



**Awori v Kenya Civil Aviation Authority (Cause E595 of 2021)
[2022] KEELRC 14669 (KLR) (27 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 14669 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E595 OF 2021
M MBARŪ, J
OCTOBER 27, 2022**

BETWEEN

MERCY BEATRICE AWORI CLAIMANT

AND

KENYA CIVIL AVIATION AUTHORITY RESPONDENT

RULING

- 1 The claimant filed application dated July 14, 2021 seeking for orders that
 1. Spent.
 2. A declaration be made that employers are bound by the [Employment Act 2007](#) Section 18 (5) (a) which provides that, ...
 3. A mandatory injunction be issued compelling the respondent vide [Employment Act 2007](#) Section 18(5)(a) to unconditionally issue flexible air tickets for the applicant and her dependants who are stranded in Canada to enable them repatriate back home to Kenya.
 4. A mandatory injunction be issued compelling the respondent vide [Employment Act 2007](#) Section 18(5)(a) and Section 18(2)(a) to unconditionally pay the applicant the July 2021, Foreign Service Allowances and Local Salary and issue payslips with tax deductions as required by law.
 5. A mandatory injunction be issued compelling the respondent vide [Employment Act 2007](#) Section 18(5)(a) to unconditionally pay the applicant the transfer Allowances for the year 2014 and 2021.
 6. A mandatory injunction be issued compelling the respondent vide [Employment Act 2007](#) Section 18(5)(a) to unconditionally pay the applicant gratuity for the period 2019 to 2021 and issue statement with tax deduction as required by law.



7. A mandatory injunction be issued compelling the respondent vide [Employment Act 2007](#) Section 18(5)(a) to unconditionally pay the applicant her transport allowance for the months of June and July 2021.
 8. A mandatory injunction be issued compelling the respondent vide [Employment Act 2007](#) Section 18(5)(a) to unconditionally pay the applicant her Educational Supplement entitlement.
 9. A mandatory injunction be issued compelling the respondent vide [Employment Act 2007](#) Section 18(5)(a) to unconditionally pay the applicant her leave allowance for the 2020 to 2021 period.
2. The application is supported by the affidavit of the claimant and on the grounds that her contract of service with the respondent was extended and appointed as the Alternate Representative of Kenya to ICAO through letter dated April 29, 2021 for a period of 3 months with effect from 1st May to July 31, 2021. She worked until the closure of the financial year and handing over.
 3. The claimant and her dependants are unable to repatriate to date due to the respondent's negligence and the court's acquiescence on not compelling the respondent to pay final dues and issue flexible air tickets as required by law at the end of tour of duty for public officers. The claimant is in debt and has been forced to a life of penury as a result of the respondent withholding final dues despite completion of duty and handing over.
 4. The claimant avers in her Affidavit that in September, 2021 the respondent acted contrary to Section 18(5) (a) of the [Employment Act](#) paid the Foreign Service Allowance and Local Salary only for the months of May and June, 2021 without issuing pay slips and without paying the salary and Foreign Service allowances for July, 2021. The respondent has failed to pay transfer allowances owed for the years 2014 and 2021 or to facilitate the claimant and her dependants repatriate by not issuing flexible air tickets. The respondent has also failed to pay for the claimant's daughter education supplement or the transport allowances of the extended contract period as Alternate Representative for the months of June and July, 2021.
 5. The claimant also avers that she has incurred expenses due to the late provision of funds necessary for running the office which the respondent has failed to pay and unless the orders sought are granted she will suffer grave irreparable harm and prejudice as a result of the illegal actions of the respondent.
 6. In reply, the respondent filed the Replying Affidavit of George Mogaka the Corporation Secretary and who avers that the application is in abuse of court process since the claimant has not met the threshold for the grant of the orders sought. The court issued pre-trial directions and the respondent filed a response and counterclaim on October 30, 2021 but the claimant has failed to set the matter down for hearing. The respondent fully relies on the response, counterclaim and witness statements filed.
 7. Mogaka also avers that the mandatory orders sought cannot issue at an interlocutory stage where the same brings to an end the suit without a full hearing which will deny the respondent the right to be heard on the counterclaim. The claimant in the Statement of Claim has sought the same orders as herein sought and which is repetitive in abuse of court process.
 8. The court in its orders on September 21, 2021 directed the claimant to vacate the official residence she occupied in Canada and further directed that all other pending issues be addressed during trial. The court dismissed the interim orders granted on July 28, 2021 which had been irregularly obtained for



- non-disclosure of material facts at that time and for these reasons the application should be dismissed with costs.
- 9 Mogaka also avers that the respondent has on numerous occasions requested the claimant to provide dates of her intended return to Kenya to facilitate the air tickets for her and dependants without success. The claimant has opted to live in Canada where her dependants are now working and studying and none is stranded as alleged. The claimant has refused to clear with the employer to allow for payment of final dues and such cannot be obtained through a court injunction and the application should be dismissed with costs.
- 10 Both parties attended and made oral submissions which are put into account and the sole issue herein is whether the orders of mandatory injunction sought by the claimant should issue in the interim.
- 11 Ordinarily, a court should not issue a mandatory injunction until the a full hearing of a suit unless there are exceptional circumstances where a respondent's act are indisputably unlawful and there is a high likelihood of interference with the subject matter of the suit to the detriment of the applicant and when eventually the court renders final orders, the same is just academic.
- 12 The Court of Appeal in the case of *Joseph Kaloki t/a Royal Family Assembly v Nancy Atieno Ouma* [2020] eKLR held that;
- a mandatory injunction can be granted on an interlocutory applications as well as at the hearing but should not normally be granted in the absence of special circumstances but that if a case is clear and which the court thinks it ought to be decided at once, a mandatory injunction will be granted at an interlocutory application.
- 13 The employment of the claimant by the respondent as the Alternate Representative at ICAO has since lapsed as at July 31, 2021.
- 14 The claimant filed suit on July 27, 2021 seeking for various remedies among them being;
- 15 Payment of allowances and benefits for the remainder of her contract term at ICAO to October, 2022;
- 16 Education supplement; Gratuity payment; and An order of reinstatement to employment without loss of benefits.
- 17 The respondent filed a response and counterclaim and set-off on the grounds that upon termination of employment, the claimant occupied the official residence of the respondent and at the time was paid foreign service allowances which ought not to have been paid and owes the respondent the following; Foreign Service allowances; and Rent for the official residence.
- 18 And that the owing final dues should be paid less what the claimant owes the respondent and the same be off-set thereof.
- 19 Whereas Section 18(5) (a) of the *Employment Act, 2007* directs an employer to pay an employee wages and allowances when due and at the end of employment, Section 17 and 19 of the *Act* allow an employer to recover salaries and allowances wrongfully paid or paid in excess and or recoverable from the employee for lawful cause and further effect a deduction from the wages for a reasonable amount for any damage done to, or loss of, any property lawfully in the possession or custody of the employee occasioned by the wilful default of the employee when then an employee demands the due salary and allowances and the employer counterclaims for the recovery and deduction from the salary and final dues of an employee for good cause, then the court is called to balance rights. Such can only apply upon



the merits of each case and final determination. To proceed on the affidavits filed would deny the court essential and relevant matters which can well be addressed at a full hearing.

- 20 To therefore grant the mandatory injunction sought by the claimant in the interim would not expedite justice.
- 21 On 21st September, 2021 the court directed the claimant to move the court and secure her rights. To urge the court on the instant application seeking mandatory injunctions instead of addressing the main claim on the face of the response and counterclaim filed by the respondent and dated October 14, 2021 shall not foster justice. In this case, it is necessary and important for the court to hear the parties on the merits for a full determination.
- 22 Before conclusion, the claimant's counsel made submissions that the court has acted in acquiescence with the respondent, the court has failed to protect the claimant in pursuant of justice; the court has refused to direct the respondent appropriately by issuing injunctive orders directing that the claimant be paid her dues and be issued with flexible air tickets for travel from Canada to Kenya; and that the court has allowed for the eviction of the claimant from her official residence without taking into account that she is ailing and is unwell while failing to take into account that her terminal dues have not been paid hence making her destitute. All these submissions taken into account, this court continue to administer justice to all parties who attend in equal measure based on the constitutional morality and legal duty and oath of office and nothing else.
- 23 Whereas both parties are represented by counsels, both bear a duty first to this Court as well articulated under Section 3(3) of the *Employment and Labour Relations Court Act, 2011* that;
- (3) The parties and their representatives, as the case may be, shall assist the Court to further the principal objective and, to that effect, to participate in the proceedings of the Court and to comply with directions and orders of the Court.
- 24 In this regard, the above shall suffice.
- 25 The claimant shall set the matter down for hearing of the main claim.
- 26 Accordingly, application dated July 14, 2022 is found without merits and is dismissed with costs to the respondent.

Delivered in court at Nairobi this 27th day of October, 2022.

M. MBARŪ JUDGE

In the presence of:

Court Assistant: Okodoi

..... and

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