



REPUBLIC OF KENYA



KENYA LAW
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**Muhanji v Kenya Ports Authority (Cause 98[B] of 2021)
[2022] KEELRC 3808 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3808 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 98[B] OF 2021**

**AK NZEI, J
JULY 28, 2022**

BETWEEN

ANTHONY MUHANJI CLAIMANT

AND

KENYA PORTS AUTHORITY RESPONDENT

RULING

1. Vide a Memorandum of Claim dated August 18, 2021 and filed in the court's registry at Nairobi on the same date, the claimant/applicant sued the respondent herein and pleaded, *inter-alia*:
 - a. that the claimant was employed by the respondent as a sub-overseer (Grade HG2) in 2010 and was subsequently promoted to the position of works officer (port) Grade HM2 on October 17, 2013.
 - b. that in February 2016, the claimant was recommended for the position of senior works officer (port) C/no 87798 Grade HM2 following retirement of the person formerly holding that position and was subsequently interviewed and confirmed to that position, whereupon he diligently discharged his duties on that position until March 19, 2021 when the respondent issued him with a letter of redeployment/re-designation to the position of senior architect HM2, post no 830-3002, which was effective immediately. That the said deployment was arbitral and devoid of procedure.
 - c. that barely a week after the illegal re-deployment, the respondent issued the claimant with a show cause letter dated March 23, 2021, requiring him to show cause why disciplinary proceedings could not be instituted against him over allegations that he was among KPA engineers who issued certificates which led to overpayment to named contractors to the tune of ksh 89,192,909.66.



- d. that although he responded to the show cause letter on March 30, 2021 and further expounded the issues before the respondent's human resource committee of the board, he was issued with a summary dismissal letter dated June 23, 2021 stating the reason as "issuing certificates that led to the overpayment of contractors in the concrete barriers and Makongeni Concrete Works Cases."
 - e. that the respondent's act of summarily dismissing the claimant from employment was unjustified and malicious as none of the payments certified by the claimant led to any overpayment.
 - f. that matters over which the claimant was dismissed were investigation and charges were thereafter preferred against persons found culpable vide Milimani Criminal Case no MCAC/E019/2020. That the claimant/applicant was absolved of any blame by the investigators and no charges were preferred against him.
 - g. that the respondent's board of directors that effected the claimant's dismissal had no power to do so, the appointment of its members having been quashed by the High Court vide a judgment delivered on May 27, 2021 in Petition no 236 of 2018, and that the dismissal was null and void.
2. Reliefs sought by the claimant/applicant in the suit include prayers for a declaratory order that his dismissal was null and void, and payment of damages, among others.
 3. Along with the Memorandum of claim filed in Court on August 18, 2021 as aforesaid, the claimant also filed a Notice of Motion dated August 18, 2021, under a certificate of urgency, making a raft of prayers, which included, among others, prayers for:-
 - a. an order restraining the respondent from advertising, shortlisting, interviewing, recruiting or in any other way filling the position of senior works officer (maintenance port) grade HM2, C/no 562612 pending hearing and determination of the suit.
 - b. a temporary order suspending the summary dismissal letter dated June 23, 2021 issued by the respondent against the claimant purporting to terminate the claimant/applicant's services pending hearing of the application, and a temporary injunction restraining the respondent from terminating the claimant's employment.
 - c. a temporary order of injunction restraining the respondent from taking any action to interfere with the claimant's employment as a senior works officer (maintenance port) grade HM2, C/ no 562612, or in any way hindering him from discharging his duties under the said position.
 4. It is not clear, from the application as framed, what orders the claimant/applicant is seeking under prayers numbered as 5 and 6.
 5. The application, which is supported by the claimant's supporting affidavit sworn on August 18, 2021, was placed before the duty court at Nairobi, where the suit was first filed, and the court declined to either certify the application as urgent or to issue any interim orders. The court noted that the claimant's employment had been terminated on June 23, 2021 and that the claimant had been indolent for two months. The court further noted that pursuant to rule 17(10) of this Court's Procedure Rules, orders of reinstatement could not be made *ex-parte*. Subsequently, the court granted the respondent leave to file response to the application and transferred the suit to this court.
 6. On January 20, 2022, the respondent filed a Replying Affidavit sworn by one Daniel Ogotu on October 15, 2021. It is deponed in the said replying affidavit, *inter-alia*:-



- a. that between 2017 and 2021, the respondent encountered huge budget overruns in the excess of ksh 3.5 Billion on account of payments to contractors for concrete works and manufacture of concrete barriers among other civil works, and a validation exercise thereon by the State Ministry of Public Works revealed that some of the respondent's engineers were responsible for valuation and certification of what occasioned the massive overpayments.
 - b. that the claimant was implicated, whereupon he was charged with occasioning overpayments amounting to ksh 89,192,909.66 as shown in the show cause letter dated March 23, 2021.
 - c. that vide a letter dated March 30, 2021, the claimant requested for a personal hearing, and was invited for a personal hearing vide a letter dated May 10, 2021.
 - d. that the respondent's HR committee of the board accorded the claimant a personal hearing, and that upon deliberations of the matter, the claimant was found culpable of the charge against him, and was summarily dismissed for gross misconduct vide a letter dated June 23, 2021.
 - e. that the claimant did not prefer any appeal against his dismissal in accordance with the provisions of section K 13 of the respondent's human resource manual; and that the suit herein and application are an afterthought.
 - f. that the applicant is seeking an order of reinstatement, which is an order in finality, and cannot be granted at preliminary stage.
 - g. that the claimant has not challenged the reasons for his dismissal or the lawfulness thereof.
 - h. that the allegations that the appointment of the respondent's Board was quashed by the High Court is malicious and ill-intended.
7. The respondent also filed Response to the claim on January 20, 2022 dated January 17, 2022.
 8. Both parties filed written submissions on the application pursuant to the court's directions in that regard, which I have considered.
 9. It is a common ground that the claimant/applicant was taken through a disciplinary process, which culminated in his summary dismissal on June 23, 2021. The claimant did not seek the court's intervention before his dismissal, if he felt that the process or the reasons upon which it was based was in any way legally wanting. Indeed, the claimant appears to question the validity of the reasons for his dismissal, but not the process leading to it.
 10. The issue of whether or not the claimant's dismissal was lawful or based on valid reasons and the reliefs available to him, if any, can only be determined by this court upon trial. The orders sought by the claimant cannot be granted at an interlocutory stage. Evidence must be taken, and issues involved must be probed based on that evidence.
 11. In the case of *Alfred Nyungu Kimungui vs Bomas of Kenya* [2013] eKLR the Industrial Court (Rika J,) correctly stated as follows: -

“although the industrial court has jurisdiction as urged by the claimant to grant a wide range of interim reliefs and remedies in employment and labour disputes, it must exercise caution and draw a distinction between workplace disciplinary process and judicial process. Judicial officers should not descend into the arena of the disciplinary process, determining how termination letters should be written or nullifying termination letters. The court agrees entirely with the respondent that whether termination was unlawful or unfair, cannot be



determined at the interlocutory stage. It is a matter to be decided upon the full presentation of facts.”

12. The court had the following to say in the case of *Venansio Mbataru Kariuki vs Governor, County Government of Nyandarua & 2 others* [2019] eKLR

“however, in employment and labour relations, the remedy of reinstatement back to employment upon the cessation of the same is a matter the court should address on the merit and be guided by the provisions of section 49(4) of the *Employment Act*, 2007. It cannot issue as an interim order as to do so would be to allow for specific performance at the interlocutory stage whereas the parties have a chance to address the same at a full hearing.....

See the Court of Appeal decision in *Kenya Airways Limited vs Aviation Allied Workers Union Kenya & 3 others* [2014] eKLR that:

The remedy of reinstatement is discretionary. However, the court is required to be guided by factors stipulated in section 49(4) of the *Employment Act* which includes the practicability of reinstatement or re-engagement and the common law principle that specific performance in a contract of employment should not be offered except in very exceptional circumstances. The court should also balance the interest of the employee with the interest of the employer...”

13. In *Kenya Tea Growers Association & Another vs Kenya Plantation & Agricultural Workers Union* [2018] eKLR, Court of Appeal stated:-

“the summary dismissal being a contentious issue, it required judicial determination in proper proceedings after a full hearing. In the circumstance of this case, we find that the order of reinstatement was improperly made at an interlocutory stage through an oral application and erroneously granted without due consideration of its implication on the previous orders and the pending proceedings.”

14. In the present case the orders sought by the claimant/applicant cannot be granted at the interlocutory stage. The Notice of Motion dated August 18, 2021 lacks merit. The same is hereby dismissed with no orders as to cost.
15. Parties are directed to fast track the suit herein to facilitate expeditious hearing and determination of the same on merit.
16. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH 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

