



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. E481 OF 2021

(Before Hon. Lady Justice Maureen Onyango)

DUKE ORIKU MACHINI.....CLAIMANT

VERSUS

REGIS SCHOOL RUNDA.....1ST RESPONDENT

LINA ANYANGO.....2ND RESPONDENT

RULING

1. Before me, for determination is the Claimant's Notice of Motion Application dated 14th June, 2021. It seeks the following orders:

- a) *That the Application herein be certified urgent, service be dispensed with in the first instance (Spent).*
- b) *That pending the hearing of this Application inter-parties and subsequently pending the hearing and determination of this application, the 1st Respondent either by itself, its directors, its servants, agents and or employees be restrained from advertising, shortlisting, interviewing, recruiting or in any other way filling the position of ICT teacher of Regis School-Runda.*
- c) *That pending the hearing of this application inter-parties and subsequently pending the hearing and determination of this Application, a reinstatement order does issue reinstating the Claimant as ICT teacher at Regis school -Runda.*
- d) *That the costs of this Application and interest thereon be provided for.*
- e) *Any other and further relief that this court may deem fit and just to grant in the circumstances.*

2. This Application is premised on the grounds **THAT:-**

- i) *The Claimant was appointed as an ICT teacher at the 1st Respondent school on a fixed term contract of 2 years with an option of renewal.*
- ii) *He performed his duties diligently and to the Respondents satisfaction until 25th May, 2021 when he received a letter requiring him to show cause why his employment should not be terminated on account of gross misconduct.*
- iii) *That the 1st Respondent's actions were instigated by the 2nd Respondent who alleged in February 2020 and/or 2021 the Claimant had issued chocolates as gift to students and demanded hugs in return from the students thus making some learners in the school uncomfortable.*
- iv) *The Claimant was taken through a rushed disciplinary process, which he termed as frivolous, malicious and violated his rights as an employee and as a result was unlawfully and unfairly terminated.*
- v) *The Claimant's termination was without any justifiable reasons and without being accorded a chance to defend himself of the allegations levelled against him.*

- vi) *The Applicant has a prima facie case with overwhelming chances of success and that he will suffer irreparable harm incapable of compensation by way of damages should his prayers not be granted.*
- vii) *The balance of convenience tilts in his favour and that the ends of justice would be met by the grant of the orders sought in this Application as replacement may be recruited and this will lock out the Claimant.*
- viii) *The acts of the 1st Respondent were initiated by the 2nd Respondent who had promised to teach the Claimant a lesson/revenge for failing to comply to her numerous sexual advances and the opportunity availed with recruitment of a new principal from the 2nd Respondent's community who reported only a day before the Claimant was served with a notice to show cause.*
- ix) *It is in the interest of justice that the orders sought herein are granted.*

3. The Application is supported by the Affidavit of **DUKE ORIKU MACHINI** sworn on 14th June, 2021 in which he reiterates the grounds on the face of the motion.

4. In response to the Application the Respondent filed a Grounds of Opposition dated 9th July, 2021 raising the following grounds:

- (1) *The application is frivolous, vexatious and a textbook case of abuse of process of the court.*
- (2) *The Claimant was accorded due process prior to the termination of his employment as a teacher at the 1st Respondent school. The reasons for the termination are valid and fair as envisaged under section 45 (2) of the Employment Act. The motion is without any foundation in law.*
- (3) *All payments due and payable to the Claimant have already been settled by the 1st Respondent.*
- (4) *Claimant was summarily dismissed on grounds of inappropriate conduct involving female learners at the 1st Respondent School. Reinstating the Claimant will put at risk the safety of female students in the school.*
- (5) *Reinstating the Claimant will put in harm's way the female learners who reported his misconduct to the school administration.*
- (6) *The Claimant has made serious allegations of sexual misconduct against the 2nd Respondent who is still employed by the 1st Respondent. Reinstating the Claimant will cause the 2nd Respondent distress, humiliation, and an overall difficult working environment for the students and the teachers at the school. The balance of convenience tilts in favour of the 1st Respondent.*
- (7) *The Claimant in his statement of claim seeks an order for reinstatement at the 1st Respondent. The orders sought will amount to reinstating the Claimant at the interlocutory stage contrary to the laid down principles for the grant of interlocutory orders.*
- (8) *The 1st Respondent is a school that must hire teachers to offer learning services to the students. The orders sought seek to gag in its operations and interfere with the operations of the school to the detriment of the students.*
- (9) *The Claimant is not entitled to orders of injunction as he has not met the test for the grant of an interlocutory injunction:*
 - a) *The Claimant has not established a prime facie case that the 1st Respondent did not comply with provisions of the law and its internal disciplinary process in summarily dismissing him.*
 - b) *The Claimant has not shown that he is likely to suffer irreparable harm that cannot be compensated by way of damages.*
 - c) *The balance of convenience lies in favour of the 1st Respondent as it risks compromising the safety of the female learners that reported the Claimant and all other female learners at the school.*
- (10) *The Application is an abuse of court process and ought to be dismissed.*

5. In further response to the Application the 1st and 2nd Respondents filed a Replying Affidavit sworn by **ENOCK RUTO**, the Human Resource Manager of the 1st Respondent on 9th July, 2021, in which he avers that the termination of the Claimant's employment was on the ground of gross misconduct and that due process was followed.

6. He further avers that the decision to terminate the Claimant's employment was in the best interest of the learners and that reinstating him would be tantamount to taking a risk by subjecting other learners to unnecessary exposure.

7. The Affiant posits that barring the 1st Respondent from recruiting a new ICT teacher would be detrimental to it as learners will fall behind in their curriculum.

8. Mr. Ruto, maintains that there is no irreparable harm that would be occasioned upon the Claimant if the orders sought in the instant application are not granted.

9. The Respondent urges this Court to find the application to be devoid of merit and to dismiss it with costs to the Respondents.
10. Parties agreed to dispose of the application by way of written submissions.

Respondents' Submissions

11. The Respondents in their submissions maintained that due process was followed before the 1st Respondent terminated the Claimant's employment on grounds of gross misconduct and that an order of reinstatement as sought by the Claimant cannot be issued at interlocutory stage. To buttress this argument the Respondent relied on the Courts' findings in the cases of **Kenya Airways Limited v Aviation Workers Union Kenya & 3 Others (2014) eKLR**, **Anthony Omari Ongera v Teachers Service Commission (2017) eKLR** and **Alfred Nyungu Kimungui vs Bomas of Kenya (2013) eKLR** where the Courts emphasized that an Order for reinstatement can only be awarded in special circumstances.
12. The Respondents submitted that the Claimant has not shown any special circumstances in his case to warrant the grant of the order of reinstatement.
13. It is further submitted that the Applicant has not met the threshold for grant of an interlocutory injunction as set out in the case of **Giella v Cassman Brown (1973) E.A 358** and as such cannot be granted the orders as sought. To fortify this argument the Respondent cited the case of **Dolly Nyambura Mwangi v Faulu Micro Finance Bank Limited (2020) eKLR**.
14. The Respondents urged this Court to find that the Application as filed is devoid of merit and an abuse to Court process and that it ought to be dismissed with costs to the Respondent.
15. At the time of preparing this Ruling there were no submissions filed on record on behalf of the Claimant/Applicant.

Analysis and Determination

16. After considering the Application, Affidavits and Submissions on record and the evidence adduced the issues for determination are:-
 - a) Whether the court should grant the interlocutory injunction sought by the applicant;
 - b) Whether the court should grant the reinstatement order sought by the applicant.

Interlocutory injunction

17. The threshold for granting interlocutory injunction are set out in the celebrated decision in **Giella v Cassman brown (1973) EA 358** where the following principles were set out:
 - (i) That the applicant must establish a prima facie case with probability of success.
 - (ii) That the applicant must demonstrate that he stands to suffer irreparable harm if the order is withheld.
 - (iii) If the court is in doubt, it should determine the application on a balance of convenience.

Prima facie case

18. Prima facie case was defined by the Court of Appeal in **Mrao Limited v First American limited & 2 others (2003) eKLR** as follows: -

“...in civil cases is a case in which on the material presented to the court a tribunal properly directed itself will conclude that there exists a right which apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
19. The prayers sought in the application are intended to safeguard the position that the Claimant held before he left employment in the hope that should he be reinstated, the position would be available for him to go back to.
20. In cases of termination of employment, reinstatement is not an automatic remedy. Section 49(4) of the Employment Act sets out considerations to be taken into account by the Court before ordering reinstatement.
21. For the Court to established the likelihood of the Claimant being reinstated he must demonstrate that he is entitled to reinstatement under Section 49(4). This can however only be done at the hearing. It is not possible to determine the same at this stage.

Irreparable harm or injury

22. Irreparable harm or injury is defined in **Halsbury's Laws of England, 3rd Edition Volume 21 page 252 paragraph 739** as:

“... injury which is substantial and could never be adequately remedied or atoned for by damages...”

23. Section 49 for the Employment Act provides that compensation is the first line of remedy to an employee who has been unfairly terminated. The Applicant in this case has failed to demonstrate by way of affidavit that should he be successful in his claim, damages would not be adequate compensation.

Balance of convenience

24. In his affidavit in support for the application, the Claimant has made some very damning allegations against the Respondent. Should the allegations be true, it would be impossible for the Claimant to work with the 2nd Respondent. Further the Claimant was an ICT Teacher. Should the orders of stay sought be granted, the students who require the services of an ICT Teacher will go without the service. On the other hand, should the Claimant be successful, this Court can order reinstatement.

25. I find that the balance of convenience tilts in favour of not granting the orders sought.

26. In conclusion, I find the instant application without merit and dismiss it. Costs of this application shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 11TH DAY OF FEBRUARY 2022

MAUREEN ONYANGO

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 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 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.

MAUREEN ONYANGO

JUDGE