



**Ngige v Samsung Electronics EA Limited (Cause E273 of 2023)
[2023] KEELRC 1985 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1985 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E273 OF 2023
NZIOKI WA MAKAU, J
JULY 27, 2023**

BETWEEN

STANLEY GITHE NDE NGIGE CLAIMANT

AND

SAMSUNG ELECTRONICS EA LIMITED RESPONDENT

RULING

1. The claimant/applicant filed a Notice of Motion Application dated April 3, 2023 seeking to be heard for Orders that:
 - i. Spent.
 - ii. Spent.
 - iii. An interlocutory injunction be issued restraining the respondent from recruiting or employing a substantive Retail Marketing Manager, Internet & Mobile (I&M) Group, to take the Applicant's position pending the hearing and determination of the Main Suit herein.
 - iv. The respondent reinstates the applicant to the position he held prior to the termination of his employment or otherwise engages him in a position comparable to his former position with no loss of benefits, pending the hearing and determination of the Main Suit herein.
 - v. The costs of this Application be provided for.
2. The Application was premised on the grounds that the applicant and respondent had entered into a Contract of Employment and the applicant executed the functions of his role with distinction. That however without any reasonable basis, the applicant's Line Manager instituted disciplinary proceedings against him on September 28, 2022 that led to the termination of his employment on December 9, 2022. The Applicant was aggrieved by the said termination hence the suit herein, which he contended would be rendered nugatory unless the Orders sought herein are granted. Further, that



there exist exceptional circumstances that call for the rare exercise of this court's jurisdiction to grant an order of reinstatement or re-engagement pending hearing of the main suit. According to the applicant, the applicant will not suffer any prejudice that would not be compensable by an award of costs if the orders sought herein were granted but the main suit is unsuccessful.

3. The Application was supported by the applicant's affidavit in which he averred that there were very few players in the telecommunications industry in Kenya of the same cadre as the respondent with the consequence that there are hardly any available opportunities for him to secure comparable employment with another employer. Consequently, the injury he stood to suffer should reinstatement not be granted was actual, substantial, demonstrable, and hardly compensable in terms of damages. He believed that it is just and proper that this court grants the orders sought on the basis of the grounds set out on the face of the motion.
4. In response, the respondent filed a replying affidavit sworn by Ms. Margaret Wachira on April 20, 2023. Ms. Wachira averred that the claimant/applicant was dismissed from the respondent's employment on grounds of negligence of duty. That the claimant was afforded an opportunity to explain himself that after the respondent thereafter lawfully terminated his employment, his position was filled and was thus no longer vacant. That the applicant's orders of seeking an injunction had thus been overtaken by events and in any event, he had raised the claim well over three months after his termination, which only serves to prejudice the respondent. She also believed the Order of reinstatement that the claimant/applicant was seeking cannot legally be made on an interlocutory application and should await a full hearing of the case. Further, that the relationship between the claimant and the respondent had irretrievably broken down and an order of reinstatement would occasion difficulty on both parties due the already strained relationship.
5. In seeking to counter the applicant's assertions that he was terminated for no valid reason, Ms. Wachira averred that the claimant's disciplinary process was both substantively and procedurally fair and in accordance with the law. She further averred that the claimant had not satisfied the threshold for grant of an order of reinstatement and that an employer does not have a duty in law to maintain an employee simply because there is no market for his skills. In addition, that an employer cannot be held the personal financial arrangements made by an employee, especially where the employer complies with the law in the termination of employment. It was her stance that the claimant will not suffer any irreparable damage that cannot be compensated in the form of damages should the orders sought not be granted. Lastly, that the claimant's Application was without merit and was fit for dismissal with costs.

Claimant/Applicant's Submissions

6. The claimant/ applicant submitted that the respondent's responses on the issue of reinstatement are inadequate because the position the applicant used to hold, namely, Retail Marketing Manager, IM Group is different from the position the respondent has allegedly filled, namely Retail Manager, MX Division, and that it cannot therefore be said to be "no longer vacant". Moreover, that the law allows a party to lodge a claim for unfair termination and the court, up to three years from the date of termination, to order reinstatement. That the respondent's argument that he was late in filing his claim within 3 months of the termination of his employment cannot therefore stand.
7. As to whether he should be reinstated into the respondent's employ, the applicant submitted that there was no suggestion whatsoever in the respondent's replying affidavit that there are no positions in its structure at which he can be re-engaged pending trial, nor was there a suggestion that it would be impractical to re-engage him pending trial, should the court so order. That section 49(3) of the [Employment Act](#) as read with section 50 thereof empowers this court to grant an order of reinstatement or re-engagement in the event it finds an employee's termination as unjustified. That the court also



has the power to grant any other appropriate relief as it may deem fit to grant under section 12(3) of the *ELRC Act*. In addition, Rule 17(6) of the *Employment and Labour Relations Court (Procedure) Rules* 2016 provides that a court can issue an interim or interlocutory injunction to restrain a party from breaching the right of another, or causing injury to such right. He submits that Rule 17(10) provides that a court shall not grant an order of reinstatement, ex parte. In this regard, there is thus no statutory provision that denies the court jurisdiction to grant an order of reinstatement or re-engagement pending trial, upon inter partes hearing. The applicant relied on ELRC Mombasa Cause No. 793 of 2015 - *Fadhil Juma Kisua & another v Kenya Ports Authority* [2015] eKLR wherein the Court was of the view that after inter parties hearing of an application for reinstatement pending trial, the court can still reinstate an employee if it is within 3 years after termination. He submitted that this court has the requisite jurisdiction to order reinstatement and failing that, re-engagement pending trial of the main suit.

8. The applicant submitted that the approach that the essence of reinstatement/re-engagement is to build productive employment relationships through the promotion of good faith was considered in the Ruling of this court in ELRC Nairobi Cause No. 581 of 2019 - *Dolly Nyambura Mwangi v Faulu Micro Finance Bank Limited* [2020] eKLR where the court stated that the orders sought by the applicant would only be justified if there was likelihood for her reinstatement. He further submitted that this court, before granting the orders sought herein, is therefore obliged to undertake a broad assessment of the affidavit evidence with a view to:
 - a. Assessing whether the applicant is likely, at the full hearing of his Claim, to succeed in proving that the termination of his employment was unjustified;
 - b. assessing whether there is a possibility that the applicant may be permanently reinstated into employment, upon the full hearing of his Claim;
 - c. assessing whether in the absence of reinstatement the applicant is likely to suffer irreparable injury which would not be adequately compensated by an award of damages; and
 - d. if the court is in doubt as to the above, assessing whether the balance of convenience lies in favour of reinstatement.
9. The Applicant further submitted that while an order of reinstatement or re-engagement is granted at the discretion of the court, the factors that a court would consider include that the respondent is a large institution with presence across East Africa and that mere assertions of lost trust and confidence are not sufficient to show a genuine barrier to reinstatement. That the court in determining whether to order reinstatement upon conclusion of the full hearing should consider the legality and the practicability of making the order. That this is considering that the applicant's claim for reinstatement or re-engagement would have been defeated, out of no fault of his own, as he has no way of ensuring that the main suit would be heard and determined within 3 years. That the balance of convenience weighs in the applicant's favour and in support of interlocutory reinstatement/ re-engagement, on account of several factors, including the disruptive nature of the termination on his personal financial commitments and the financial strain it has put his family under, and in contrast, the respondent would suffer no difficulties. It was the applicant's submission that he had demonstrated that the Application meets the requirements set in law for an order of reinstatement or re-engagement pending trial, or in the alternative, for an order restraining the respondent from filling the applicant's erstwhile position pending trial.



Respondent's Submissions

10. The respondent submitted that no exceptional circumstances have been demonstrated by the applicant to warrant the exercise of this honourable court's discretion as sought. That the claimant's application is by nature and effect an application for a mandatory order of injunction and that it is trite law that a mandatory order of injunction cannot be issued at an interlocutory state except in very clear cases and in very special circumstances. The respondent referred to the holding of the Court of Appeal in *Stephen Kipkebut t/a Riverside Lodge and Rooms v Naftali Ogola* [2009] eKLR. It was the respondent's submission that the claimant had thus failed to satisfy the threshold for grant of an order of mandatory injunction reinstating him to employment or restraining the respondent from undertaking recruitment for the position previously held by him. On this submission the respondent cited the case of *Idriss Aden Mukhtar & 2 others v County Government of Garissa & another* [2016] eKLR in which the applicants had asked the court for orders that would amount to a mandatory injunction ordering reinstatement of a dismissed employee and the Court of Appeal held that they had not satisfied the threshold for a grant of such orders.
11. The respondent submitted that under section 49 of the *Employment Act*, this court ought to consider the circumstances under which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination. That in the case of *Mundia Njeru Geteria v Embu County Government & 3 others* [2013] eKLR, the court stated thus:

“However in granting the reliefs whose consequence is to keep in service, an employee in a strained relationship with an employer, the Court is very much conscious of the common law principle against specific performance in employment contracts unless in exceptional cases. The principle against specific performance in employment contracts is premised on the fact that employment relationships are in most cases personal in nature. Therefore the moment the minimum necessary confidence between the parties has been severely eroded, that relationship cannot reasonably continue without a considerable degree of awkwardness.” (Emphasis by Respondent)
12. It submitted that further, since the claimant/applicant had sought for an order of reinstatement as a substantive prayer in his Statement of Claim, an adjudication of whether the same should be granted should await trial. That this position was reaffirmed by the Court of Appeal in the case of *Kenya Tea Growers Association & another v Kenya Plantation and Agricultural Workers Union* [2018] eKLR that the law does not contemplate that reinstatement issues as a provisional measure and that it is a remedy that should normally be granted upon the full hearing of the employer, and employee. The Respondent accordingly submitted that it would be premature and a grave miscarriage of justice for the court to issue the substantive orders sought before hearing the evidence that parties and their witnesses will give on the issues arising in this matter.
13. The respondent urged the court to be guided by the determination in the case of *Kenya Shipping Clearing Freight Logistics and Warehouse Workers Union v May Freight Ltd* [2020] eKLR where the Court summarized the position in the following terms:

“On the other hand it is trite law that reinstatement of an employee is tantamount to ordering specific performance in a contract of service at whatever stage of the suit as such in line with section 49(4) of the *Employment Act* and the holding in the Kenya Airways case, supra, the employee must demonstrate exceptional circumstances. In this instance, however, the Applicant has not demonstrated any exceptional circumstances to justify his reinstatement but only contended that the grievant did not commit the wrong doing



and that the Respondent did not follow the procedure set out under the CBA and the Employment Act before dismissing the grievant.

With due respect to the applicant, the foregoing contention constitutes the main issues for determination after hearing of the main suit not at this stage. 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.”

14. It submitted that in any event, if the orders of reinstatement and of injunction restraining the respondent from filling his position were to be made by this honourable court, the same would be impossible to implement having been overtaken by events as the respondent had since filled the position. That the Applicant’s assertion that the position that had been filled was different from the one he previously held was misleading, in bad faith and an attempt to divert this court’s attention from the issue in controversy. This is because the name of the division in which the claimant worked changed from IM to Mobile Experience (MX) in 2021, a fact well known to the claimant and which is also referred to in his own documents. further, that the claimant cannot be allowed to approbate and reprobate as he also seeks an otherwise re-engagement in a position comparable to his former position. In addition, the respondent submitted that there was no mutual trust between it and the claimant and that an order of reinstatement would occasion difficulty on both parties due to the already strained relationship. That the claimant had particularly referred to his previous supervisor in unpalatable terms and it does not bode well for the employment relationship for him to be reinstated to the position still supervised by the same supervisor. That should the claimant prove his case after full hearing, the law provides sufficient remedy in terms of compensation for unfair termination of employment.
15. The claimant/applicant has sought reinstatement. He asserts that under the rubric of employment law, this is a remedy available to him at this stage and thus urges the grant of the prayer for reinstatement or re-engagement. The Respondent on its part denies the claimant is entitled to the prayer sought and asserts this is a mandatory injunction being sought pending resolution of the claim and that the parameters for grant of such an order have not been met. It thus urges the dismissal of the claimant’s motion with costs.
16. It is my considered view that after termination of an employee, exceptional circumstances must be laid before an order of reinstatement can be made pending the hearing. As the claimant has not made out grounds for the grant of the prayer at this stage, the court will decline to order reinstatement at this time and will hear the matter on the merits before making a determination as to whether the claimant is entitled to an order of reinstatement as he can avail of the remedy at the end of trial if he is successful in that regard. Application dismissed albeit with no order as to costs. Parties will take directions on the disposal of the suit immediately after this Ruling.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JULY 2023

NZIOKI WA MAKAU

JUDGE

