



**Keter v Family Bank Limited (Cause E009 of 2022)  
[2022] KEELRC 12844 (KLR) (13 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12844 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
CAUSE E009 OF 2022  
JW KELI, J  
OCTOBER 13, 2022**

**BETWEEN**

**MONICAH JEPKEMBOI KETER ..... CLAIMANT**

**AND**

**FAMILY BANK LIMITED ..... RESPONDENT**

**RULING**

1. The Claimant in the instant suit by way of Notice of Motion Application dated 8<sup>th</sup> April, 2022 lodged in court on 12<sup>th</sup> April 2022 sought the following substantive orders:-
  - a. Pending the hearing and determination of the main suit, an order be and is hereby issued restraining the respondent from recruiting an Operations Manager for Family Bank Busia Branch.
  - b. Pending the hearing and determination of the main suit, an order be and is hereby issued cancelling the termination letter dated 28<sup>th</sup> February 2022 and directing the Respondent to allow the Claimant to resume her duties as Operations Manager for Family Bank Busia Branch.
  - c. That Costs of this application be provided for by the Respondent.
2. The application is grounded on several grounds and the affidavit of Monicah Jepkemboi Keter the Applicant and summarized to be, that the applicant is a former employee of the respondent first retained as sales marketing officer and promoted to branch operations manager vide appointment letter of 22<sup>nd</sup> January 2016 a position she avers to have served in diligently without any disciplinary issues. The applicant attributes her woes to a complaint lodged by a customer (MJK-3) of debited monies from her account at the Busia Branch where the applicant was the Operations Manager. It is this complaint that led to the internal disciplinary proceedings by the employer after which she was terminated from employment. The applicant states the process leading to her termination was flawed and prays for reinstatement.



3. The applicant filed a further affidavit sworn on 5<sup>th</sup> July 2022 by Monicah Jepkemboi Keter and filed on the 13<sup>th</sup> July 2022.
4. The Application is opposed vide affidavit of Samuel Muchuku Matheri sworn on 28<sup>th</sup> April, 2022 and from the said affidavit the court finds that the parties are in agreement that the applicant/ Claimant's employment was terminated after completion of internal discipline proceedings.
5. The application was canvassed by way of written submissions.
6. The Applicant's submissions drawn by Omondi Abande & Company Advocates are dated 16<sup>th</sup> May 2022 and received in court on the 17<sup>th</sup> May 2022. The applicant filed further submissions dated 14<sup>th</sup> July 2022 on receipt of the replying affidavit by the respondent.
7. The Respondent's written submissions drawn by Wamae & Allen are dated 8<sup>th</sup> July 2022. The respondent filed further submissions on the 29<sup>th</sup> July 2022.

#### **Determination.**

8. The applicant identified the following issues for determination:-
  - a. Whether a prima facie case has been established by the applicant to warrant granting an order of reinstatement.
  - b. Whether the irreparable harm would be occasioned on the Applicant if the orders sought are not granted;
  - c. And whether the balance of inconvenience tilts in favour of granting the prayers sought.
9. The Respondent, in submissions, addressed the same issues as raised by the Applicant.
10. The court proceeds to consider the issues adopted by the parties under the broad theme of whether the application is merited.

#### **Whether the application is merited.**

11. The applicant submits that an interlocutory injunction can only be granted where the applicant establishes a prima facie case with a probability of success and relies on the definition of a prima facie case in *Mrao Limited v First American Bank of Kenya & 2 others* (2003)eKLR where it was held, "A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."
12. The claimant/ applicant submits that the jurisdiction to order reinstatement of an employee is donated by section 49(3)(a) of the *Employment Act* and section 12(3)(vii) of the Employment and Labour Relations Act . That the mainstay of the claimant's case is that no valid reasons existed for her termination. She was a whistle blower who reported a fraudulent transaction and instead of being lauded for her honesty she was victimized and dismissed from employment.
13. The applicant submits that she relies on the settled jurisprudence that an order for reinstatement can only be granted in the interim in exceptional circumstances and submits that those exceptional circumstances do exist in the instant application for lack of valid reason for termination.
14. The applicant to buttress the foregoing submissions relied on the case of *Shadrack Musyoka v Middle East Bank Kenya Limited*(2021)eKLR where Justice Onesmus Makau held that the applicant had



established a prima facie case for reinstatement in view of lack of response by the respondent. The court noted that a replying affidavit of the Respondent in the instant application was validly filed after these submissions had been filed.

15. The applicant submits that granting the order or reinstatement does not terminate the main suit at the interim stage as erroneously held by several courts on the subject. That far from it, an interim order for reinstatement does not determine the suit as the respondent will have opportunity to justify the termination at the main hearing and if justified will be at liberty to proceed with the termination. That the claimant has held her clearance and her terminal dues not processed hence no risk of loss of salary paid in the interlocutory period in the very unlikely event the suit is dismissed.

## Response

16. The respondent relied on the replying affidavit sworn on Samuel Muchuku Matheri on 28<sup>th</sup> April 2022 and the exhibits therein.
17. The Respondent's facts agree with the claimant save for that the claimant disputes the fairness of the termination stating the reasons were not valid.
18. The respondent in opposition to the application in submissions submits that the applicant has not made a case for grant of orders sought and places reliance in the case of *Rose Njambi Mwangi v Point East Africa Limited*(2021)eKLR where in the court noted that issuing reinstatement orders at an interlocutory stage would amount to granting orders that a party is entitled to upon full hearing of a suit.
19. The respondent submits that the further affidavit by the Applicant raises new issues hence no opportunity for the respondent to respond and the said further affidavit ought to be struck off the record. The court will not address the issue of the validity of the further affidavit in this ruling.
20. The respondent submits that the applicant is subjecting the court to fishing expedition. That as per the authorities presented by the claimant which wrongly note the law in relation to issue of application as that of the claimant is that a party must demonstrate a prima facie case. The respondent submits that the jurisprudence of this honourable court is that there should be a good cause or exceptional circumstances and if the same is practical to warrant the granting of an interlocutory order.
21. The respondent submits that prayers sought would be nugatory if issued as the respondent has already recruited an operational manager for the position previously held by the applicant.
22. The respondent further relies on the Court of Appeal decision in *Kenya Tea Growers Association v Kenya Plantation & Agricultural Workers Union*(2018)eKLR where the court held, 'We agree entirely with the statement by Rika J, in *Alfred Nyungu Kimangii v Bomas of Kenya* (2013)eKLR that 'ordinarily reinstatement of an employee is a substantive remedy, not a temporally relief. The law does not contemplate that reinstatement issues as a provisional measure. It is a remedy that should normally be granted upon the full hearing of the employer and of the employee.'

## Court decision

23. The Claimant's sought for interim reinstatement at interlocutory stage. The court has considered the application of the claimant and the submissions by the Claimant as summarized above. The court also considered the respondent's response and submissions as also summarized in the above.
24. The Claimant in support of her application and to buttress their case has cited authorities of this court in *Shadrack Musyoka v Middle East Bank Kenya Limited*(2021)eKLR and *Hedwig Nyalwal v*



Kenya Institute of Supplies Management(2020)eKLR where the court granted orders of reinstatement at interlocutory stage. The court noted that in both cases there was no due process and no defence filed making the decisions irrelevant as in the instant case where on prima facie basis there was no dispute by the parties that there was internal disciplinary proceedings carried out before the termination with the claimant exercising right of appeal. There is also replying affidavit filed in opposition to the application.

25. The Court further finds the matter of interim reinstatement on basis of a prima facie case is not settled jurisprudence as the claimant submits. The court further finds that those authorities of the court respectively relied and cited above by the claimant are not binding to this court but are persuasive.
26. It is the understanding of the court that Jurisprudence of the court by judges of equal status cannot be said to be settled when the courts have taken different positions on the matter. For example in this case the decisions by the Claimant of the court in Shadrack Musyoka v Middle East Bank Kenya Limited(2021)eKLR and Hedwig Nyalwal v Kenya Institute of Supplies Management(2020)eKLR respectively granting reinstatement at interlocutory stage are to be viewed in comparison with other decisions of the court to wit:- in East African Portland Cement Company Limited v Attorney General & Another Petition No. 9 of 2012 wherein the court held that it is not the mandate of the industrial court to determine validity of the termination letter on interim ex parte basis. The grant of ex parte orders reversing interdiction and termination amounts to reinstatement by the court and is in violation of the court's rules. ; in Antony Omari Ongeru v Teachers Service Commission (2017)eKLR where the court observed that the rationale is that the order of reinstatement is final in nature and should only issue in exceptional circumstances which warrant specific performance and in Ahmed Aden Hire v Natif Juma v County Government of Garissa Petition No. 121 of 2016 where the court observed that the rationale of not reinstating an employee at an interlocutory stage is that the order of reinstatement is a specific performance order with finality. The foregoing decisions demonstrate that the court has not settled jurisprudence on reinstatement at interlocutory stage. None of the judges of the court binds the other. Only the Court of Appeal and Supreme Court decisions are binding on the court and their authorities unless overruled by the same courts can be stated then to have settled the jurisprudence on a subject.
27. The Applicant submits that the jurisdiction to order reinstatement of an employee is donated by section 49(3)(a) of the Employment Act and section 12(3)(vii) of the Employment and Labour Relations Act. That the mainstay of the claimant's case is that no valid reasons existed for her termination. That she was a whistle blower who reported a fraudulent transaction and instead of being lauded for her honesty she was victimized and dismissed from employment. That for lack of valid reasons then she has established a prima facie case for interim order of reinstatement to issue.
28. To bring perspective to the application the court outlines the cited provisions of the law under which the prayers are hinged. Section 49 (1)(a) of the Employment Act reads:-

“ 49.

- (1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following –
- (3) Where in the opinion of a labour officer an employee's summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to - (a) reinstate the employee and treat the employee in all respects as if the employee's employment had not been terminated; “



29. The Employment and Labour Relations Court Act section 12(3) reads:- “In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders:- (vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law.”
30. The court is empowered to grant any of the orders under section 49 of the Employment Act by section 50 of the Act which reads:-. In determining a complaint or suit under this Act involving wrongful dismissal or unfair termination of the employment of an employee, the Industrial Court shall be guided by the provisions of section 49.”
31. The court’s understanding of the above law as outlined and relied on to invoke the powers of the court by the applicant is that all the awards under section 49 of the Employment Act of which the court is granted powers to award by section 12 of the Employment and Labor Relations Act and section 50 of the Employment Act are final in nature. Section 49 of the Employment Act contemplates the awards to be upon finding the summary dismissal or termination of the employee unjustified.
32. For the foregoing reasons the court is not persuaded by the decisions of the court relied on by the applicant in *Shadrack Musyoka v Middle East Bank Kenya Limited*(2021)eKLR and *Hedwig Nyalwal v Kenya Institute of Supplies Management* (2020)eKLR to the effect that the court on finding prima facie case can award reinstatement at interlocutory stage. By its nature the order of reinstatement cannot be said to be interim as it restores full employee and employer relations with attendant rights and obligations.
33. The court finds that the intention of Parliament as gleaned under section 49 of the Employment Act was that the reinstatement order can only be awarded in exceptional circumstances considering practicability on finding the termination was unfair. The court is to be further guided under 49 subsection 4(d) to wit:- ‘the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances’.
34. The court upholds to apply in the instant application the binding decision of Court of Appeal in *Kenya Tea Growers Association v Kenya Planation & Agricultural Workers Union*(2018)eKLR where the court held, ‘We agree entirely with the statement by Rika J, in *Alfred Nyungu Kimangii v Bomas of Kenya* (2013)eKLR that ‘ordinarily reinstatement of an employee is a substantive remedy, not a temporally relief. The law does not contemplate that reinstatement issues as a provisional measure. It is a remedy that should normally be granted upon the full hearing of the employer and of the employee’.”
35. The foregoing decision of the Court of Appeal in *Kenya Tea Growers Association v Kenya Planation & Agricultural Workers Union*(2018)eKLR is binding on this court. The court finds that the order of reinstatement is not available at interlocutory stage even if there was a prima facie case established as the order is final in nature on the court finding unfair termination. The court cannot make a finding on unfair termination before hearing the parties on merit as the claimant seeks in the interlocutory stage.
36. Consequently, court finds and determines that the Application dated 8<sup>th</sup> April 2022 is without merit and dismisses the same with costs to the Respondent in cause.
37. It is so ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 13<sup>TH</sup> DAY OF OCTOBER, 2022.**

**J. W. KELI**  
**JUDGE**



In the Presence of:

Court Assistant; Brenda Wesonga

Applicant: Ouru Counsel for Applicant

Respondent : Kithinji

Court Order

The suit to be mentioned on the 26<sup>th</sup> October 2022 for trial directions

It is so Ordered.

**J.W. Keli**

**JUDGE**

