant was accused of gross misconduct and was required to respond within 48 hours. He put his response dated 25th June 2022.
9. On 6th July 2022 the applicant was invited for a disciplinary hearing before the staff disciplinary committee and was told it was due to gross misconduct. Disciplinary hearing was scheduled for 13th July 2022.
10. He says on 13th July applicant was taken ill and disciplinary hearing was rescheduled for 18th July 2022 and the disciplinary meeting took place.
11. He says the disciplinary meeting was held in violation of human resource manual of the respondent as members of board ought not to sit in staff disciplinary committee as provided 6.7 of Disciplinary committee which provides that before the case is finalised the employee shall be accorded a chance to be heard by the staff disciplinary committee outlined above. Each subsidiary company shall set up a disciplinary committee. He says he ought to have been subjected to staff disciplinary committee as constituted under the respondent's circular no 12/2016 where disciplinary committee members are

1. Senior Manager filed services
2. Senior Manager factory accounts
3. Head of technical services
4. Manager Legal regulatory
5. ICT Services Manager
6. Employee relations manager.



12. He says he had no avenue for appeal as he was disciplined by the board yet appeal was with the board of Directors.
13. He says he received a termination letter dated 3rd August 2022 and was informed he could appeal to the board and yet 50% of the board of director members had participated in his disciplinary hearing.
14. He made an appeal on 15th August 2022 and it was not successful as per the communication he got on 9th September 2022. The termination was therefore upheld.
15. The applicant had been asked to go on early retirement in December 2021 and in July 2022 he was coerced to take up early voluntary retirement and was asked to sign a discharge voucher and withdraw the claim. He received the termination letter on 3rd August 2022.
16. The respondent did not file his response despite being given ample time to do so.

Applicant's submissions

17. The issues in the view of the court for determination are whether the applicant has proved its case on the balance of probability and secondly is he entitled to the prayers sought.
18. The claimant in his submissions relates he was suspended from employment on 8th October 2021 without a notice to show cause letter contrary to section 6.5.3 of the respondent's human resource manual.
19. He further states that on 20th June 2022 he was asked to respond to a charge of gross misconduct within 48 hours. He said he responded to the notice and on 5th July 2022 he was invited for a disciplinary hearing to appear on 13/7/2022. He was then heard finally on 18/7/2022 before the board of directors and not before staff disciplinary committee as provided in their HR manual.
20. He says the reason given for the disciplinary hearing was negligence for failure to thwart mismanagement of workers when plucking tea leaves at Munuinga Tea Factory on 25th May 2021. The said tea leaves were apparently not weighted till 26th May 2021.
21. He says he was even forced on a voluntary early retirement in July 2022 but when he declined to sign the discharge voucher he was terminated on 3rd August 2022.
22. Now he says the respondent also flouted his appeal process since appeal lies with the board of directors. But now his disciplinary process was conducted by the board and so there would have been no justice from the said board to conduct is appeal. He appealed and same was declared unsuccessful on 16th September 2022 and no reasons were given for that decision.
23. The applicant therefore states the decision of the board should be stayed and he should be reinstated and indeed his entire application dated 20th September 2022 be allowed in terms of prayers 4, 5, 6 and 7.
24. On the prayer for reinstatement the applicant relies on the case of *Stephen Chase Kisaka v Emirates Airlines Limited* (2015) eKLR where the court stated:

“in the case before court, the submissions by the applicant is that he was subject to a flawed disciplinary process and that for this reason he has a prima facie case with a probability of success. On the face of it, the applicant was subjected to a disciplinary process but from the submissions of applicant, he has a prima facie case with a probability of success. The respondents contend 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. Based on the holding of judge



Ringera (as he then was) in *Suleiman v Amboseli Resort Limited* (2004) 2KLR 589 cited above. It is the applicant's 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 any prejudice. Their only submissions is that the applicant can be compensated by damages. This submissions in my view misses the view even though the respondent is moneyed enough should not be a 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 findings that the applicant has established their case and I allow the application in term of prayer 1,2,3 and 4."

Respondent's submissions

25. The Respondent in his submissions says this is an application that should have come by way of a judicial review and also via alternative dispute resolution process as provided in section 159 of the *Constitution* of Kenya 2010. He says the dispute is not related to private person and so judicial review was appropriate.
26. He further says that even if the suit has merit never less the applicant would suffer no loss because he would still be entitled to damages whichever way the determination goes.
27. He further submits that it is crucial the respondent recruits a new office holder to enable it to function and so recommends the application be dismissed.

Analysis and determination

28. The claimant filed an application praying for interim orders against recruitment of the post of security manager and he came to court via notice of motion instead of a judicial review.
29. The respondent is defined as a limited liability company under *Companies Act* owned by private persons. That being the case and always being cognisant that article 159(d) of the *Constitution* provide that justice shall be administered without undue regard to procedural technicalities, the court is not persuaded that the applicant is not proper before the court by filing a claim instead of a judicial review.
30. Now the other issue for determination is whether the claimant has a case with merits. The issue for the court to determine is how the claimant was terminated as that is usually the bone of contention in employment matters. The law is quite clear and simple as pertains to termination of an employee.
31. Section 45(1) is one of the crucial provision to satisfy where the employer must satisfy the substantial justification of termination as well as the procedural fairness as well stipulated also in section 41 of *employment act*.
32. The claimant was suspended from employment on 8th October 2021 and was given no notice to show cause. He was not given reason or valid reason for the suspension contrary to section 6.5.4 of their human resource manual.
33. About one year later claimant was invited for a disciplinary hearing for gross misconduct for the actions that took place on 25th May 2021 to do with the plucked tea leaves that were not weighted. He was accused of gross misconduct and in particular negligence of duty in that he did not stop disruption of operations causing loss to the respondent and inconvenience to the farmers. He was asked to respond within 48 hours and was then invited to a disciplinary hearing and after the hearing which took place almost a year after the alleged misconduct by a notice to show cause dated 20/6/2021 he was served with a termination letter dated 3rd August 2022.



34. Having said so the prayers for the application are prayers 3 and prayer 5. Prayer 3 the applicant is praying for a conservatory order against respondent to suspend the impugned decision of the board, their agents or servants as conveyed by the termination letter dated 3rd August 2022.
35. Prayer 5 as well is seeking that the 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 3rd August 2022.
36. He further prays that the court should suspend the recruitment of any other person to this position.
37. The applicant is praying on one hand that his termination letter dated 3rd August 2022 be impugned and at the same time is praying that the recruitment of a replacement of any other person be stayed.
38. The court is not clear if the prayers are capable of being implement. If the termination letter was issued on 3rd August 2022. So impugning such a letter so many months later is not clear if it is capable of being implemented anyway. If is not clear if the applicant is still in employment or not.
39. Even if the termination letter is impugned it is not certain to the court if the same is overtaken by events or not.
40. Definitely the court finds the respondent fail 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.
41. 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 applicant by notice of motion praying for conservatory orders one to be reinstated to his job and secondly to stall the filing up of his job through recruitment. The court is therefore not dealing with the man claim where it would have had the benefit of listening to the evidence and pleadings and made a substantial determination.
42. The court is reluctant to consider a substantial remedy of reinstatement of an employee vide an application dated 20th September 2022. The court of appeal in the case of *Kenya Tea Growers association v Kenya plantation & agricultural Workers Union* (2018) eKLR held that “we agree entirely with the statement by Rika J in *Alfred Nyungu Kimungiti v 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 as 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 tht interlocutory reinstatement should only issue for a good cause of exceptional circumstances and if the same is practical.”
43. You will notice I have referred to reinstatement even though applicant really was praying for orders against recruitment of a Security Manager. A termination letter was served on the applicant in August 2022 and the court is not informed if another Security 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 have suspended the recruitment of a new Security Manager by its court order dated 6th October 2022 but cannot stop the organisation recruiting for the position beyond here and so the same order is hereby vacated.



44. The parties have an opportunity to proceed with the main suit without delay.
45. In the meantime the court has declined the application dated 20th September 2022 for the foregoing reason.
46. Costs will be in the cause.

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.

Anna Ngibuini Mwaure

Judge

