



**Kagena v Francis Maina (Head-Teacher) Aimeel Preparatory School & another
(Petition E081 of 2022) [2022] KEELRC 3870 (KLR) (25 August 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3870 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E081 OF 2022
AN MWAURE, J
AUGUST 25, 2022**

BETWEEN

BRENDA KAGENA PETITIONER

AND

**FRANCIS MAINA (HEAD-TEACHER) AIMEEL PREPARATORY
SCHOOL 1ST RESPONDENT**

DIRECTOR AIMEEL PREPARATORY SCHOOL 2ND RESPONDENT

RULING

INTRODUCTION

1. Before the Court for determination is a Notice of Motion application dated May 24, 2022 wherein she seeks the following temporary orders are sought :
 - (a) Spent
 - (b) That this Honourable Court be pleased to issue a temporary order restraining the Respondents either by themselves or any person acting on their behalf from dismissing the Applicant from employment pending hearing and determination of this application.
 - (c) That this Honourable Court be pleased to issue a temporary order restricting the Respondents either by themselves or any person acting on their behalf from dismissing the Applicant pending the hearing and determination of the Petition filed herewith.
 - (d) That pending hearing and determination of this application the Applicant's children be allowed to continue with their studies as per the prevailing terms.
 - (e) That costs of this application be provided for.



2. The Respondents filed their replying affidavit through one Chrispine Oluoch; the 2nd Respondent's manager.

The applicant's case

3. The Petitioner avers that she was employed by the Respondents as a teacher on or about January 2021. She was however not issued with a letter of employment for concurrence and signing as was expected. She was however assigned duties which she performed as if she was permanently employed.
4. She states that she fell ill on May 19, 2022 and sought leave from the 1st Respondent to seek medication. Upon being granted the said leave she went to Ebenezer Medical Clinic in Kiambu County where she was attended to and advised to be on bed rest and off duty for at least 3 days. She was therefore unable to attend to her teaching duties on May 20, 2022.
5. The Petitioner made an attempt to go back to school on May 21, 2022 as she was feeling a little bit better but was denied entry by security officers acting under the instructions of the 1st Respondent. She was then asked to report back to school on May 23, 2022.
6. In the middle of her lesson on May 23, 2022 the deputy head teacher informed her that the 1st Respondent had summoned her to his office. She was asked by the head teacher why she did not report to work on May 20, 2020. She gave her response and even furnished him with copies of the medical notes. However, she was told by the 1st Respondent to leave school until she was called again without explanation as to why she was being relieved of her duties.
7. It is her case that she is the only breadwinner of her family and is not sure whether she will be able to earn her salary while at home. She states that she has children in the 2nd Respondent's school. The children enjoy the incentive of not paying school fees as their mother is a teacher therein. She believes that if she is terminated her children will no longer be able to enjoy the free education.

The Respondents' Case

8. On June 10, 2022 the Respondents put in a response vide a replying affidavit sworn by Chrispine Oluoch; the school manager. The manager said that he was aware that the Petitioner was unwell and was given one day to seek medication on or about 1May 9, 2022 by the 1st Respondent.
9. The Respondents aver that the Petitioner neither reported to work on May 20, 2022 nor produced any evidence showing that she had been given 3 days sick off by the doctor she visited. She reported to duty on Saturday, May 21, 2022 and was advised to report back to the 1st Respondent on Monday, May 23, 2022. The Petitioner proceeded to class on Monday without clearing with the 1st Respondent.
10. It is the respondents' case that the Petitioner's absence disrupted the timetable with regards to classes. When she was summoned to the 1st Respondent's office she verbally explained that she had been granted a sick off. The Respondent's reiterate that the Petitioner did not produce any evidence to support her position. Consequently, she was asked to leave school in order for appropriate action to be taken.
11. The school was closed for holidays from May 25, 2022 to May 30, 2022 and her matter was still in abeyance until the school resumed. They intended to proceed with disciplinary action against the Petitioner when school resumed. The Petitioner was paid full salary May 2022.



12. Since the Petitioner had filed the present case, it was advisable that her children who had been studying in that school be stay away to shield them from any claims that may arise should any adverse action happen to them.
13. The Respondents submit that the Petitioner's basic equal rights were at no time denied and that there was no discrimination as the petitioner and her children were not subjected to any differential treatment. The Respondents pray that this petition be dismissed as it fails the specificity test required in constitutional petitions.

Analysis and determination

14. The Court wishes to first reiterate that a temporary injunction remains operative only for a specified period of time, lapse of which it ceases to apply. It is usually meant to protect the substratum of the suit. On this, the Court relies on the case of *Kenya Power & Lighting Company v Sheriff Molana Habib* [2018] eKLR where the Court held:

“A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties...”

15. The determination is whether the Applicant herein has satisfied the conditions upon which temporary injunctions may be granted. Before granting a temporary injunction the Court has to ask whether there are any serious issues to be tried or whether the applicant will suffer irreparable harm should the temporary injunction be denied.
16. The conditions for granting a temporary injunction are now well settled in the celebrated case of *Giella v Cassman Brown & Company Limited* [1973] EA 358 where the Court expressed itself as hereunder:

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

17. The court finds the claimant has not presented before the court any evidence that the respondent intends to terminate her employment. The respondent asked her to leave school to enable appropriate action be considered by the respondent in view of absenting herself from employment without providing any medical records from the doctor. Then she filed the suit even if she did not get any letter terminating her employment. Indeed the respondent confirms he did not intend to terminate her employment but only wanted to conduct disciplinary hearing in order for the claimant to explain why she absented herself from employment without providing the report from the doctor.
18. The court has noted the respondent invited her for notice to show cause dated June 9, 2022 and was given 7 days to respond and was told if she did not respond disciplinary action would be taken against her. She was asked to return her children to school.
19. The court finds there is no violation of claimant's right and was merely sent her a notice to show cause letter for absenting herself from work. That is all she received and so her claim that she feared unfair termination is a mere presumption with no evidence.



20. There are several authorities that clarify that courts do not interfere with the disciplinary actions of the employer unless there is a constitutional or legal violation. There is no plausible reason why the claimant failed to respond to the respondents letter of notice to show cause but instead filed a suit in court. The court would rely on the case of *Rachel Muthoni Wanyoike & another v Mentor Sacco Society Limited* (2021)eKLR where it was held:-

“we would however again stress that if a person is seeking redress from the High Court on a matter which involves reference to the constitution, it is important (if only to ensure that justice is done to his case) he should set out reasonable degree of precision that which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.”

21. Such explanation is missing in this application. The court will not be keen to interfere with the employer’s disciplinary process unless it is clear there is constitutional or legal violations of the employee. In this case there is no such evidence of any violation of claimants rights. It is only fair that the claimant should have responded to the notice to show cause letter and not rush to court.

22. As far as this application dated May 24, 2022 is concerned the court finds no merits on the same and is dismissed with no orders as to the costs. The respondent is instructed to allow the claimant’s children to continue attending the school pending the determination of this suit or on the disciplinary proceedings. On another note the court would urge the parties to attempt out of court settlement and can refer the matter to the DR on September 27, 2022 to appoint a mediator on their behalf and to give a mediation report within 60 days.

Mention on November 2, 2022 to get the mediator’s report.

Order

The above directions to be communicated to the claimant and Mention Notice to issue to the claimant.

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 25TH AUGUST, 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 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 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.

ANNA NGIBUINI MWAURE

JUDGE

