



Nakitari v Busia Water & Sewerage Services Co. Ltd & another (Employment and Labour Relations Cause 9 of 2023) [2023] KEELRC 2534 (KLR) (18 October 2023) (Ruling)

Neutral citation: [2023] KEELRC 2534 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS CAUSE 9 OF 2023**

**JW KELI, J
OCTOBER 18, 2023**

BETWEEN

ERICK NAKITARI CLAIMANT

AND

COUNTY GOVERNMENT OF BUSIA 1ST RESPONDENT

BUSIA WATER & SEWERAGE SERVICES CO. LTD 2ND RESPONDENT

(Application by Claimant dated 19th September 2023 and amended on the 25th September 2023)

RULING

Coram:

Lady Justice Jemimah KELI

CC: Lucy Macheso

Claimant/Applicant: Amondi & Company Advocates

1st Respondent: J.O Juma & Company Advocates

2nd Respondent: Innocent Enoce Omboko Advocate, Busia County Attorney

1. The claimant vide statement of claim dated 19th September 2023 and amended on the 25th September 2023 received in court on even date sought the following reliefs:-
 - a. That the decision by the respondent dated 28/07/2023 but served appointment upon the claimant on the 18/09/2023 revoking the claimant's re-appointment as the Managing Director of the 1st respondent be and is hereby quashed.
 - b. That the claimant be and hereby re-instated as the Managing Director of the 1st respondent.



- c. That in the alternative the claimant be and is hereby duly compensated for the unexpired term of contract running upto 30/06/2026.
 - d. That the claimant be compensated in terms of damages for the breach of his right to fair labour practices contrary to Article 41 of the [Constitution of Kenya](#).
 - e. That the claimant be compensated in terms of general damages for defamation.
 - f. Costs of this suit.
2. The claimant in addition filed his verifying affidavit, amended witness statement and list of documents and annexed copies of the documents.
 3. The claimant filed the claim under certificate of urgency together with Notice of Motion application of even date seeking the following orders:-
 - a. Spent.
 - b. That this court be pleased to grant temporary conservatory order by way of temporary injunction suspending the contents of the letter of revocation dated 28/07/2023 but served on 18/09/2023 pending the hearing of this application interparte.
 - c. That this court be pleased to grant temporary conservatory ordered by way of temporary injunction suspending the contents of the letter of revocation dated 28/07/2023 pending the hearing and determination of the main cause herein.
 - d. That this court be pleased to re-instate the claimant as the Managing Director of the 1st Respondent pending the hearing and determination of this application inter-parte.
 - e. That this court be pleased to re-instate the claimant as the Managing Director of the 1st Respondent pending the hearing and determination of the main cause herein.
 - f. That the respondent bears the costs of this application.
 4. The application was premised on the grounds:- That the respondents had on the 18th September 2023 served the claimant with letter of revocation of his contract of reappointment mischievously dated 28th July 2023. That this was done without affording him hearing, that he as a technocrat engineer with high reputation who had long outstanding service in various fields with a manifestation of excellence and hard work hence the purported constructive dismissal is adverse to him, intimidating and had occasioned irreparable injury which cannot be compensated by way of pecuniary relief, that he was still in office and the respondents may move fast actuated by malice to fill the position of Managing Director of the 1st respondent, that if temporary conservatory order was not issued the respondent would proceed with recruitment.
 5. The applicant further swore affidavit dated 25th September 2023 in support of the application.
 6. I have discerned from the said affidavit that the applicant's contract as a Managing Director issued by the Board dated 30th June 2020 for 3 years came to an end(PEXB 2) and he states that he applied for renewal and vide letter dated 16th June 2023 it was renewed for 3 years. The re-appointment letter was authored by the Deputy Governor and CECM Department of Water, Irrigation, Environment and Natural Resources (PEXB 4). By another letter dated 28th July 2023 (PERXB-5) which the applicant states he received on 18th September 2023 the said Deputy Governor revoked the renewal of contract on basis the renewal was devoid of due process. The applicant vide the letter was directed to proceed on leave to allow the newly appointed Board to recruit a new Managing Director.



7. The 1st respondent filed replying affidavit to the application sworn by Sarah Akasiba on 2nd October 2023 and in summary stated that the application had not disclosed sufficient ground for the court to exercise discretion in granting orders sought and placed reliance on the response to the claim. According to the response by the 1st respondent the re- appointment letter was revoked as the renewal was devoid of due process under section 10 of the [Busia County and Water and Sewerage Services Act, 2015](#). That the allegation of constructive dismissal was without basis as the applicant did not derive any rights under the illegal contract. That at time of alleged renewal there was no Board in place to recommend the renewal to line County Executive Member and further the applicant did not apply for renewal 6 months to expiry of the contract hence was not entitled to renewal.
8. The 2nd respondent opted to file a notice of preliminary objection to effect that the claimant lacked capacity to bring the cause of action against the 2nd respondent and that the suit was limited by section 19 of the [Companies Act](#).

Issue for determination

9. I considered the issue for determination to be whether the application was merited. The preliminary objection by the 2nd Respondent was not subject of this ruling.
10. The applicant submits that his contract with the 1st respondent was halted abruptly without hearing contrary to section of 43 of the [Employment Act](#) to wit:-
 - “ 1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.”
11. The applicant argues that the 1st respondent was bound by the [Busia County Water and Sewerage Act](#) which gives the conditions and reason for termination of contracts including:- serious violation of [Constitution](#) or any other written law, gross misconduct , physical or mental incapacity and incompetence. That by not citing these reasons the 1st respondent acted ultravires.
12. The 1st respondent on its part submitted the applicant had not made out a prima facie case as the alleged re-appointment was an inadvertent error which was promptly rectified once the appointing authority became aware of it. To buttress this submission the 1st respondent relied on the Court of Appeal decision in [Mrao v First American Bank of Kenya and 2 others](#)(2003) eKLR where Justice(Rtd) Bosire JA addressed meaning of prima facie as follows:-
 - “ So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
13. The 1st respondent further submits that the claimant seeks permanent remedies which require the court to hear and determine the parties’ rights and obligations before granting the orders. The 1st respondent relied on the decision in [Venansio Mbatuu Kariuki v Governor County Government of Nyandarua & 2 others](#) (2019) eKLR where the court held that reinstatement should be addressed on merit and



further in *Kenya Tea Growers association v Kenya Planation & agricultural- workers union* (2018) eKLR where it was held :-

“ We agree entirely with the statement by Rika j in *Alfred Nyungu Kimungii 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 issues as a provisional measure. It is a remedy that should normally be granted upon the full hearing of the employer and the employee.”

Decision

14. The court discerned the orders sought by the applicant were for suspending the contents of the letter of revocation dated 28/07/2023 allegedly served on 18/09/2023 and for reinstatement of the applicant as the Managing Director of the 1st Respondent pending the hearing and determination of the main cause.
15. The facts were that the respondents vide the Deputy Governor re-appointed the claimant to the position he held as Managing Director under contract of 3 years for further 3 years only to revoke the reappointment shortly thereafter. The letter of revocation dated 28th July 2023 gave reasons for the revocation as follows:-

“ following my letter to you on the above, and following lengthy deliberations, it has been noted that the renewal of your contract was devoid of due process, and is hereby revoked with immediate effect. Please now hand over the reins of BUWASCO to the senior most official and proceed on leave to allow the newly appointed Board to conduct a process of recruiting a new Managing Director.”

This letter aggrieved the claimant leading to the instant application and suit. The term of the contract coming to an end the reappointment was done by the Deputy Governor and CECM Department of Water, Irrigation and Environment vide letter dated 16th June 2023 for a new three year term effective 1st july 2023 the Deputy Governor who later revoked the re-appointment.

16. The 1st respondent on its part submitted there was no prima facie case as the alleged re-appointment was an inadvertent error which was promptly rectified once the appointing authority became aware of it. To buttress this submission the 1st respondent relied on the Court of Appeal decision in *Mrao v First American Bank of Kenya and 2 others*(2003) eKLR where Justice(Rtd) Bosire JA addressed meaning of prima facie case as follows:-

“ So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

17. The burden of prove in employment claims is stated under Section 47(5) of the *Employment Act* as follows:-

“ For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred



shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer."

It is my opinion that section 47(5) obliges the employer to rebut the claim where employer employee relations exists and allegation of unfair dismissal are made hence the establishment of a prima facie case is not the best test to decide whether or not to grant the interim/ conservatory orders in employment claims. The court in an application like this has to consider the application simply on own merit.

18. The court found that the 1st respondent raised arguable defence and reinstating the applicant pending the hearing of the claim on merit would amount to granting the final orders hence defeating the defence. The court opines there are serious consequences of reinstatement of employee which is a final remedy under section 49 of the *Employment Act*.
19. The court is guided under section 49(4)(d) of *Employment Act* to factor the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances. The court notes section 49 of the *Employment Act* only applies after finding of unlawful dismissal. The applicant has alleged unlawful and unfair dismissal. The applicant does not seek to stop recruitment into the position but to suspend his revocation and for reinstatement. Parties are bound by their pleadings. The court would then have to hear the case and determine whether there were valid reasons for the revocation of the re-appointment letter as required under section 43 of the *Employment Act*.
20. The court upholds the decision of the court of Appeal relied on by the 1st respondent in *Kenya Tea Growers association v Kenya Planation & agricultural- workers union* (2018) eKLR where it was held :-

"We agree entirely with the statement by Rika j in *Alfred Nyungu Kimungii 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 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."

The decision is binding on this court and I also find it is good judgment and uphold the same.

21. I hold the application to be incompetent for seeking remedy of reinstatement at interlocutory stage and dismiss it with costs to the 1st respondent in the cause.

It is so ordered.

RULING DATED, DELIVERED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 18TH DAY OF OCTOBER, 2023.

JEMIMAH KELI,

JUDGE.

In the presence of:-

Court Assistant:- Lucy Macheso

For Applicant :- Ms. Nyabeki

For 1st Respondent:- Gakuya James

2nd Respondent- absent

