



**Wangari v The Kenya Ports Authority (Cause E019 of 2022)  
[2022] KEELRC 3850 (KLR) (28 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3850 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E019 OF 2022**

**AK NZEI, J  
JUNE 28, 2022**

**BETWEEN**

**CATHERINE WANGARI ..... CLAIMANT**

**AND**

**THE KENYA PORTS AUTHORITY ..... RESPONDENT**

**RULING**

1. The suit herein was instituted by the claimant/applicant vide a Memorandum of Claim dated March 23, 2022 and filed in court on March 24, 2022. It was pleaded in the said memorandum of claim, *inter alia*:-
  3. that at all material time and still, the claimant is an employee of the respondent.
  4. that the claimant filed (Mombasa) ELRC Petition no E005 of 2022 challenging the extension of the contract of the general manager in charge of (the respondent's) human resource and administration.
  5. that on March 14, 2022, the claimant was served with a letter of suspension from duty in regard to the affidavit and supporting documents that she had filed in ELRC Petition no E005 of 2022.
  6. that it is the suspension from duty letter dated March 14, 2022 which gave rise to the cause of action in this suit.
  7. that the suspension letter dated March 14, 2022 is malicious, illegal and an abuse of the claimant's right to challenge an illegal process committed by the respondent.
  8. that the purpose of the letter dated March 14, 2022 was to commence an illegal process of terminating the claimant for exercising her legal right in ELRC Petition no E005 of 2022.



9. that the claimant demanded to be supplied with the documents mentioned in the respondent's letter dated March 14, 2022 vide her letter dated March 19, 2022 and the same had not been supplied to her.
10. that failure by the respondent to supply the claimant with the documents requested by the claimant was a denial of fair hearing in the disciplinary process commenced by the respondent..."
2. The claimant prayed for unconditional lifting of her suspension and immediate reinstatement, an order of injunction restraining the Respondent either by itself, employees, servants and/or agents from terminating the claimant's employment; and payment of general damages for defamation of the claimant.
3. Alongside the aforesaid statement of claim, the claimant also filed a Notice of Motion dated March 23, 2022, seeking:-
  - a. an order directing unconditional lifting of her suspension from employment and immediate reinstatement pending hearing and determination of the application.
  - b. an order of injunction restraining the Respondent either by themselves, employees, servants and/or agents from terminating the claimant/applicant's employment pending hearing and determination of the application and claim.
4. The application was supported by the claimant's supporting affidavit sworn on March 23, 2022. Documents annexed to the supporting affidavit included copies of pleadings filed by the claimant in Mombasa ELRC Petition no E005 of 2022, the suspension letter dated March 14, 2022 and the claimant's letter to the respondent dated March 19, 2022.
5. On March 29, 2022, the respondent filed a Replying Affidavit sworn by Bildad Kisero, the respondent's head of administration, on March 28, 2022. Documents annexed to the said replying affidavit include a letter by the Law Society of Kenya dated March 24, 2022 confirming that the claimant's advocate on record, Oduor Henry John, did not hold a valid practicing certificate, and a copy of the respondent's human resource manual 2017.
6. When the application came up for mention on March 30, 2022 pursuant to directions given by me on March 24, 2022 when the matter was placed before me under a certificate of urgency, I granted leave to the claimant to file a supplementary affidavit within fourteen days and directed both parties to file written submissions on the application within specific timelines. I further directed that the application be mentioned on May 10, 2022 for further directions.
7. The claimant/applicant's written submissions (on the Notice of Motion dated March 23, 2022) were filed on April 13, 2022.
8. On April 14, 2022, however, the respondent served the claimant/applicant with two letters as follows:-
  - a. a letter dated April 6, 2022 substituting the claimant's suspension from duty with an interdiction order in accordance with section K.4 (a) of the respondent's human resource manual 2017, and
  - b. a letter/notice of personal hearing dated April 13, 2022 advising the claimant that the respondent's board would grant her an opportunity to present her case before it on April 20, 2022, and advising her of her right to be accompanied by a co-worker pursuant to section 41(1) of the *Employment Act*.



The respondent's aforesaid action completely changed the cause of action herein.

9. I have had an opportunity to peruse the copy of the respondent's human resource manual 2017 referred to in paragraph 8 of this ruling. Sections K.4(a), K.4(d), K.4(f), K.4(h) and Section K. 4(i) of the Manual provide as follows:-

Section K.4(a)

“where an employee is suspected or accused of a misconduct which may lead to termination of service, the Authority shall interdict the employee from duty pending investigations and consideration of offence. While under interdiction, the employee shall not attend his place of work and must keep off the authority's premises unless requested otherwise. Notice of interdiction shall be given in writing to the employee concerned and, where applicable, copied to the union.

Section K.4(d)

an employee who is interdicted will receive half of his basic salary, full house allowance and medical benefits.

Section K.4(f)

“where an employee has been charged in a Court of law with a criminal offence which arises from, is connected with or has a bearing on his employment, he will be suspended from employment pending a formal report from Head of security Services. If the criminal offence also amounts to an offence under this handbook, disciplinary proceedings may be commenced without prejudice to the Court case and its outcome.”

Section K.4(h)

“an employee who is suspended will receive full house allowance, medical benefits and no basic salary.

Section K. 4(i)

“where disciplinary or criminal proceedings have been completed, regardless of the outcome, the suspension shall be lifted and the whole of the basic salary withheld under paragraph (c) above will be paid to him.”

10. It is to be noted from the foregoing provisions of the respondent's human resource manual, which is presumed to have the force of law under section 12 of the *Employment Act*, that the respondent's act of suspending the claimant from duty on March 14, 2022 was wrongful and illegal as the claimant had not been charged with any criminal offence in a Court of law. I have deliberately used the word “presumed” because none of the parties has exhibited the claimant's contract of employment, and the court has not been addressed on the issue of whether or not the claimant's contract of employment refers to the respondent's human resource manual or any provisions thereof pursuant to section 12(a) of the *Employment Act* 2007.
11. The respondent's subsequent act of substituting the already effected illegal suspension did not cure the illegality already visited on claimant.
12. On April 19, 2022, the claimant filed two urgent applications as follows:-



- a. An Amended Notice of Motion dated April 15, 2022 seeking:-
    - i. an order staying the interdiction of the claimant and restraining the respondent from conducting any disciplinary proceedings against the claimant and order for her immediate reinstatement pending the *inter-partes* hearing and determination of the application.
    - ii. an order restraining the respondent from interdicting and/or conducting any disciplinary proceedings against the applicant based on its letters dated April 6, 2022 and April 13, 2022, either by themselves, employees, servants and/or agents and from terminating the employment of the applicant/claimant.
    - iii. that the court do grant orders it deems fit to grant.
  - b. A chamber summons dated April 15, 2022 whereby the claimant/applicant sought: -
    - i. leave to amend the Notice of Motion dated March 23, 2022.
    - ii. an order deeming the Amended Notice of Motion dated April 15, 2022 as duly filed.
13. An amended statement of claim was subsequently filed.
  14. Upon hearing oral submissions by counsel for both parties on April 25, 2022, I allowed the claimant's Chamber Summons dated April 15, 2022, which the respondent did not oppose, and in effect granted the claimant leave to amend the Notice of Motion dated March 23, 2022, and deemed the Amended Notice of Motion dated April 15, 2022 as having been duly filed and served. The respondent's grounds of opposition dated April 25, 2022, excluding ground no 2 thereof which the respondent's counsel told the Court was not correct, and the Replying affidavit of Bildad Kisero sworn on March 28, 2022 were deemed to be the Respondent's response to the Claimant's said Amended Notice of Motion. The claimant was granted leave to file a further affidavit in support of the Amended Notice of Motion.
  15. On the same date, I granted interim orders restraining the respondent authority from conducting any disciplinary proceedings against the claimant/applicant pending hearing and determination of the Amended Notice of Motion dated April 15, 2022, which is the application before me. Both parties have filed written submission on the application pursuant to the court's directions in that regard.
  16. It is a common ground that the claimant applicant's suspension and subsequent purported interdiction from duty stem from some two documents alleged to have been filed by the claimant in support of her claim in Mombasa ELRC Petition no 005 of 2022, filed by the claimant against the respondent herein. In the Replying Affidavit of Bildad Kesero sworn on March 28, 2022 and filed herein on March 29, 2022, the respondent deponed, *inter-alia*:-
    6. That the claimant is an employee of the respondent. As an employee, the claimant is bound by rules and regulations applicable to the respondent's employees. Those rules are to be found in the respondent's human resource manual 2017 (I annexed and marked as BK-3a copy of the respondent's human resource manual 2017.)
    8. the claimant has a right to seek legal redress against the respondent if she believes rightly or wrongly, that her rights are being infringed or are threatened with infringement.
    9. in exercise of that right, the claimant filed Mombasa ELRC Petition no E005 of 2022, Catherine Wangari vs Kenya Ports Authority & others. The respondent has given blow by blow response to the allegations made in the petition vide a Response to petition dated March 7, 2022.



11. in Msa ELRC Petition no E005 of 2022, the claimant referred to some two (2) documents allegedly originating from the respondent. Those two documents do not in fact emanate from the respondent.
  14. even assuming those two documents emanated from the respondent and were official records of the respondent, they are documents which are not in the custody of the claimant or the public at large. They are documents kept by the respondent's board secretary.
  15. if the claimant, by virtue of her employment, came across documents not available to the public at large, she is not entitled to rely on them to pursue her private interests in Petition no E005 of 2022..."
17. The suspension letter dated March 14, 2022, reads in part:-
- “we are in receipt of an affidavit sworn by yourself on February 16, 2022 in your personal capacity as an employee of the authority. In the affidavit, you have presented manipulated documents which purportedly originate from the authority, being the purported proceedings of a meeting of the HR committee of the board and the other being a purported Memo of the managing director addressed to the human resource committee on staff matters. Copies of the two documents as annexed to your affidavit are as follows:-
1. Annex CW1: a true copy of the deliberations arising from 177<sup>th</sup> HR Meeting held on January 26 and 27, 2022.”
  2. A memorandum no 002 of 2022 Doc KPA/HR/02/2022”...
- In view of the seriousness of your aforementioned action, you are hereby required to show cause why disciplinary action leading to summary dismissal from the service of the authority on account of gross misconduct should not be taken against your....
- You are suspended from the service of the authority with immediate effect...”
18. The interdiction letter dated April 6, 2022 and served on the claimant on April 14, 2022 reads in part:-
- “this is further to our letter dated March 14, 2022 suspending you from duty.
- Kindly be advised that the suspension order against you is hereby substituted with an interdiction order in accordance with section K.4(a) of the human resource manual 2017 which states...”
19. The two documents, which are shown to be the cause of the claimant's tribulations with her employer (the respondent) are said to have been exhibited by the claimant in Mombasa ELRC Petition no E005 of 2022 wherein the respondent herein is one of the respondents. The issues of whether or not those documents are true records of the respondent herein and whether the claimant was entitled to use them in the said case/petition are issues that can only be determined by the court in which the documents have been exhibited, possibly upon hearing parties to the petition. I will not say more on the said alleged two documents; as I cannot do so without commenting on a suit pending before a superior court of competent jurisdiction.
20. Having already made a finding that the claimant's suspension on March 14, 2022 was illegal and that subsequent purported substitution thereof with an interdiction order did not, and could not cure the illegality already visited on the claimant or validate the disciplinary process commenced on the wrong



footing by the respondent, it follows that the interdiction order dated April 6, 2022 and served on the claimant by the respondent on April 14, 2022 is one that never was.

21. An illegality is just that, an illegality, and cannot be aided by the law. An illegality is not capable of being substituted with what is lawful or what is perceived to be lawful or valid. An illegality can only be vacated and/or lifted to give way for a lawful and/right process to issue as may be necessary, if the applicable law and procedure so permits.
22. The claimant remains an employee of the respondent as her employment is not shown to have been terminated at any given time. The claimant has demonstrated the respondent's determination to proceed with disciplinary proceedings against the claimant "leading to summary dismissal from the service of the authority on account of gross misconduct."

The claimant, who in my view has established a *prima facie* case against the respondent, will suffer irreparable loss if her employment is terminated before the suit herein is heard and determined on merit. The facts of the suit herein, which I have substantially set out in this Ruling, are both peculiar and exceptional. The claimant faces possible termination of her employment on account of documents which, according to her, originated from the respondent, a fact which the respondent denies. The alleged documents were allegedly exhibited in a suit other than the suit herein and which is pending before another superior court.

23. A *prima facie* case is not necessarily one that must succeed, but one which is arguable. The principles in *Giella vs Casman Brown* are well settled. An applicant must establish a *prima facie* case with a probability of success, that he will suffer irreparable damage which cannot be compensated by an award of damages; and if the court is in doubt, it will decide the case on a balance of convenience. As already stated herein above, the claimant has established a *prima facie* case. No amount of damages can adequately compensate for unjustified loss of employment or destruction of a career. This court will not hesitate to issue orders that will ensure preservation of the claimant's employment pending hearing and determination of the suit herein.
24. In the case of *Mrao vs first American Bank of Kenya Limited & 2 others* [2003] KLR 125, the Court of Appeal (Bosire, JA) stated as follows:-

"the power of the court in an application for an interlocutory injunction is discretionary. Such discretion is judicial. And as is always the case, judicial discretion has to be exercised on the basis of the law and evidence."

25. Pursuant to section 12 of the [Employment and Labour Relations Court Act](#), this court has jurisdiction to issue orders of injunction where necessary. The claimant/applicant has presented evidence on the basis of which this court is satisfied that an order of injunction is deserved. The claimant is still an employee of the respondent. I find no reason why she should not remain such an employee pending hearing and determination of the suit herein. As already stated in this ruling, the suspension order dated March 14, 2022 was an illegality while the purported interdiction dated April 6, 2022 and served on the claimant on April 14, 2022 was one that never was, in view of the unvacated unlawful suspension.
26. Subsequently, I allow the Amended Notice of Motion dated April 15, 2022 in the following terms:-
  - a. an order of injunction is hereby granted restraining the respondent from interdicting the claimant/applicant and/or conducting any disciplinary proceedings against the claimant/applicant based on the letters dated April 6, 2022 or April 13, 2022 or any other, and from terminating the claimant's employment pending hearing and determination of the suit herein.



- b. for avoidance of doubt, the claimant/applicant shall remain an employee of the respondent, earning her full salary, allowances and benefits to which she is entitled, pending hearing and determination of the suit herein.
27. On the respondent’s contention that the claimant’s suit herein was filed through an advocate who did not hold a current practicing certificate, it is my view that the claimant/applicant’s right to be heard by this court and to be granted any deserved reliefs cannot be taken away on account of her advocate’s alleged failure to hold a current practicing certificate at the time of filing the suit and application herein. Article 50(1) of the Constitution of Kenya 2010 provides as follows:-
- “every person has the right to have any dispute that can be resolved by the application of law decided in fair and public hearing before a court or, if appropriate another independent and impartial tribunal or body.”
28. In my view, any misconduct and/or offence allegedly committed by an advocate who may be found to be practicing or to have practiced law without a valid practicing certificate attach to such advocate personally, and does not affect such advocate’s clients’ constitutional right to have disputes presented to courts resolved. Any court before which such an advocate appears may, however, make appropriate orders against such advocate if he or she is found to be in contempt of court.
29. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28<sup>TH</sup> DAY OF JULY 2022**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

**In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.**

**AGNES KITIKU NZEI**

**JUDGE**

**Appearance:**

..... for claimant/applicant

..... for respondent

