



**Macharia v Nairobi Golf Hotels (Kenya) Limited (aka Windsor Golf Hotel and Country Club) (Cause E722 of 2021) [2022] KEELRC 12810 (KLR) (27 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12810 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE E722 OF 2021**  
**MA ONYANGO, J**  
**SEPTEMBER 27, 2022**

**BETWEEN**

**JANET MUTHONI MACHARIA ..... CLAIMANT**

**AND**

**NAIROBI GOLF HOTELS (KENYA) LIMITED (AKA WINDSOR GOLF HOTEL AND COUNTRY CLUB) ..... RESPONDENT**

**RULING**

1. *Vide* an application dated August 13, 2021, the claimant seeks the following orders: -
  - (i) Spent.
  - (ii) That pending the hearing and determination of the main suit *inter-partes*, this Honourable Court be pleased to make an order directing the respondent, Nairobi Golf Hotels (kenya) Ltd (a k a -Windsor Golf Hotel & Country Club), to pay ABSA Bank Kenya Ltd on behalf of the claimant money deducted from the claimant payslip a total of Kshs 96,921/= from the Month of March, 2020 to date.
  - (iii) That pending the hearing and determination of this application *inter-partes*, this honourable court be pleased to make a temporary order staying the summary dismissal effected upon the claimant by the Nairobi Golf Hotels (kenya) Ltd (a k a -windsor Golf Hotel & Country Club).
  - (iv) That pending the hearing and determination of the main suit *inter-partes*, this Honourable Court be pleased to make a temporary order staying the summary dismissal effected upon the claimant by the Nairobi Golf Hotels (kenya) Ltd (a k a -windsor Golf Hotel & Country Club).
  - (v) That Upon Hearing and determination of this application *inter-partes*, this Honourable Court be pleased to make a temporary order staying the summary effected upon the claimant by the Nairobi Golf Hotels (kenya) Ltd (a k a -windsor Golf Hotel & Country Club).



- (vi) That the costs of this application be in the cause.
2. The application is supported by the grounds on the face thereof and the supporting affidavit of Janet Muthomi Macharia, the claimant.
  3. It is the case of the applicant that she was employed by the respondent as a security guard on November 1, 2012 and served the respondent diligently for eight years. She was also the secretary to the works committee.
  4. The claimant states that her last salary was Kshs 67,150.07.
  5. She avers that the respondent deducted a total of Kshs 96,921/= from her salary from the month of March 2020 for onward remittance to ABSA Bank Kenya Limited, which money the respondent failed to remit to offset a loan advanced to the claimant by the bank. That at the time of filing suit the loan balance was Kshs 236,336.75 and the bank had threatened to take action against the claimant.
  6. The claimant further avers that the respondent deducted a sum of Kshs 1,365.50 on account of pension to be remitted to Madison Life Assurance Kenya Limited from October 2018 but failed to remit the same, which amount had accumulated to Kshs 96,522/=.
  7. It is further the claimant's averment that the respondent was to transfer a sum of Kshs 69,692/= accrued on account of gratuity payment as per CBA for 2017 to Madison Life Assurance Limited which amount the respondent had failed to transfer.
  8. The claimant further avers that the respondent failed/refused to issue to her payslips from the month of November 2020 to date of dismissal. That the respondent further failed to issue her with statements from NSSF and pension despite her demands for the same.
  9. She further avers that she expended her personal funds to buy boots and a pair of uniform for the year 2019, 2020 and 2021 for which she was entitled to be paid Kshs 700/= per month which the respondent had failed to pay for 24 months up to April 2021, amounting to Kshs 144,000/=. She claims the amount from the respondent.
  10. The claimant further avers that the respondent directed her to take half salary for three months from April to June 2020 and committed to pay the same together with her normal salary within three months but the respondent had failed to do so. As such she was owed Kshs 404,889/= by the respondent.
  11. She avers that the respondent's actions were a total violation of her labour rights and had subjected her to physical shock and anguish. She prayed that the court stops the same.
  12. The respondent opposes the application through the replying affidavit of Leah K Nzioki, its Human Resource Manager.
  13. The respondent argues that the application is an attempt to pre-empt the outcome of a full trial at interlocutory stage without according it an opportunity to be heard on the main claim. That the prayers sought are incapable of being granted at interlocutory stage.
  14. It is further the respondent's position that the claimant had not demonstrated exceptional circumstances warranting the drastic remedies sought in the application or that she would suffer irreparable harm. That should the orders sought be granted the suit would be rendered an academic exercise.
  15. It is further the respondent's position that the claimant has failed to furnish facts to enable the court exercise discretion in her favour.



16. It is the respondent's case that the summary dismissal of the claimant was justified following the conduct of the claimant. That before dismissal, she was subjected to a fair hearing preceded by a letter dated 14<sup>th</sup> April requiring the claimant to respond to the charges against her which she responded to, and was subjected to a disciplinary hearing on April 19, 2021.
17. That at the hearing the claimant was allowed to be accompanied by a fellow employee, to question the respondent's witnesses and to adduce her evidence and witnesses.
18. It is the respondent's position that it has resolved the delays in remittance of pensions and has been allowed by Retirement Benefits Authority (RBA) to pay the arrears in instalments, which it was complying with.
19. The respondent denies that it deducted Kshs 96,921.00 from the claimant's salary and failed to remit to ABSA Bank. It avers that the amount deducted was Kshs 17,622.00 which it was in the process of remitting to ABSA Bank together with interest accrued as a result of delay in remittance of the same.
20. It is the respondent's position that the monies expended by the claimant in the alleged purchase of uniforms was unwarranted and unjustified as the contract of the claimant did not allow her to buy the same and claim from the respondent.
21. The respondent avers that the claimant failed to clear and thus frustrated calculation of her terminal dues.
22. The application was disposed of by way of written submissions. I have considered the motion and grounds and affidavit in support thereof. I have further considered the replying affidavit and the submissions for and against the application. The issues that arise for determination are whether the applicant merits the grant of the orders sought and whether the prayers can be granted at interlocutory stage.
23. The claimant's first prayer is that the respondent be compelled to pay ABSA Bank Kshs 96,921/= deducted from her salary from March 2020 to the date of the termination of her employment contract on April 21, 2021.
24. In the replying affidavit at paragraph 26, the respondent admits not remitting some deductions from the claimant's salary where it states as follows –
  - “26. That it is not true that the respondent has deducted the sum of Kshs 96,921.00 from the claimant's salary and failed to remit to ABSA. That amount deducted is Kshs 17,622.000 which is in the process of remitted to ABSA together with interest accrued as a result of delay in remitting the same.”
25. Based on the admission, the respondent is directed to immediately submit to the claimant a statement for all monies deducted from her salary and remitted to ABSA Bank, including the date of deduction and date of remittance. The respondent is by virtue of section 19 of the *Employment Act* responsible for any interest arising from delay in remittance of the deducted amounts.
26. The other prayer by the claimant is that the summary dismissal of the claimant be stayed. Staying summary dismissal is tantamount to reinstating the claimant back to employment.
27. Section 49(4) sets out the parameters that the court must take into account before ordering reinstatement. One of these parameters is that specific performance in a contract for service can only be ordered in very exceptional circumstances. The other is that the court takes into account



the circumstances under which the termination took place, including the extent if any to which the employee caused or contributed to the termination.

28. These can only be established after hearing the evidence in the suit. This is why courts have held that reinstatement cannot be ordered at interlocutory stage. The prayer therefore fails and is dismissed.
29. The claimant is entitled to an account of deductions in respect of NSSF and pension as well as an account of her gratuity which was to be remitted to the pension administrator. The respondent is directed to give an account of the same to the claimant.
30. The application therefore succeeds only practically. The respondent is directed to account to the claimant for all deductions made from her salary for purposes of remittance to ABSA Bank, setting out the dates of deductions and proof of dates of remittance to ABSA Bank. Any interest accruing as result of delay in remittance to the bank shall be borne by the respondent.
31. The respondent is further directed to account or remittances for pension and NSSF. All other prayers will have to await the hearing and determination of the main suit.
32. The costs of this application shall be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 27<sup>TH</sup> DAY OF SEPTEMBER 2022**

**MAUREEN ONYANGO**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 has 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.

**MAUREEN ONYANGO**

**JUDGE**

