



Kibore v Kenya Veterinary Vaccines Production Institute & 2 others (Cause E223 of 2021) [2022] KEELRC 4070 (KLR) (29 September 2022) (Ruling)

Neutral citation: [2022] KEELRC 4070 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E223 OF 2021
M MBARÚ, J
SEPTEMBER 29, 2022**

BETWEEN

BENSON KIBORE CLAIMANT

AND

**KENYA VETERINARY VACCINES PRODUCTION INSTITUTE 1ST
RESPONDENT**

JANE WACHIRA 2ND RESPONDENT

**BOARD OF KENYA VETERINARY VACCINES PRODUCTION
INSTITUTE 3RD RESPONDENT**

RULING

1. The claimant filed application dated March 12, 2021 seeking for order that pending hearing of the suit herein the respondent be restrained from evicting him and his family from House No KVI/LB/5001/13 or acting in any way on his letter of dismissal dated January 13, 2021. The claimant is also seeking that his dismissal from employment by the respondent be stayed, lifted and or be revoked.
2. The application is supported by the claimant's affidavit and on the grounds that in a letter dated January 13, 2021 forwarded through the G4S and through email the respondent dismissed the claimant from his employment on unfounded basis and alleged insubordination and absence from duty without leave or lawful cause from April 1, 2020. This was despite the claimant objecting to the disciplinary process that had been taken against him without his knowledge. Acting on the decision to dismiss the claimant from his employment, the respondents issued him with notice to vacate house No KVL/LB/5001/13 where he occupies with his family by March 15, 2021.
3. In his affidavit, the claimant avers that he is an employee of the 1st respondent and on February 28, 2020 he requested for secondment to serve in the County Government of Elgeyo Marakwet as a Chief Officer in charge of livestock, cooperatives and fisheries for a period of 3 years from April 1, 2020.



The letter was sent to the 2nd respondent and copied to the Principal Secretary, State Department of Livestock and the Secretary to the Public Service Commission. The secondment was approved by the Public Service Commission through the Ministry of Agriculture, Livestock, Fisheries in a letter dated September 8, 2020 taking effect on March 2, 2020.

4. The respondents were aware of the secondment but the 2nd respondent failed to stop the payment of salary under his employment with the 1st respondent but opted to issue a notice to show cause why disciplinary action should not be taken for absence from work and despite the claimant objecting to the disciplinary process, his employment was dismissed on January 13, 2021 and notice to vacate his residence by March 15, 2021 leading to proceedings herein. The claimant will suffer loss and damage if the letter of dismissal is not vacated and the decision to vacate the allocated house lifted.
5. In reply, the respondent filed the replying affidavit of Walter Nyamwaya the legal officer who avers that the 1st respondent did not get a request for secondment of the claimant when he proceeded on leave on April 1, 2020 which was not approved. The claimant was invited to a disciplinary hearing but he failed to attend.
6. Mr Nyamwaya also avers that the subject house the claimant is seeking to keep is not occupied by him or his family and the same has been sublet too third parties and the eviction notice should be upheld by the court and the application dismissed with costs.
7. Both parties attended and filed written submissions which have been put into account and the twin issues for determination are;

Whether the respondent should be restrained from evicting the claimant from the allocated residence;
and

Whether letter dated January 13, 2021 dismissing the claimant from his employment should be stayed, lifted or revoked.
8. Through letter dated January 13, 2021 the 1st respondent terminated the claimant from his employment through summary dismissal on the grounds of being absent from duty without leave or reasonable cause from April 1, 2020.

Employment between the parties has since ceased.
9. To stay, lift or revoke letter dated January 13, 2020 dismissing the claimant from his employment would effectively reinstate him back to the position held with the 1st respondent prior to termination of employment through summary dismissal. Such would be a reinstatement, an order of specific performance pending hearing and determination of the claim herein.
10. An order of reinstatement is regulated under section 49(3) of the *Employment Act*, 2007 and section 12(3) of the *Employment and Labour Relations Court Act, 2011* which is discretionary and to be granted only in very exceptional circumstances and under subsection 49(4) of the *Employment Act*, the conditions to be put into account are outlined. Such remedy should only issue as a final order upon hearing the claim on the merits.
11. In the case of *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others* [2014] eKLR the Court of Appeal held 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."

12. And in the case of in *Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike* [2017] eKLR the court held that;

"At the very least a judge ought to set out the factors that mark out a particular case as possessed of exceptional circumstances before reinstatement can be ordered. This provision, properly understood, ought to render orders of reinstatement rarities, not common place and routine pronouncements ... This call for a strict adherence to the law as carefully and mandatorily set out in the controlling statute."

13. Without going into the merits of the case, to stay, lift or in any manner reverse the letter dated January 13, 2021 without hearing the suit herein would not aid the ends of justice. It would deny the respondent and effectively the court the chance to hear each party on its case and make a determination on the merits.
14. Under prayer (E) in the memorandum of claim dated March 12, 2021 the claimant is seeking an order of reinstatement without loss of benefits. Such put into account, on good cause, such remedy can be well addressed at the hearing.
15. Under the contract agreement between the parties dated February 3, 2013 and the letter of appointment dated February 7, 2014 the claimant is given a house allowance of Ksh 20,000 per month.
16. I take it, the allocation of housing noted as house No KVL/LB/5001/13 is a work benefit attached to employment which has since ceased. Such benefit cannot accrue outside of employment.
17. As noted above, upon a full hearing of the matter, the order of reinstatement put into account, where the court finds there was unfair termination of employment, the benefits therefrom shall be put into account but where the court were to find otherwise, to allow the claimant to keep in occupation of the allocated residence without the foundation of employment would be to visit injustice upon the respondent.
18. Accordingly, application dated March 12, 2021 is found without merit and is hereby dismissed. Costs in the cause.

DELIVERED IN OPEN COURT AT NAIROBI THIS 29TH DAY OF SEPTEMBER, 2022.

M. MBARŪ

JUDGE

In the presence of: Court Assistant Okodoi

..... **and**

