



**Omondi v Action Against Hunger (USA) (Cause E159 of 2023)  
[2023] KEELRC 1821 (KLR) (26 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1821 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E159 OF 2023**

**JK GAKERI, J  
JULY 26, 2023**

**BETWEEN**

**GRACE OMONDI ..... CLAIMANT**

**AND**

**ACTION AGAINST HUNGER (USA) ..... RESPONDENT**

**RULING**

1. Before the court for determination is a Notice of Motion dated 21<sup>st</sup> February, 2023 by the Claimant filed under Certificate of Urgency seeking orders that;
  1. Spent.
  2. Spent.
  3. Pending the hearing and determination of this suit, a conservatory order be issued prohibiting the Respondent from replacing the Claimant as Regional Logistics Specialist, Horn and East Africa Region.
  4. Pending the hearing and determination of this suit, a conservatory order do issue requiring the Respondent to reinstate the Claimant to her duties as Regional Logistic Specialist, Horn and Eastern Africa Region.
  5. Any suitable orders calculated to meet the ends of justice be made.
  6. The costs of this application be provided for.
2. The Notice of Motion is based on the grounds that termination of the Claimant's employment was wrong as the provisions of Section 41 of the *Employment Act* were not complied with which violated the Claimant's rights to fair labour practices.



3. Similarly, the Notice of Motion is supported by the Affidavit of the Claimant sworn on 21<sup>st</sup> February, 2023 who depones that she was employed by the Respondent in April 2018 with confirmed renewal with the current contract running from January 2022 to December 2023.
4. That the genesis of the dismissal was a report the Claimant prepared in her line of duty which does not appear to have delighted the Line Manager.
5. The affiant depones that her termination was actuated by malice.

### **Response**

6. In its grounds of opposition dated 8<sup>th</sup> March, 2023, the Respondent states that Notice of Motion is misconceived and had not been filed with clean hands, lacks merit and should be dismissed.
7. In the Replying Affidavit sworn by Loice Birgeu, the Respondent deposes that the Claimant's contract was terminable by one month's notice or summarily and the Claimant's employment was terminated for insubordination.
8. That the Claimant appealed and the appeal was yet to be determined on merit and the suit is premature and offended the principle of exhaustion.
9. That the Claimant's documents disclose some degree of incompatibility and grant of the orders sought could occasion discord and hardship to the Respondent.
10. In a Further Affidavit sworn on 13<sup>th</sup> April, 2023, the affiant deposes that sometime in September 2022, the Claimant had been sent to Haiti for one month to provide technical support and reinforce capacity of the team owing to the challenges at the place and identify possible solutions.
11. That on 24<sup>th</sup> November, 2022, the Claimant went to her office shaking terribly having walked out of a meeting with the Line Manager, and the Interim Regional Director and agreed to file a formal complaint against the Line Manager which she did.
12. That the affiant convened a meeting on 24<sup>th</sup> January, 2023 attended by Head of Office Human Resource Administrator, Finance and Logistics and the Acting Human Resource Director and the Claimant.
13. That the Claimant initially had complained of being branded a "liar" but explained that she had been informed by the line manager that she would be subjected to a forensic audit.
14. That the line manager explained that he had asked the Claimant to allow him deal with the issue of Haiti due to the fragility of the country and the Claimant's report would be subjected to a forensic audit and not her as a person.
15. That the meeting adjourned owing to other commitments of the line manager and resumed on 25<sup>th</sup> January, 2023 when the Claimant stated that she was busy and uttered the words "You people" can decide whatever.
16. That the meeting resolved to discontinue the Claimant's contract and she was notified on 26<sup>th</sup> January, 2023 but declined to sign the termination letter but took a picture of it.
17. The affiant attached copies of email communication from the Claimant, Line Manager and other members of staff to demonstrate the context of the termination of the Claimant's employment.



18. That the Claimant was accorded an opportunity to show cause but refused to attend the meeting and filed the instant suit before exhausting internal dispute resolution mechanisms as she had a pending appeal which the Chief Executive Officer could not deal with owing to the instant suit.

### **Claimant's submissions**

19. Counsel submitted that the court had wide jurisdiction under Section 12 of the *Employment and Labour Relations Court Act*, 2011 (incorrectly cited as *Employment Act*) to order specific performance i.e reinstatement of the Claimant notwithstanding the fact that the Claimant is seeking damages as well.
20. That if the order was not granted at this stage, the same will have been overtaken by events and the litigation would be in vain.
21. Reliance as made on the provisions of Article 23(3) of the *Constitution* of Kenya, 2010, Section 3 of the *Civil Procedure Act* and Section 12(3), (1), (2), (3) of the *Employment and Labour Relations Court Act*, 2011.
22. Counsel submitted that the Claimant's rights should be vindicated as she was dismissed from employment without due process.
23. That the Notice of Motion is timeous and the Respondent was responsible for the delay of the hearing.
24. It was further submitted that the Respondent had not pleaded that it would be prejudiced if the orders sought were granted.  
  
That the status quo should be maintained as only a few officers of the Respondent could not work with the Claimant.

### **Respondent's submissions**

25. Counsel for the Respondent isolated no specific issue but submitted inter alia that the Claimant became uncooperative, defiant and not ready to pursue her complaint against the line manager or defend his claim against her as evidenced by the failed meeting of 25<sup>th</sup> January, 2023.
26. Counsel submitted that in the circumstances, the Respondent was bound to take action.
27. That although the Claimant acknowledged the termination of employment vide the email dated 31<sup>st</sup> January, 2023 and filed an appeal in accordance with the Human Resource Manual and Procedures, she quickly filed the instant suit.
28. Counsel further submitted that the Respondent complied with the provisions of Section 41 of the *Employment Act*, 2007 as the Claimant was given a chance to show cause but was uncooperative.
29. Counsel urged that the suit was premature on account of the provisions of Section 9(1) (2) (3) and (4) of the *Fair Administrative Action Act*, 2015 as the Claimant had not exhausted the internal dispute resolution mechanisms before invoking the court's jurisdiction.
30. Counsel urged that termination of the Claimant's employment was not actuated by bad faith.
31. As regards the orders sought, reliance was made on the decision in *Kenya Airways Ltd V Aviation & Allied Workers Union Kenya & 3 others* (2014) eKLR to urge that the remedy of reinstatement was discretionary and the court must consider the circumstances set out in Section 49(4) of the *Employment Act* and balance the interests of both parties.
32. Counsel persuaded the court not to grant the order of reinstatement.



33. As regards the order of prohibition, counsel relied on the sentiments of the court in *Invesco Assurance Co. Ltd V MV (Minor suing through next friend and mother)* (2016) eKLR to highlight the nature of the conservatory orders and urge that based on the evidence on record, the Claimant had not made a prima facie case to warrant the orders sought.
34. It was submitted that granting the orders sought would be a determination of the main suit and the Claimant had not satisfied the requisite conditions.
35. That the court could not stay a termination of employment as it amounted to an interference with a decision already made by the management exercising its discretion.
36. That granting the orders would not be in the public interest as courts have observed and in any event the suit does not touch on public interest as held in *Gatirau Peter Munya V Dickson Mwenda Kitbinji & 2 others* (2014) eKLR.
37. Counsel urged the court to dismiss the Notice of Motion with costs.

### **Determination**

38. It is common ground as submitted by the Claimant's counsel that this court has extensive jurisdiction to grant the orders sought.
39. The provisions of Section 12 of the *Employment and Labour Relations Court Act* are clear on the scope of the court's jurisdiction and exemplifies the orders which the court may make and include interim preservative orders including injunctions, specific performance, declaration, reinstatement and many others.
40. More significantly, Section 12(3)(viii) of the *Act* is unambiguous that the court has jurisdiction to make;  
“ any other appropriate relief as the court may deem fit to grant.”
41. In the instant suit, the Claimant seeks the orders of reinstatement and the Respondent restrained from replacing the Claimant as the Regional Logistics Specialist, Horn and East African Region of the Respondent.
42. As to whether the Claimant is entitled to reinstatement, the court proceeds as follows;
43. Reinstatement is one of the remedies identified by Section 12(3)(vii) of the *Employment and Labour Relations Court Act*, 2011 read together with Section 49(3)(a) of the *Employment Act*, 2007 and is a terminal remedy.
44. Similarly, and as correctly submitted by the Respondent's counsel, the remedy is discretionary, a fact emphasized by the Court of Appeal in *Kenya Airways Ltd V Aviation and Allied Workers Union & 3 others* (*Supra*), which discretion must be exercised in the context of the provisions of Section 12(3) (vii) and 49(3)(a) above.
45. In the instant Notice of Motion, the Claimant has not particularized the prejudice she stood to suffer between now and determination of the main suit, if the order of reinstatement was not decreed.
46. Similarly, in her main suit, the Claimant prays for the same remedy as well as damages in the alternative and the issue will remain outstanding if the order is not granted at this stage of the proceeding.



47. In determining this issue, the court is guided by the sentiments of Maraga JA (as he then was) in *Kenya Airways Limited V Aviation & Allied Workers Union Kenya & 3 others* (supra) as follows;

“ . . . Reinstatement is, however, not an automatic right of an employee. It is discretionary and each case has to be considered on its own merits based on the spirit of fairness and justice in keeping with the objectives of industrial adjudication. In this regard, there are fairly well settled principles to be applied. For instance, the traditional common law position is that courts will not force parties in a personal relationship to continue in such relationship against the will of one of them. That will engender friction, which is not healthy for business unless the employment relationship is capable of withstanding friction like where the employer is a large organization in which personal contact between the affected employee and the office who took action against him will be minimal. Under the Kenyan *Employment Act*, the factors to be taken into account when considering reinstatement are enumerated in Section 49(4) of the *Employment Act*. Those relevant to this appeal include the wishes and expectations of the employee; The common law principle that there should be no order for specific performance in a contract of service except in very exceptional circumstances, the practicability of reinstatement and compensation paid by the employer and chances of the employee securing alternative employment. . . ”

48. In this case, it is common ground that the Claimant was serving the Respondent as the Regional Logistics Specialist under a renewable 2 year contract of service effective January 2022 to December 2023 terminable by one (1) month’s notice of either party.

49. It is also not in contest that the Claimant’s employment was terminated on 26<sup>th</sup> January, 2023 following what appears to have been a misunderstanding between the Claimant and the Line Manager regarding her work in Haiti and subsequently report of her activities and findings there.

50. According to the Respondent’s Human Resource Manager, Loice Birgen, the Claimant attended a meeting she had convened and her Line Manager too was also present including four other attendees but could not proceed to conclusion owing to the Line Manager’s other commitments.

51. Loice Birgen deposed that she reconvened the meeting on 25<sup>th</sup> January, 2023 but the Claimant flatly refused to attend.

52. Although the Respondent’s witness did not attach minutes of the two meetings, the Claimant did not deny that they took place.

53. Finally, it is not in dispute that the Claimant’s employment was terminated on 26<sup>th</sup> January, 2023, the Claimant appealed to the Chief Executive Officer but filed the instant suit before the appeal was heard and determined.

54. Records reveal that the demand letter from Tripple A Advocates is dated 2<sup>nd</sup> February, 2023 one day after filing of the appeal.

55. Although the Respondent did not respond or suggest that it was considering the appeal, it is evident to the court that the Claimant was not ready to await the outcome of the appeal but to her credit, the Claimant accorded the Respondent sufficient time to respond to the appeal as the instant suit was filed on 28<sup>th</sup> February, 2023.

56. The court is not persuaded that the Claimant’s case was premature or had not exhausted the internal disciplinary mechanisms.



57. One month was sufficient for the Respondent to respond to the Claimant's appeal by way of acknowledgment and the way forward. It did not respond.
58. From the evidence on record so far, it is clear that there were differences between the Claimant and the Line Manager specifically after the trip to Haiti and the Claimant's report.
59. In the court's view it would be injudicious to grant the remedy of reinstatement at this stage before the evidence on record is tested by cross-examination.
60. It is only fair that the parties be accorded sufficient opportunity to present their respective cases for the issues arising to be determined on merit.
61. At any rate, the remedy of reinstatement has been sought and is still available after hearing the suit.
62. In the circumstances, the remedy of reinstatement will not be decreed in this instance.
63. With regard to the order to prohibit the Respondent from replacing the Claimant as the Regional Logistics Specialist, the Claimant is seeking an injunction to restrain the Respondent from recruiting a replacement and is thus required to establish the essentials of an injunction as enunciated in *Giella v Cassman Brown Co. Ltd* (1973) EA 358 as restated and applied in countless decisions.
64. The Court of Appeal stated as follows;

“ . . . An injunction may also be applied for to restrain a party from committing a breach of contract or other injury. It is equally settled that a temporary injunction cannot be claimed as a matter of right neither can it be denied arbitrarily by the court.

Because of its importance and susceptibility to abuse certain guidelines have been developed while considering an application for temporary injunction. The three well known tests enunciated in *Giella V Cassman Brown* (1973) E.A 358 are to the effect that a party seeking a temporary injunction has to establish a prima facie case whether the party seeking injunction will suffer irreparable damage if injunction is denied and in case of doubt the issue in contention ought to be decided on the scale of a balance of convenience.”

65. In the instant suit, although the Claimant's counsel urged that the balance of convenience was for a restoration of the status quo and demonstrated that the Claimant had a strong case with probability of success, the Claimant's Supporting Affidavit contain no averments on the irreparable or other damage or loss which she stood to suffer if the order of injunction was not granted.
66. In the circumstances, the court is not persuaded that Claimant has demonstrated that an injunction should issue in this instance.
67. From the foregoing, it is the finding of the court that the Notice of Motion dated 21<sup>st</sup> February, 2023 is unmerited and it is accordingly dismissed.
68. Costs shall abide the outcome of the suit.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 26<sup>TH</sup> DAY OF JULY 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 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**

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