



Dock Workers Union v Kenya Ports Authority (Miscellaneous Application E057 of 2021) [2023] KEELRC 1247 (KLR) (18 May 2023) (Ruling)

Neutral citation: [2023] KEELRC 1247 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION E057 OF 2021**

**AK NZEI, J
MAY 18, 2023**

BETWEEN

DOCK WORKERS UNION APPLICANT

AND

KENYA PORTS AUTHORITY RESPONDENT

RULING

1. The Application before me is the Applicant’s Notice of Motion dated September 1, 2022 and is filed by way of a Miscellaneous Application. The Applicant seeks orders:-
 - a. that pending hearing and determination of the application or further orders, the Court be pleased to issue an order of injunction against the Respondent restraining it, its agents and/or servants and or any person or entity acting on its behalf from evicting the grievants from KPA staff houses, the current residents (sic) of the Respondents.
 - b. that pending the hearing and determination of this application and or further orders, the Court be pleased to issue an order of stay against the decision of the Respondent to discontinue the medical benefits which (have) been available to the grievants and their families.
 - c. that pending hearing and determination of the appeals filed by the grievants against their dismissal and or filing of a substantive claim against the decision to dismiss the grievants, this Court be pleased to issue an order of injunction against the Respondent restraining it, its agents and or servants or any person or entity acting on its behalf from evicting the grievants from the KPA Staff houses, the current residents (sic) of the grievants respectively (sic).
 - d. that pending hearing and determination of the appeals filed by the grievants against their dismissal and or filing of a substantive claim against the decision to dismiss the grievants, the Court be pleased to issue an order of injunction to stay the decision of the Respondent to discontinue the medical benefits which have been available to the grievants and their families.



- e. that costs of the suit be borne by the Respondents.
2. The application is expressed to be brought under Sections 3 and 12 of the *Employment and Labour Relations Court Act, 2007*, Sections 12, 41, 43, 44, 45 and 46 of the *Employment Act 2007*, Section 2 of the *Labour Relations Act 2007* and Rule 17 of the *Employment and Labour Relations Court (procedure) Rules 2016*, and is based on a supporting affidavit of Simon Kiprono Sang, sworn on September 1, 2022, in which the grievants are named as:-
 - a. Edga Hagyo
 - b. Abuu Mohammed Shee
 - c. Gonna Tsuma Mwangae
 - d. Iddi Bakari
 - e. Mwavita Chapu, and
 - f. Justus Onyancha.
 3. It is deponed in the said affidavit, *inter-alia*:-
 - a. that the application is filed on behalf of the above-named grievants who are dismissed employees (of the Respondent).
 - b. that the Applicant has a recognition agreement with the Respondent in accordance with the law, which provides for initiating and handling of disciplinary proceedings (involving unionizable employees and that the grievants complain that their charge sheets were never signed and their disciplinary proceedings were never initiated by their immediate supervisor.
 - c. that whereas under Section K 7(n) of the Respondent's Human Resource Manual 2017 disciplinary processes are supposed to be concluded within six (6) months except with a written explanation to the Managing Director giving reasons why the process cannot be concluded, disciplinary process involving the grievants took at least ten months and no reasons were given to warrant an extension of time.
 - d. that the (Respondent's Human Resource) Manual Section K 13(6) and the Recognition Agreement (Section 11) provide for appeals, and that the letters dismissing the grievants gave them leave to appeal the Respondent's decision dismissing them.
 - e. that the dismissal letters also required the grievants to clear and vacate their staff residential houses, and that these dual instructions render the appeals academic and/or mischievous.
 - f. that the Respondent has discontinued/withdrawn medical services from the grievants, some of whom have existing medical conditions requiring post medical aid and with current medical referrals.
 - g. that the Respondent is a state agency and health care is one of the minimum rights guaranteed to the grievants and other citizens under the Bill of Rights.
 - h. that the appeals, if left under the control of the Respondent, may take eternity to be concluded, and that cost to the grievants during the period of prosecuting the appeals will be overbearing.
 4. Documents annexed to the Applicant's said supporting affidavit include the grievants' dismissal letters dated 15/8/2022, the grievant's letters to the Respondent appealing against the dismissals, a



recognition agreement between the Applicant and the Respondent dated 1986 and the Respondents HR Manual 2017, among others.

5. The application is opposed by the Respondent. On November 21, 2021, the Respondent filed a Replying Affidavit sworn by Bildad Kisero, the Respondent's Manager incharge of Administration Department, on November 18, 2022. It is deponed in the said replying affidavit:-
 - a. that in compliance with Section 31 of the Employment Act, the Respondent (KPA) pays monthly house allowance to all its employees.
 - b. that pursuant to Section L 3 of KPA Human Resource Manual 2017(now repealed), KPA's employees may, subject to availability, be allocated a house owned by KPA whereupon a tenancy is created and rent at market rates deducted from the employees' monthly salary. That where an employee who is a tenant of KPA is dismissed from employment, the tenancy terminates and the former employee is required to vacate the house within 1 month of the dismissal.
 - c. that similarly, Section E of the KPA HR Manual stipulates the KPA guiding principle on medical services whereby it provides that employees are entitled to limited medical benefits as prescribed in the HR Manual, which is a cost to KPA.
 - d. that the grievants were all accorded personal hearing by the Respondent's Human Resource Committee and thereafter dismissed as depicted in the letters of dismissal filed by the claimant.
 - e. that the grievants have not filed a substantive suit to challenge the dismissal and that their instant application is solely meant to seek retention of benefits that were due to them by virtue of their employment.
 - f. that 3 out of the 7 grievants herein, being Tsuma Gona Mwangea, Edga Hagyo and Abuu Shee, have on September 21, 2022 filed a separate substantive suit in this Honourable Court to challenge their dismissal under MSA ELRC Cause No E73 of 2022 which is pending before this Court; and wherein the 3 claimants also filed an application dated 20/9/2022 seeking similar orders as those sought in the instant application. That the suit herein is tantamount to forum shopping and is an abuse of this Court's process.
 - g. that 4 out of the 7 grievants listed by the claimant were housed by KPA, paying monthly rent through check off system from their monthly salary as follows:-
 - i. Kenneth G Masha - BLK HI-D3, Shimanzi at Ksh 5,900 per month.
 - ii. Abuu Mohammed Shee - GFN BLK 12 D303 Gorofani at Ksh s 4,490 per month.
 - iii. Gona Tsuma Mwangea - GFN BLK HIOD D301 Gorofani at Ksh 4,100 per month.
 - iv. Mwavita Chapu - BLK C-D1 Hussein BLK KHL at ksh 6,420 per month.
 - h. that the 4 owe KPA unpaid rent, which shall first be paid to KPA prior to their clearance from employment.
 - i. that the Superior Courts have consistently held that once a contract of employment has terminated, all the fringe benefits, including additional subsidized housing, also terminate.
 - j. that the grievants' employment having come to an end, it is in the interest of justice that the houses that were allocated to the four grievants as an additional benefit during their employment should be vacated in accordance with KPA Human Resource Manual.



- k. that similarly, the grievants are no longer entitled to the limited medical benefits available to KPA employees since they are no longer employees of KPA, and do not offer any further services to KPA. That it would be unfair and unjust to compel KPA to incur expenses for their medical and housing requirements when there is no more employment relationship.
6. Documents annexed to the Respondent's said replying affidavit include an excerpt of the KPA HR Manual 2017 containing Section L.3 and copies of pleadings filed in MSA ELRC Cause No E73 of 2022.
7. The Applicant did not deny or controvert any of the averments made in the affidavit of Bildad Kisero, either by filing a further affidavit or otherwise.
8. The Respondent also filed grounds of opposition dated October 14, 2022.
9. As already stated in this Ruling, the proceedings herein were commenced by the Applicant by way of a Miscellaneous Application whereby a Notice of Motion was filed seeking orders of injunction against the Respondent pending hearing and determination of appeals said to have been lodged with the Respondent by the grievants challenging their dismissal, and pending filing of a substantive claim. This offends Rule 17(5) of the *Employment and Labour Relations Court (Procedure) Rules 2016* which requires that injunction orders be sought, in and on the basis of a substantive suit. The Rule provides:-
- “(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 property or right.”
10. It is for a good reason that the forgoing rule requires that an application for orders of injunction be made in a substantive suit. Orders of injunction cannot be granted unless the Court is satisfied that the Applicant has a prima facie case with a possibility of success and that the Applicant will suffer irreparable loss that cannot be compensated in damages if the orders sought are not granted. If the Court is in doubt, the application will be determined on a balance of convenience.
11. That Court of Appeal stated as follows in *Nguruman Limited -vs- Jan Bonde Nielsen & 2 Others* [2014] eKLR:-

“In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to:-

- a. Establish his case only at a prima facie level.
- b. Demonstrate irreparable injury if a temporary injunction is not granted, and
- c. 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 sequentially. See *Kenya Commercial Finance Co Ltd -vs- Afraha Education Society* [2001] Vol 1 EA 86. If the Applicant establishes a prima facie case, that alone is not sufficient basis to grant an interlocutory injunction, the Court must further be satisfied that the injury the Respondent will suffer, in the event the injunction is not granted, is



irreparable. In other words, if damages recoverable in law is an adequate remedy and the Respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the claimant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of prima facie case does not permit "leap frogging" by the Applicant to injunction directly without crossing the other hurdles."

12. None of the foregoing three requirements has been established in the present application. The Applicant opted not to file a substantive claim and to thereby place before this Court all the materials regarding matters and/or reasons leading to the grievants' dismissal from employment and the procedure adopted by the Respondent in effecting the dismissals. There is absolutely nothing placed before this Court for interrogation in search of an answer as to whether or not there exists a prima facie case. In the absence of a substantive suit and demonstration of existence of a prima facie case, the Applicant could not, and has not satisfied the other two requirements/pillars.
13. It is to be noted that the grievants were dismissed from employment by the Respondent vide termination letters dated August 15, 2022 and that the Applicant has not challenged the legality or the validity of the dismissals. This Court cannot issue speculative injunctive orders pending filing of a substantive suit as the Applicant is asking the Court to do. Why hasn't the substantive suit been filed so far". The grievants ceased to be employees of the Respondent upon their dismissal on August 15, 2022, and any benefit to which they were entitled under their respective terms of employment terminated along with the contracts of employment. The housing and medical benefits that they are seeking to have restored and/or to retain can only revert back to them if they are reinstated back to employment. It was stated as follows in *Fadhil Juma Kisua & Another -vs- Kenya Ports Authority* [2015] eKLR:-
 - " 13the right to housing of an employee under Section 31 of Employment Act is only available as long as the employment relationship between the parties exist. Such right is either enjoyed in form of physical shelter or paid monthly allowance. It cannot therefore continue after termination of the employment contract unless the employer permits the former employee to continue using the house in humanitarian consideration.

That position was settled by the Court of Appeal in *Erick Vj Makhokha & 4 others -vs- Lawrence Sagini & 2 others* [1994] eKLR when it held that:

"The contract of employment having gone, the fringe benefits of subsidized housing went with it."
 14. The foregoing decision is binding on this Court and this Court will obviously follow it to find and hold that the claimant's right of housing went with their employment after they were dismissed. For that reason, just as an employee who receives housing allowance cannot continue holding his former employer liable to pay the same after separation, the employee who is housed by the employer cannot demand to continue being housed after separation."
14. The relationship that exists between an employer and employee is purely contractual, and the same terminates upon termination of the contract of employment. Any right or fringe benefit enjoyed by the employee by virtue of his employment determines upon termination of the contract of employment from which the right or benefit ensued.
15. Further, an order of injunction, whether interim, interlocutory or permanent, cannot issue if the applicant does not establish the existence of a right, legal or equitable. The Applicant did not establish



that the grievants are legally or equitably entitled to the housing or medical care regarding which injunctive orders are being sought.

16. Finally, and having considered written submissions filed by both parties, I find no merit in the Notice of Motion dated September 1, 2022. The same is hereby dismissed. Each party will bear its own costs of the application.
17. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 18TH MAY 2023

AGNES KITIKU NZEI

JUDGE

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Mr. Ochieng for Applicant

Mr. Cheryuiyot for Respondent.

