



REPUBLIC OF KENYA



**Waweru v Kenyatta University (Cause E481 of 2023)
[2023] KEELRC 2418 (KLR) (6 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2418 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E481 OF 2023
SC RUTTO, J
OCTOBER 6, 2023**

BETWEEN

DR. MARTIN GETE WAWERU CLAIMANT

AND

KENYATTA UNIVERSITY RESPONDENT

RULING

1. The Claimant/Applicant has moved this Court vide a Notice of motion Application dated 13th June, 2023, expressed to be brought under Order 40 of the Civil Procedure Rules, section 25 of the Employment Act, section 3A of the Civil Procedure Act and all enabling provisions of the law.
2. The motion application which is supported by the Affidavit of Dr. Gete Waweru, the Applicant herein, seeks the following orders: -
 - a. Spent.
 - b. That the Honourable court be pleased to issue an order directing the Respondent to unconditionally lift the suspension of the Claimant from his employment and order for his immediate reinstatement with full pay pending the inter parties hearing and determination of this Application.
 - c. That an order be and is hereby issued directing the Respondent to unconditionally lift the suspension of the Claimant from his employment and order for his immediate reinstatement with full pay pending the inter parties hearing and determination of this suit.
 - d. That an order of injunction be and is hereby issued restraining the Respondent either by itself, employees, servants and/or agents from suspending, interdicting, dismissing and/or terminating the employment of the Claimant pending the hearing and determination of this Application.



- e. That an order of injunction be and is hereby issued restraining the Respondent either by itself, employees, servants and/or agents from suspending, interdicting, dismissing and/or terminating the employment of the Claimant pending the hearing and determination of this suit.
 - f. That costs of this Application be borne by the Respondent.
3. The Application is premised on the following grounds inter alia:
- a. *Vide* a letter dated 19th May, 2023 the Respondent purported to suspend the Claimant from his employment pending investigations for alleged absenteeism and as a consequence thereof, he was put on half salary.
 - b. Contrary to the allegations by the Respondent, on the alleged material dates of March 14, 2023, 15th March, 2023 and 21st March, 2023, the Claimant duly reported to work and attended to patients at the hospital as captured by the Respondent's own electronic patients' treatment register of the respective dates.
 - c. Section 11.4 (iii) (b) of the Claimant's Terms of Service provides for absenteeism from work by an employee for seven consecutive days. Therefore, the Claimant's alleged absenteeism as particularized by the Respondent does not fall under the absenteeism envisaged by Section 11.4 (iii) (b) of his Terms of Service thereby making the suspension grossly unfair, unjustified and patently illegal and unwarranted.
 - d. The Claimant was not issued with any warning letter of notice or at all nor was he informed of his alleged misconduct prior to the suspension.
 - e. The Claimant was not accorded an opportunity to be heard or to be represented in any disciplinary meeting or at all prior to his suspension and the suspension letter was a bombshell.
 - f. The purported suspension of the Claimant is irregular, unfair and unlawful hence the same should be declared null and void and/or quashed.
 - g. The Claimant has been condemned unheard and is now at an imminent risk of being unlawfully underpaid and subsequently terminated from his employment a factor which will cause him irreparable harm and damage.
 - h. The purported investigations are a premeditated scheme to unlawfully, unfairly and irregularly terminate and dismiss the Claimant from employment without any lawful cause, reason and or justification.
 - i. The purported investigations and/or hearing before the Senior Discipline Board is irregular and illegal as the alleged charges do not amount to summary dismissal or at all either pursuant to the employment contract and/or the [Employment Act](#).
 - j. The decision to put the Claimant on half salary amounts to illegal and unjustified withholding of his salary contrary to the express provisions of section 8 of the [Employment Act](#).
 - k. The Respondent's actions amount to unfair, irregular and unconscionable labour practices and infringement of the Claimant's constitutional right employment as enshrined in article 47 of the [Constitution](#) of Kenya.
 - l. The Collective Bargaining Agreement does not provide for suspension on allegations of absenteeism and/or lateness and as such, the Respondent's actions are not only unfounded



and malicious but the same are in flagrant breach of the terms and conditions of service and the Collective Bargaining Agreement hence illegal and unacceptable.

- m. It is fair and in the interest of justice that this Application is allowed.
4. The Application was opposed by the Respondent which filed Grounds of Opposition dated June 26, 2023, through its Counsel. The Respondent contends that: -
- i. The Application is premature for reason that the Claimant's disciplinary matter is pending before the Respondent's Senior Board of discipline for determination.
 - ii. The interlocutory Orders sought are of a final nature and will in essence determine the entire dispute between the parties at an interlocutory stage.
 - iii. The Application is frivolous, vexatious and an abuse of the process of this Honourable Court.

Submissions

5. On June 27, 2023, the Court directed that the Application be canvassed by way of written submissions. Both parties complied and I have considered their respective submissions.
6. The Applicant argued that the Respondent only filed Grounds of Opposition but has not denied and/or controverted its averments and/or exhibits filed in court. In support of this position, the Applicant referenced the case of *Kennedy Otieno Odiyo & 12 Others v Kenya Electricity Generating Company Limited* [2010] eKLR.
7. It was the Applicant's further submission that the purported basis for his suspension is a blatant breach of the terms and conditions of his employment, hence unlawful. That further, suspension is not a disciplinary procedure provided for under the law especially under section 44(4)(a) of the *Employment Act* as relied on by the Respondent.
8. It was further submitted that the intended disciplinary procedure is founded on an illegal action and is therefore null and void and cannot be allowed to stand. Placing reliance on the determination in the case of *Kenya Plantation and Agricultural Workers Union v Finlays Horticulture Limited* [2015] eKLR, it was the Applicant's argument that this Court has jurisdiction to stop an illegal disciplinary process where there are compelling reasons to justify said intervention.
9. The Applicant further submitted that it is only the Court which can grant him justice against the illegal and unjustified actions of the Respondent and that the contention that the suit herein is premature is moot and ought to be rejected.
10. It was the Applicant's further submission that he has established a prima facie case warranting the orders sought as he has proved that his rights to fair labour practices, as guaranteed by the *Constitution* and the *Employment Act* have been violated. That his suffering is further aggravated by the fact that he was barred from accessing his place of work and being put on an indefinite half salary pending investigations.
11. He urged that in view of the above, the immense pain and suffering, loss of reputation, mental anguish and humiliation that he endures is indefinite, irreparable and irredeemable. He further argued that he continues to suffer financial loss due to the unlawful decision by the Respondent to put him on half pay as the same has had an immense adverse effect of his livelihood. He further submitted that he risks losing further if the Court does not intervene.



12. In conclusion, the Applicant submitted that the evidence on record tilts the balance of convenience in his favour as he has demonstrated exceptional circumstances to warrant the court to grant mandatory orders at the interlocutory stage.
13. On the Respondent's part, it was submitted that the law recognizes that an Application can be opposed either by a Replying Affidavit, Grounds of Opposition or Preliminary Objection. To this end, the Court was invited to determine the Application on its merits.
14. Placing reliance on the case of *Luka Korir v Moi Teaching and Referral Hospital* [2022] eKLR, the Respondent submitted that the mere act of suspension cannot be deemed as unfair and unlawful. It was the Respondent's further submission that suspension is not a strange practice in employment but rather a mechanism exercised by employers to pave way for investigations during disciplinary proceedings as was held by the Court of Appeal in the case of *Charles Muturi Mwangi v Invesco Assurance Co. Ltd* [2019] eKLR.
15. The Respondent maintained that it was justified to suspend the Applicant from employment pending investigation and disciplinary proceedings. That further, the present proceedings are premature since those investigations are yet to be completed and disciplinary proceedings instituted.
16. The Respondent further argued that the Applicant has not demonstrated how, if at all, the suspension with half pay is unprocedural, contravenes his rights under the *Constitution* or his terms of service. That in addition, he has not satisfied the prerequisite to warrant this Court's jurisdiction to be invoked.
17. It was further submitted by the Respondent that should the Court find that it has jurisdiction, no matter how remote, to entertain the present Application as is, the interlocutory orders sought are final in nature and should not be granted. That if granted, the orders will deal with a substantial portion of the dispute.
18. The Respondent further argued that the Applicant has not demonstrated how he stands to suffer should the orders not be granted. In addition, it was submitted that the Respondent has not provided sufficient reasons for this Court to exercise its discretion and grant the interlocutory orders as prayed.

Analysis and Determination

19. Arising from the Application, the Affidavit in support thereof, the Respondent's Ground of Opposition and the parties' submissions, to my mind, the singular issue for determination before the Court is whether the Application is merited. Put another way, should the Court unconditionally lift the Applicant's suspension and order for his immediate reinstatement? Further, should the Court restrain the Respondent from interdicting and/or terminating the Applicant's employment pending the hearing and determination of the suit?
20. Evidently, the orders sought by the Applicant at this interim stage are injunctive in nature hence in arriving at its determination, the Court is to be guided by the principles set out in the celebrated case of *Giella v Cassman Brown* [1973] EA 358 at page 360 where Spry VP held that:

“.... First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (*E.A. Industries v Trufoods*, [1972] E.A. 420.)”



21. In essence, the Applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the orders, he is likely to suffer irreparable injury. Further, if the Court is in doubt, it should decide the matter on a balance of convenience.

Prima facie case

22. The Court of Appeal in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR defined a *prima facie* case in the following terms;

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case 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.”

23. Accordingly, at this juncture the main consideration by the Court ought to be whether the Applicant has pointed out to a right that has been apparently infringed. I am also mindful of the fact that this is not mini trial hence the Court will not examine the evidence presented microscopically.
24. In this case, the Applicant advanced several grounds in support of his Application. He contends that contrary to the allegations by the Respondent, he duly reported to work on 14th March, 2023, 15th March, 2023 and 21st March, 2023 and attended to patients. In support of this position, the Applicant exhibited copies of extracts of the Electronic Attendance and Patients Treatment Register, to confirm that he was at work on the days he is alleged to have been absent.
25. The Applicant has further stated that his suspension was premised on Section 11.4 (iii) (b) of his Terms of Service which provides for absenteeism from work by an employee for seven consecutive days. That therefore, his alleged absenteeism does not fall under the absenteeism envisaged under Section 11.4 (iii) (b) of his Terms of Service. Notably, the Applicant did not exhibit the said Terms of Service.
26. It is the Applicant’s further contention that the relevant Collective Bargaining Agreement (CBA) does not provide for suspension on allegations of absenteeism. Again, the said CBA was not exhibited by the Applicant.
27. In light of the foregoing, several issues come to the fore, for instance, was the Applicant absent from work on the date and time stated in the letter of suspension? If so, did his absence constitute absenteeism as envisaged under his Terms of Service? Further, was the Applicant’s suspension in line with the provisions of the relevant CBA?
28. No doubt, the foregoing are pertinent issues which will have to be ultimately resolved upon taking evidence. Therefore, having considered the Application, against the evidence tendered so far and which as I have stated herein, cannot be examined microscopically at this interlocutory stage and having applied the same against the principle set out in the *Mrao case* (supra), I find that the Applicant has proved that he has an arguable prima facie case.
29. Establishing a prima facie case is not an end in itself and cannot form sufficient basis to grant an interlocutory injunction, hence the Court must undertake a further enquiry in order to be satisfied that the injury to be suffered by an Applicant in the event the injunction is not granted, will be irreparable.



Irreparable injury

30. As to the meaning of irreparable injury, the Court of Appeal in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, had this to say:
- “An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”
31. In line with the above holding, the question then should be, will the Applicant suffer irreparable injury in the event the Court does not grant the orders he seeks at this stage?
32. In the instant case, the subject matter in dispute is the suspension of the Applicant and the disciplinary proceedings commenced against him. As it is, the Applicant is in the middle of a disciplinary process. Therefore, at this juncture, the Respondent has not made any determination with regards to his culpability or otherwise. Indeed, the disciplinary process may go either way. As a matter of fact, he may be absolved from any wrongdoing. Therefore, it may very well be said that the Applicant will not suffer irreparable loss if the orders sought are not granted at this interim stage.
33. What’s more, it is logical that in the event the Disciplinary Board finds the Applicant not culpable of absenteeism as alleged, the salary withheld during the period of suspension will be released to him.
34. Besides, reinstatement is in the nature of a final order and prudence requires that such an order only issues at the time when the matter is finally heard and determined.
35. All in all, it is my considered view that the Applicant will not suffer irreparable injury in the event his suspension is not lifted and/or the disciplinary process commenced against him, not halted.
36. In addition to the foregoing, I am aligned to the position taken by the Court in the case of *Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology* [2014] eKLR, that the Court should not take over and exercise managerial prerogative at the work place. Drawing an exception, the Court went on to hold that in cases where an employee facing disciplinary action legitimately feels that the process is marred with irregularities or is stage managed towards their dismissal, the Court will intervene not to stop the process altogether but to put things right.
37. Further, in the South African case of *Booyesen v The Minister of Safety and Security & Or* [2011] 1 BLLR 83 (LAC), it was determined that the Court’s intervention to interdict a disciplinary action before it is concluded should only be undertaken in exceptional cases, and I must say that this is not one such case.
38. This Court wholly adopts the position taken in the above precedents and in the circumstances, the Court will not hinder the Respondent’s prerogative to discipline its employees. Be that as it may, the Respondent should undertake the disciplinary process in strict compliance with the statutory procedural fairness safeguards.

Orders

39. In the premises, the Court declines to grant the orders sought in the Application dated June 13, 2023 and consequently, the Application is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF OCTOBER, 2023.

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STELLA RUTTO

JUDGE

Appearance:

Mr. Muga for the Claimant/Applicant

Ms. Aden by the Respondent

Abdimalik Hussein Court Assistant

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 had 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.

STELLA RUTTO

JUDGE

