



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO.E.926 OF 2021**

**(Before Hon. Lady Justice Anna Ngibuini Mwaure)**

**LINDAH ANYONA SALEH.....CLAIMANT**

**VERSUS**

**CO-OPERATIVE BANK OF KENYA LIMITED.....RESPONDENT**

**RULING**

1. The Claimant **LINDAH ANYONA SALEH** filed an application dated 9<sup>th</sup> November, 2021 against his former employer the **CO-OPERATIVE BANK OF KENYA LIMITED**. She served as the employee as an Agent Banker first on contractual basis to permanent basis on 19<sup>th</sup> May, 2021.
2. The Claimant avers that on 9<sup>th</sup> September, 2021 she was issued a notice to show cause letter from the Respondent stating that an investigation was carried out by the Security Department of the Respondent and a Customer's complaint revealed that she committed a security breach relating to the Respondent's obligation dated 1<sup>st</sup> February, 2021. (Bank letter dated 9<sup>th</sup> September, 2021 (LAS -3).
3. She was asked to show cause why disciplinary action should not be taken against her. The wrong doing raised by the Respondent was that she instructed a colleague George Metet to issue an account's mini statement for account number of Mbwele Holdings Limited to a third party Eucabeth Nyambeki who was not a signatory or an agent of that account. She was accused to have contravened the provisions of Section 10.1 of the Banks code of conduct and Ethics on restricted information and privacy protection.
4. She responded to the notice to show cause by her letter of 13<sup>th</sup> September, 2021 and thereafter was invited to a disciplinary meeting by a letter dated 22<sup>nd</sup> September, 2021. The meeting was scheduled for 27<sup>th</sup> September 2021 at 9.30a.m. and she was invited to invite another staff member or staff union official as her witness.
5. She appeared before the panel on 2<sup>nd</sup> October 2021 and she signed a copy of the minutes and so did her witness Dennis Mulewa.
6. On 15<sup>th</sup> October, 2021 the Claimant was issued with a letter of termination and was advised of her right to appeal.
7. On 9<sup>th</sup> November, 2021 the Claimant filed an application in court which seeks;
  - i. That the application be certified as urgent and service be dispensed with in the first instance.
  - ii. That the Honourable court be pleased to issue an order for reinstating the Applicant to her position as a Co-operative Relationship Banker with full salary and benefits pending the hearing and determination of this application.
  - iii. That the honourable court be pleased to compel the Respondent not to offer the Claimant's position to a 3<sup>rd</sup> party nor conduct interviews for the same.
  - iv. Costs of this application be provided for.
8. The Respondent filed an affidavit of response deposed by **BEATRICE KATHURE** who says she works in the employee relations and staff welfare department and the same is in the Human Resource Department. It is dated 12<sup>th</sup> December, 2021. The affidavit explains that the Claimant's employment was terminated on account of breach of security involving one of the bank's client and that the Claimant

admitted to the charges of breach during the disciplinary hearing.

9. The application was canvassed by way of written submissions by the respective parties.

The Claimant submissions dated 6<sup>th</sup> January, 2022 submitted that the Claimant had met the legal threshold of granting the order prayed as provided in the case of **GIELLA VS CASSMAN BROWN & CO. LIMITED 1973 EA 358** for injunctive reliefs to wit;

a. Prima facie case with a probability of success and

b. Irreparable injury

10. The Respondent on the other hand filed their submissions dated 20<sup>th</sup> January, 2022 and rebutted that the trite legal thresholds provided in granting injunctive reliefs had indeed not been met and prayed the application be dismissed with costs to the Respondent.

11. The main issue for determination herein is whether a court can grant an order of reinstatement as an interlocutory measure.

12. Ordinarily reinstatement of an employee is a substantive remedy not a temporary relief. It is not a provisional measure and ideally should be granted upon full hearing of both the employer and the employee.

13. In the case of Professor **GITILE NAITULE VS UNIVERSITY COUNCIL MULTIMEDIA UNIVERSITY COLLEGE AND ANOTHER**, Industrial Case No.1200 of 2012 the court refused to grant an injunction restraining employer from interference with employee's peaceful performance of his duties.

In the case of **ALFRED NYUNGU KIMUNGUI VS BOMAS OF KENYA CAUSE NO. 620 OF 2013** the court held that protections under Employment Act are to be taken as shields not sword in the hands of employers to impose themselves with and of a court at the workplace. The court will not normally grant interim reinstatement exparte. The court further found that whether termination was unlawful/or unfair, it cannot be determined at the interlocutory stage. It is a matter to be decided upon the full presentation of facts.

14. In further support of the above in **RICHARD MUIMO PARSITAU VS KAJIADO COUNTY GOVERNMENT AND OTHERS (2014)** eKLR held that in respect of an interlocutory application for reinstatement;-

“the court has to address this issue on several occasion

And the general view is that courts are reluctant to issue orders of reinstatement at interlocutory stage of hearings.”

Section 49 (3) of the Employment Act as read together with Section 12 (3) (vii) of Industrial Court Act – RO11 gave this court power to reinstate an employee only after reaching a conclusion that the employee was unfairly terminated and considering other factors under Section 49 (4) of the Employment Act.

15. In rare cases interim reinstatement may be granted if termination is shown to be clearly that compensation and back wages would not address the injuries. This is more so in cases of outright discrimination for example on bases of pregnancy or union membership etc.

16. In this case there is no clear evidence that even if the Claimant would be found to have been unfairly terminated there are no sufficient reliefs to mitigate her injuries. Indeed as the Respondent pointed out the Claimant has even set out alternative reliefs in her memorandum of claim dated 9<sup>th</sup> November, 2021. The Respondent being a major bank would be in a position to pay up or to reinstate if so ruled after the hearing.

17. The court also hereby is inquiring whether the employer on the prime facie evidence before the court had reasonable ground to terminate. While I do not wish to pre-empt the full hearing but I find there is sufficient ground to litigate in court in view of the alleged security breach by the Claimant. Whether the decision was arrived at fairly however, is a matter that calls for full hearing by both parties.

In conclusion, I do not find the legal threshold in granting injunctive relief as set out in the **CASE OF GIELLA VS CASSMAN BROWN & CO. LIMITED (Supra)** have been proved in this case and the Claimant therefore has not proved that she deserves an interim reinstatement to her former employment as there are no special circumstances proved to grant the same. The fairness of the procedure will be established after full hearing.

**IT IS HEREBY ORDERED:**

1. The application dated 9<sup>th</sup> November, 2021 and in particular prayers 2 and 3 are rejected.
2. The Claimant to prosecute its case without delay after Respondent files its response.
3. Response to be filed and served within 14 days from this date.
4. Costs in the cause.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 24<sup>TH</sup> DAY OF MARCH, 2022**

**ANNA NGIBUINI MWAURE**

**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.

A signed copy will be availed to each party upon payment of court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**