Jakait; Judicial Service Commission (Respondent) (Employment and Labour Relations Petition E951 of 2022) [2022] KEELRC 1427 (KLR) (23 June 2022) (Ruling)

Neutral citation: [2022] KEELRC 1427 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS PETITION E951 OF 2022

SC RUTTO, J

JUNE 23, 2022

IN THE MATTER OF ARTICLES 10, 22, 23, 35, 41, 47, 48, 50, 159 AND 232 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF CONTRAVENTION OF THE RIGHT TO INFORMATION, RIGHT TO FAIR ADMINISTRATIVE ACTION AND THE RIGHT TO FAIR HEARING AS PROVIDED FOR UNDER ARTICLE 35, 47 AND 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONS ACT

AND

IN THE MATTER OF THE EMPLOYMENT ACT, 2007

AND

IN THE MATTER OF JUDICIAL SERVICE ACT

AND

IN THE MATTER OF THE JUDICIAL SERVICE HUMAN RESOURCE POLICIES AND PROCEDURES MANUAL

IN THE MATTER OF

JOPHTER ECHOR JAKAIT ..... PETITIONER

AND

JUDICIAL SERVICE COMMISSION ..... RESPONDENT

RULING

1. The petitioner /applicant has moved the court through the instant Application which is expressed to be brought under Rules 4, 23, 24(1) of the *Constitution* of Kenya (2010) (*Protection of Rights and Fundamental Freedoms, Practice and Procedure Rules*, 2013).

2. The Application seeks the following orders: -

    a. Spent.

    b. Spent.

    c. Pending the substantive hearing and determination of this Petition, this honorable court be pleased to grant a conservatory order directing the respondent to reinstate the petitioner's alimentary allowance and medical insurance cover.

    d. Such further and other relief be granted to the applicant as this court may deem fit and just to grant.

    e. The costs of this application be provided for.

3. The Application is supported by the lengthy grounds on its body and an affidavit sworn by Mr. Jophter Echor Jakait, theapplicant herein, together with annexures thereto. Briefly that: -

    a. The petitioner/applicant was hired by the respondent on the 13th of October, 2006.

    b. Between 30th of April to 4th of May, 2018, the respondent's internal audit team, conducted an audit at Butali Law Courts, where the applicant was then serving as the Accountant in Charge.

    c. Following the audit exercise and the attendant audit report, the Applicant was accused of gross misconduct through a letter dated the 16th of December, 2019, and asked to show cause why he should not be dismissed from the respondent's service.

    d. He was later invited for a disciplinary hearing on various dates between August, 2020 and June, 2021.

    e. During the disciplinary hearings, his request to cross-examine the internal auditor, Mr. George Muhoho who had undertaken the audit exercise, was denied.

    f. At the close of the applicant's disciplinary hearing on 3rd of June, 2021, he expressed his displeasure as to how his hearing had been conducted in the blatant violation of his rights to fair hearing, access to information and fair administrative action.

    g. He was later dismissed from the respondent's service, through a letter dated the 27th of August, 2021 on grounds of gross misconduct.

    h. His appeal to the respondent against the dismissal, was declined.

    i. He perceives his dismissal from the respondent's service as premeditated and planned.

    j. Upon dismissal, his alimentary allowance and medical insurance were withdrawn entirely, rendering him destitute and subjecting him and his family to untold suffering.

4. The Application was opposed through the replying affidavit sworn by Mr. Peter Bunde, who identifies himself as the Assistant Director, Human Resource, of the Respondent. Mr. Bunde avers on behalf of the Respondent that: -

    a. The Application is an abuse of the court process as the applicant was dismissed on August 27, 2021hence there is nothing to conserve and there is no status quo to be maintained.

    b. The applicant had not demonstrated special exceptional circumstances warranting grant of the order sought.

    c. In the event the orders are granted in the interim and the Petition is dismissed, the respondent may never recover the monies paid to the applicant.

    d. Alimentary allowance is granted to an officer on suspension hence granting the Applicant's order, is akin to reinstating him to a "suspended employee status".

5. The applicant filed a further affidavit through which he stated that from the time of his dismissal, the respondent had intentionally and maliciously handicapped him from taking any further step in form of an appeal or review. He further deponed that he had moved the court without unreasonable delay.

Submissions

6. The Application was canvassed by written submissions which I have considered. The Applicant submitted that he has demonstrated that he was denied adequate time and material to prepare his defence as well as the right to cross examine his accusers. That as such, he had established a prima facie case with a likelihood of success as required in the case of *Mrao v First American Bank of Kenya Limited & 2 others* (2003) eKLR and *Nguruman Limited v Jan Bonde Nielsen & 2 others* (2014) eKLR. In further submission, the applicant urged that he will continue to be subjected to grave financial embarrassment if his alimentary allowance and medical cover are not restored. He further submitted that grant of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the bill of rights. That it is also in the interest of the public that a violation of the bill of rights is halted at the earliest instance.

7. On the part of the respondent, it was submitted that there is nothing to conserve or any status quo to be maintained. That grant of the orders would be tantamount to reinstating theapplicant back to his position which would be a final order as opposed to a conservatory order. Reliance was placed on the case of *Moses Etyang vs Chief of Defence Forces & another* (2021) eKLR. In further submission, the respondent stated that the legal and factual circumstances do not disclose a *prima facie* case, warranting the grant of the interlocutory relief. That further, granting the prayers sought would be equivalent to reinstating the applicant to his former position before the matter is determined on its merits. The case of *Andan Pictures Ltd. v Art Pictures Ltd & others*, AIR, CAL 428 was cited in support of this position.

Analysis and determination

8. Having considered the prayers sought in the Application, the response thereto and the opposing submissions, it is apparent that the sole issue falling for the court's determination, is whether the Application is merited.

9. To recap, the Application seeks a conservatory order directing the respondent to, reinstate theapplicant's alimentary allowance and medical insurance cover.

10. What then is a conservatory order and under what circumstances can a court grant the same?

11. The starting point is the determination by the Supreme Court in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 others*, in Petition No 2 of 2014 (eKLR), where it was held as follows: -

> " Conservatory orders" bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court in the public interest. Conservatory orders, therefore, are not unlike interlocutory injunction, linked to such private-party issues as "the prospects of irreparable harm" occurring during pendency of a case; or "high probability of success" in the applicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes and priority levels attributable to the relevant causes."

12. Essentially, the foregoing determination sets out the threshold for grant of conservatory orders.

13. Further, the High Court in the case of *Centre for Rights Education & Awareness (CREAW) & another v Speaker of the National Assembly & 2 others* [2017] eKLR, had this to say as regards issuance of conservatory orders: -

> " [58]. A conservatory order would normally issue where there is real impending danger to violation of the *Constitution* or fundamental rights and freedoms with a consequence that a petitioner or the public at large would suffer prejudice unless the court intervenes and grants Conservatory orders. In such a situation, the Court would issue a conservatory order for purposes of preserving the subject matter of the dispute." Underlined for emphasis

14. In light of the foregoing determinations and from the way I see it, a conservatory order can only issue in cases where public interest abounds and in instances where there is a real threat of violation of the *Constitution* or the fundamental rights and freedoms, to the detriment of a petitioner or the public at large. It is also aimed at preserving the substratum of the matter in dispute.

15. As stated herein, the applicant seeks reinstatement of his alimentary allowance and medical insurance cover. This order is sought pursuant to his dismissal on August 27, 2021. As such, so much water has gone under the bridge and the benefits he would otherwise be entitled to as an employee were effectively withdrawn upon his dismissal. This means that there is nothing to preserve at this point in time, by way of a conservatory order.

16. It is also instructive to note that in as much as the order sought, is couched as a conservatory order, it is in essence a mandatory injunction as it compels the Respondent to perform a specific action.

17. The Court of Appeal, in revisiting the various types of injunctions had this to say in the case of *New Ocean Transport Limited & another v Anwar Mohamed Bayusuf Limited* [2014] eKLR: -

> " We appreciate that an injunction is an order of the Court directing a party to the proceedings to do something or refrain from doing a specified act. It is granted in cases in which monetary compensation does afford an inadequate remedy to an injured party. See *Halsbury's Laws of England* 3rd edition, vol. 21 at pg. 343. Basically there are 2 types of injunctions; positive and negative. The positive injunction would direct a party to do something whereas a negative one will restrain such a person from doing something. Among the positive injunctions will be mandatory injunction. This injunction orders some act to be done. Part of this family is the restorative injunction being sought by the applicants in the instant application. This type of injunction requires the person against whom it is directed to undo a wrongful act, to restore the status quo ante so that the damage does not continue. Then there is

the mandatory injunction per se which compels a party to carry out some positive act to remedy a wrongful omission. As for negative injunctions, these would include prohibitory, perpetual, interlocutory and *Quia Timet* injunctions." Underlined for emphasis

18. From the foregoing determination, it is clear that the order sought by the Applicant at this juncture, falls under the category of a mandatory injunction. The next logical question to ask is, under what circumstances can a mandatory injunction issue?

19. The principles applicable in cases of mandatory injunctions were aptly captured in *Locabail International Finance Ltd v Agro Export and another* [1986] ALL ER 901, as follows: -

> " A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the court thought that the matter ought to be decided at once or where the injunction was directed at simple and summary act which could easily be remedied or where the defendant had attempted to steal a match on the Plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high sense of assurance that at the trial, it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibitory order."

20. This position was reiterated by the Court of Appeal in *Kenya Breweries Ltd & another v Washington O Okeya* [2002] eKLR and *Nation Media Group & 2 others v John Harun Mwau* [2014] eKLR.

21. In light thereof, acourt can only grant a mandatory injunction at an interlocutory stage, in clear cases and where special circumstances exist.

22. The instant Application raises allegations of violation of the applicant's right to fair hearing, during the conduct of his disciplinary proceedings. Specifically, the Applicant states that: -

    a. he was not allowed to cross examine the respondent's internal auditor, Mr. George Muhoho, who had undertaken the audit exercise;

    b. his application for the recusal of Mr. David Rapando, who was one of the panelists during the disciplinary hearing, was denied; and

    c. he was denied a copy of the disciplinary proceedings.

23. The applicant has also raised issues regarding the audit exercise that led to his eventual termination.

24. It is not in doubt that these are contentious issues that can only be resolved upon hearing and evaluation of the evidence presented by both parties. This is to mean that this case cannot be termed as straightforward.

25. As such, this is not a clear case and no special and exceptional circumstances, have been exhibited, to warrant grant of a mandatory injunction at this interlocutory stage.

26. It is also worth noting that the orders sought if granted at this stage, will in effect reinstate the applicant, whose employment was terminated on August 27, 2021. The benefits sought to be reinstated, are only available to an employee who is in the service of the respondent and evidently, the applicant is not.

27. Besides, the applicant has sought an order of reinstatement in the Petition, hence if granted, the order would be final and would defeat the essence of hearing and determining the matter on its merits.

28. The upshot of the foregoing is that theapplicant has not laid out basis for grant of the orders sought at this stage.

29. Accordingly, I dismiss the Application dated March 9, 2022.

30. Costs shall be in the Cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JUNE, 2022.

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STELLA RUTTO

JUDGE

Appearance:

Ms. Mutua for the Petitioner/Applicant

Ms. Saina for the Respondent

Court Assistant Barille Sora

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 1March 5, 2020 and subsequent directions of April 21, 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