Osoo v Mobile Financial Solutions Limited (Cause E227 of 2022)
[2022] KEELRC 13386 (KLR) (5 December 2022) (Ruling)

Neutral citation: [2022] KEELRC 13386 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E227 OF 2022

JK GAKERI, J

DECEMBER 5, 2022

BETWEEN

JOHN OUKO OSOO ..... CLAIMANT

AND

MOBILE FINANCIAL SOLUTIONS LIMITED ..... RESPONDENT

RULING

1. Before this court for determination is the notice of motion application dated April 6, 2022 filed under certificate of urgency under articles 23, 27, 47 and 50 of the *Constitution* of Kenya, 2010, section 3 (1) and (3) of the *Employment and Labour Relations Court Act*, 2011, rule 16 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* and sections 4, 6, 7 and 8 of the *Fair Administrative Actions Act*, 2015 and other relevant provisions of law for orders that;-

    i. Spent.

    ii. Spent.

    iii. A conservatory order does issue to stay the decision contained in or implementation or execution of the letter dated March 4, 2022 addressed to the claimant by the respondent

    iv. As a preference, immediate reinstatement to the position of head of operations without loss of salary, benefits and/or allowances failing which he be re-engaged in work comparable to that in which he was employed prior to his dismissal or other reasonable suitable work at the same wage.

    v. A conservatory order does issue restraining the respondent from recruiting and or replacing any person for the position of head or operations removing the name of the claimant from the payroll or denying him any allowances, benefits or privileges and reinstating the claimant to employment on the same terms and conditions of employment.

vi. An order do issue compelling the respondent to allow the claimant access to his office for purposes of retrieving his personal effects and do a proper handover of the respondent's property, assets and reports.

vii. Costs of this application be in the cause.

2. The application is based on the grounds set forth on its face and is supported by the affidavit sworn by the applicant, Mr John Ouko Osoo, who deposes that he was the head of operations of the respondent for 3 years from July 1, 2020 responsible for management and delivery of all contracted services for individual and portfolio customers, quality assurance and performance by team members.

3. The affiant states that his starting salary of Kshs 360,000/= was raised to Kshs 420,000/= per month from April 1, 2021 and his employment was confirmed after serving a three months probationary period after evaluation on December 7, 2020.

4. That his terms and conditions of employment were based on the respondent's Human Resource Manual, Policies and Regulations (HR Manual 2007), *Employment Act* and the *Constitution* of Kenya, 2010.

5. That on February 10, 2022. The affiant was summoned by the respondent's Human Resource Business Manager to the Managing Director's office where he was informed that he had violated his terms of employment by conflict of interest and annual declaration of interest and other employment and a show cause and suspension letter dated February 10, 2022 was issued alleging gross misconduct and suspension without pay contrary to the human resource manual which provided for 50% salary for those on suspension and was not paid for the 10 days of February 2022.

6. The affiant further states that a response was required within 24 hours and a disciplinary hearing scheduled for February 14, 2022 at 10.30 am.

7. That the misconduct alleged did not specify the provisions of law allegedly violated

8. It is deponed that the respondent did not provide sufficient information on the allegations and the applicant was thus unable to provide a full and proper explanation of the matter. That the affiant demanded documentary evidence relied upon in the suspension including witness statements to prepare for the disciplinary hearing.

9. That the affiant attended the disciplinary hearing under protest of the short notice and his request for a witness from outside the organisation was rejected.

10. That the hearing was postponed to February 17, 2022 for no reason.

11. That the disciplinary committee consisted of the Senior Human Resource Business Partner, Head of Operations, Head of Engineering and the Human Resource Officer.

12. The affiant deposes that the Human Resource Policy and Procedure Manual provided that employees in grade 2 and above were handled by the Managing Director.

13. That the disciplinary committee proceeded despite being aware of the applicant's request for documents. That the same were availed on February 25, 2022 after the hearing.

14. That the respondent did not have the documents on 14th or February 17, 2022.

15. That there was a consensus that without the documents or witnesses, the hearing could not amount to a fair hearing and it was agreed that the documents be availed.

16. That the statements of witnesses were not availed which covered the evidential value of the documents.

17. The affiant further states that he was invited for another meeting on March 2, 2022 and confirmed that he needed a further hearing to clarify issues raised on February 17, 2022.

18. That the meeting scheduled for March 2, 2022 was pushed to March 4, 2022 when a summary dismissal letter was issued requiring immediate vacation of the office.

19. The affiant states that he had neither a warning letter nor previous disciplinary hearing.

20. That the affiant was not notified of the right to call another employee as witness or representative at the point of explanation of intention to terminate his employment and was thus dismissed hurriedly unfairly.

21. The affiant states that the alleged gross misconduct was not particularised and the respondent did not adhere to its Human Resource Manual as no warning was given and the committee was not chaired by the managing director. It is unclear as to who chaired the disciplinary meeting.

22. The affiant further states that he refused to appeal the decision though notified of his right to do so.

23. That if the orders sought are not given, the respondent will fill the position of head of operations and the suit shall be an academic exercise.

24. Finally, the applicant states that if conservatory orders are not granted, the loss cannot be compensated in damages.

Respondent's Response

25. In its replying affidavit sworn by Eva Wanjiku, the Human Resource Administrator, deposes that the applicant was its employee effective July 1, 2020 under a 3 year fixed term contract, entitled to medical cover, monthly airtime and leave allowance (35% of gross pay annually).

26. The affiant states that the applicant was lawfully dismissed from employment effective March 4, 2022 for breach of terms of employment regarding conflict of interest, annual declaration of interest and other clauses.

27. The affiant states that the respondent established that the applicant had accepted an offer of employment in another organization while still in the respondent's employment.

28. That as early as October 2021, the respondent received information that the applicant may be working elsewhere due to unexplained absence, but when asked about it, the applicant denied the allegation, but on January 18, 2022, the respondent's Human Resource Officer received a reference check request on the applicant. The request stated that the applicant was an active employee of Homeland Teq Solutions Ltd as the General Manager. That the respondent's Human Resource Department sought confirmation from the company on the employment status of the applicant.

29. The affiant states that telephone conversations with officers of the Homeland Teq Solutions Ltd were categorical that the applicant was its employee and provided his resignation letter dated February 10, 2022 accepted by the company on February 11, 2022.

30. The affiant further states that Homeland Teq Solutions Ltd confirmed that it employed the applicant effective October 15, 2021, that he was given an offer and requested for background checks and the applicant was on its payroll as a fulltime employee. That the letter dated February 24, 2022 confirmed as much.

31. That on February 10, 2022, the applicant was invited for a private meeting in the managing director's office for purposes of privacy and minutes were taken and a notice to show cause and suspension was issued on the same day and he was invited for a disciplinary hearing on February 14, 2022.

32. The affiant further states that the invitation for the hearing on February 17, 2022 notified the applicant his right to attend with a witness of his choice and disciplinary proceedings were conducted on February 17, 2022 and the applicant was found guilty of gross misconduct and was accordingly dismissed from employment.

33. That the applicant attempted to benefit from two employers thereby defrauding the respondent and creating a potential breach of his employment contract.

34. The affiant states that the respondent had just cause to terminate the applicant's employment as he had not disclosed the fact to both companies and was a fulltime employee of both companies.

35. That his position of employment was based on trust and confidence which the respondent lost in the applicant and reinstatement would be impracticable in this case.

36. That the court should not overturn the respondent's managerial prerogative as reinstatement would be tantamount to forcing two parties to work together contrary to section 49 (4) (d) of the *Employment Act*, the applicant can secure another job in Kenya and the circumstances of this case are not exceptional for the court to order specific performance.

37. The respondent prays for dismissal of the notice of motion application with costs.

Applicant's Supplementary Affidavit

38. In his supplementary affidavit dated July 1, 2022, the applicant deposes that the replying affidavit was incompent and fatally defective and should be struck out for offending order 19 rule 3 of the *Civil Procedure Rules, 2010* in that the deponent did not participate in the disciplinary process and did not specify the statements of information or disclose the sources.

39. That the application is unopposed and should be allowed.

40. The applicant states that the standard of proof in civil matters is on a balance of probabilities and the issue of employment by another organization has not been proven.

41. That absenteeism was not the subject of disciplinary proceedings and the source of suspicion that he worked elsewhere was not disclosed. The letter of reference was not availed at the hearing on January 17, 2022.

42. That Homeland Teq Solutions Ltd incorrectly described as Homeland Teq Co. Ltd was registered in September, 2021 (incorrectly stated as September 2022), that on boarding was not possible under one month.

43. The affiant states that the letter of offer has not been provided.

44. That he was forced to sign the letter dated February 10, 2022.

Applicant's Submissions

45. The applicant identified two issues for determination.

    i. Whether the respondent's affidavit offends order 19 rule 3 of the *Civil Procedure Rules*.

    ii. Whether the applicant has met the threshold for grant of interlocutory injunction.

46. As regards the first issue, it was urged that Eva Wanjiku, the deponent of the respondent's replying affidavit had no meeting with the applicant, attend the disciplinary hearing or issue any letter to the applicant.

47. That the deponent was not privy to the facts.

48. Reliance was made on the decision in *Kenya Union of Entertainment and Music Industry v Bomas of Kenya* (2021) eKLR to urge that a witness in a suit ought to be privy to the matters in question.

49. That the only exception to order 19 rule 3 was disclosure of sources of information or with leave of the court which was not sought.

50. The court was urged to strike out the affidavit.

51. As to whether the applicant had met the threshold for the grant of an injunction, reliance was made on the principles enunciated in *Giella v Cassman Brown* (1973) EA 358 to urge that the applicant has met the threshold.

52. Further, the decision in Map Express Trading (K) Ltd v Barclays Bank Limited (2021) eKLR was cited on the balance of convenience.

53. It was urged that the test to be met was that a right had been infringed as set out in *Mrao Ltd v First American Bank of Kenya & 20 others* (supra).

54. That the respondent did not comply with the law in the disciplinary proceedings and violated the *Constitution* and provisions of the *Fair Administrative Action*.

55. That the respondent had no valid reason for a hearing and suspending the claimant as it did not supply the documents requested for, ignored the Human Resource Manual and did not give adequate notice of the hearing. Reliance was made on the decision in *Postal Corporation of Kenya v Andrew K. Tanui* (2019) eKLR on irreparable damage.

56. It was urged that the applicant was apprehensive that the position may be filled pending the hearing and had lost employment and reputation.

57. On balance of convenience, the court was urged to exercise the same in favour of the claimant.

58. It was urged that the remaining term of the contract will have expired by the time the case is heard and determined and the remedy of reinstatement may be unavailable then.

Respondent's submission

59. The respondent submitted that it relied on the replying affidavit sworn by Eva Wanjiku.

60. It submitted that the applicant was seeking a final order of reinstatement so as to complete his contract of service scheduled to lapse on July 1, 2023.

61. The respondent further submitted that the applicant was accused of breaching his contract of service and the letters on record showed that he allegedly worked for another company while in the respondent's employment, was taken through a disciplinary hearing and found culpable.

62. It was the respondent's submission that applicant had not given the name of the witness he intended to call but for the restriction by the respondent.

63. On the applicable law, reliance was made on the provisions of sections 41, 43 and 45 of the *Employment Act*, 2007 to urge that the respondent had a valid reason to terminate the applicant's employment for

having taken up employment with another company while in the employment of the respondent as evidenced by the letter of resignation among other documents.

64. It was further submitted that although the applicant faulted the composition of the disciplinary committee, he did not rely on the respondent's Human Resource Policies Manual as his foundation.

65. As regards the remedy of reinstatement at the interlocutory stage, it was submitted that the applicant had not demonstrated why the same cannot wait for the main suit and was opposed in the grounds that;

    a. But for his conduct, he would still be a professional worth hiring.

    b. There is no evidence that the respondent was in the process of recruiting another person.

    c. The applicant's work did not involve use of specialized skills only utilized by the respondent and is capable of securing employment in Kenya.

    d. The law does not provide for warning letter in cases of gross misconduct.

66. It was urged that the applicant had not established a *prima facie* case, as explained in *Mrao Ltd v First American Bank of Kenya Ltd* (2003) eKLR.

67. Reliance was also made on the decision in *Allan Pamba v Kenya Hospital Association for and on behalf of Nairobi Hospital* (2020) eKLR to urge that reinstatement was only available after a finding that there was an unfair termination of employment.

68. It was urged that the respondent had deposed that it has lost confidence in the applicant and an interim order would occasion confusion at the work place.

69. Reliance was also made on section 49 (3) of the *Employment Act* and the decision in *Richard Muimo Parsitau v Kajiado County Government & 2 others* (2014) eKLR to urge that courts were reluctant to issue the order of reinstatement at the interlocutory stage and only do so after full hearing.

70. The court was urged not to issue an order of reinstatement at this stage as in any case, the court had liberty to do so if it made a finding that it was the appropriate remedy after the hearing.

71. As regards irreparable harm, it was urged that the applicant could suffer any as he had already prayed for an award of Kshs 12,587,000.00 and had not demonstrated why an award of the sum pleaded would not be sufficient, if he was successful.

72. Reliance was made on the sentiments of Radido J. in *Sosten Kipruto Kerich v Monarch Insurance Co Ltd* (2015) eKLR and Rika J. in *Joab Mehta Oudia v Coffee Development Board of Trustee* (2014) eKLR on the remedy of reinstatement.

73. The Court of Appeal decision in Kenya Tea Grower Association & another was cited to urge that the remedy of reinstatement available under section 49 of the *Employment Act* was discretionary and was a final remedy.

74. The respondent submitted that the applicant violated his contractual obligations leading to the summary dismissal.

75. The court was urged to decline the invitation to grant the remedy at this stage.

76. Finally, as regards the replying affidavit, it was urged that paragraph 1 of the affidavit stated that the affiant was the Human Resource Administrator of the respondent and had been duly authorized to swear the affidavit on behalf of the respondent and thus competent to make it and disclosed the documents in the respondent's possession and relied on them. That she managed recruitment,

selection, hiring, retention and termination of employees and was better placed to outline the disciplinary procedure.

77. The decision in *Scholastica Nyaguthii Muturi v Housing Finance Co. of Kenya* (2011) eKLR was relied upon in support of the submissions.

78. Finally, it was submitted that the applicant had not made a case for the orders sought and the notice of motion was devoid of merit and should be dismissed with costs.

Analysis And Determination

79. Having considered the application, supporting, supplementary and replying affidavits and submissions on record, the issues for determination are;

    i. Whether the replying affidavit sworn by Ms Eva Wanjiku offends order 19 rule 3 of the *Civil Procedure Rules, 2010*.

    ii. Whether the applicant has met the threshold for the award of the reliefs sought.

80. As to whether the affidavit offended order 19 rule 3, the starting point is the applicable law.

81. Order 19 rule 3 (1) of the *Civil Procedure Rules, 2010* provides

> That affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove.
>
> Provided that in interlocutory proceedings or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.

82. Whereas the applicant submits that the deponent was not party to the disciplinary proceedings and did not write the letters produced, the respondent submits that she was competent to do so as an officer of the respondent.

83. It is not in dispute that Ms Eva Wanjiku was an employee of the respondent as the Human Resource Administrator in the Human Resource Department, had been authorised to make the affidavit and thus competent to do so and has provided copies of the documents relied upon as the information and grounds contrary to the applicant's submissions that the information relied upon was not attached. The deponent makes reference to annextures "EW1", the employment contract dated May 27, 2020, "EW2", letter dated January 18, 2022 and filled reference form, "EW3", letters dated February 10, 2022 and February 11, 2022, "EW4", letter dated February 24, 2022, "EW5", copy of minutes dated February 10, 2022, "EW6", the show cause letter and the applicant's response dated February 10, 2022 and February 11, 2022 respectively, "EW7", invitation to the hearing dated February 14, 2021, "EW8", minutes of the February 17, 2022 and "EW9", summary dismissal letter and "EW10", confidentiality agreement.

84. The contents of the affidavit reveal that the affiant is deposing to the actions taken by the respondent as a company and the documents attached appear to bear her out.

85. These documents show the sources and grounds relied upon.

86. In light of the foregoing, the court is satisfied that the affiant, Ms Eva Wanjiku, was competent to swear the replying affidavit.

87. The court is also guided by the sentiments of L. Njagi J. in *Scholastica Nyaguthii Muturi v Housing Finance Co of Kenya* (supra) as follows;

> " In the instant case, Mr Geofrey Kimaita has made it clear in paragraph 1 of his affidavit that he is employed by the respondent as the head of recoveries. That constitutes him an officer of the respondent:-"
>
> He has further stated that he is "duly authorised to swear the affidavit" one cannot ask for more without prying into the internal management of the respondent's affairs".

88. These sentiments apply on all fours to the affidavit in this case sworn by Ms Eva Wanjiku, the respondent's human resource administrator.

89. For the foregoing reasons, the court is not persuaded that the replying affidavit sworn by Ms Eva Wanjiku on April 26, 2022 is incompetent.

90. As to whether the applicant has made a case for the grant of the reliefs sought, parties have adopted contrasting positions. While the applicant urges that he had made a sustainable case for the grant of the remedy of reinstatement and an injunction to restrain the respondent from recruiting or replacing the applicant for the position of head of operations, the respondent submits that the appellant's application has not met the threshold.

91. As regards the interlocutory injunction, the relevant principles were enunciated in *Giella v Cassman Brown* (supra) and elaborated in *Nguruman Ltd v Jan Bonde Nielsen & 2 others* (2014) eKLR.

92. In *Faulu Microfinance Bank Ltd v Joseph Gikonyo T/A Garam Investments Auctioneers* (2020), the court stated as follows;

> " The applicant seeks an interlocutory injunction. To succeed, they must satisfy the test in *Giella v Cassman Brown & Co Ltd* (supra). They must establish a *prima facie* case with a probability of success. Even if they succeed on that first limb, an injunction will not issue if damages can be an adequate compensation. Finally, if the court is in doubt as to whether damages will be an adequate compensation, then the court will determine the matter on a balance of convenience. All these conditions and stages are to be applied as separate distinct and logical hurdles which the applicant are supposed to surmount sequentially. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration."

Prima Facie Case

93. The applicant must establish that he has a *prima facie* case with a probability of success for the grant of an interlocutory injunction.

94. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (supra) the Court of Appeal expressed itself as follows as regards a *prima facie* case.

> " . . . so what is a *prima facie* case? I would say that in civil cases, it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

95. Relatedly, in *Nguruman Ltd v Jan Bonde Nielsen & 2 others* (supra), the Court of Appeal had this to say;

> "We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threated by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial, and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation . . . The standard of proof of that *prima facie* case is on a balance, or as otherwise put, on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."

96. The court is guided by these principles.

97. In the instant case, the applicant is required to show that his right is being or likely to be violated by the respondent for it to provide a rebuttal.

98. The applicant alleges that he was dismissed by the respondent for no valid reason and the prescribed procedure was not followed.

99. It is this case that the documents and witness statements requested for were not availed or were provided after the hearing.

100. The respondent on the other hand argues that it had a valid reason, as the applicant was employed by another organisation while still in its employment and did not disclose the conflict of interest or declare as provided by the employment contract.

101. Specifically, the applicant's application for injunction seeks restraining the respondent from recruiting a replacement for the position of Operations Manager or removing his name from the payroll or denying him any allowances benefits or privileges.

102. Weighing the applicant's averments against those of the respondent in rebuttal, the court is persuaded that on the face of it, the applicant has demonstrated that its right to work is threatened with violation and therefore has shown that it has *prima facie* case with probability of success.

Irreparable Harm Or Injury

103. The second principle requires that applicant to prove that it will suffer harm or injury incapable of being compensated in monetary terms, if the order sought is not granted.

104. It is not in dispute that the applicant was an employee of the respondent from July 1, 2020 to March 4, 2022 when he was summarily dismissed by the respondent by which time his consolidated monthly salary had risen from Kshs 360,000/= to Kshs 420,000/=.

105. Relatedly, the applicant has not alleged that he was rendering specialised services to the respondent. His qualifications have not been pleaded.

106. The respondent's case is that the applicant precipitated his dismissal by the alleged employment by another company and the applicant had not led evidence to demonstrate that the respondent had commenced recruitment for the position formerly held by the applicant.

107. More significantly, the applicant is required to demonstrate that the loss likely to be suffered is irreparable. Paragraph 739 of the *Halsbury's Laws of England*, 3rd Edition Vol. 21 at page 252 states that:-

By the term irreparable is meant, injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages . . ."

108. In *Nguruman Ltd v Jan Bonde Nielsen & 2 others* (supra) the Court of Appeal stated as follows;

> "If the applicant establishes a prima facie case, that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer in the event the injunction is not granted will be irreparable. In other words, damages recoverable in law in an adequate remedy as the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage.
>
> . . . The existence of a *prima facie* case does not permit leap-frogging by the applicant to injunction directly without crossing the other hurdles in between.
>
> On the second factor, the applicant must establish he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate prima facie, the nature and extent of the injury, speculative injury will not do . . . The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount will never be adequate."

109. Guided by these principles, the court is satisfied that the applicant has failed to demonstrate that it will suffer irreparable harm or injury if the injunction is not granted.

110. The dispute, being one founded on employment which is founded on remuneration for work done, the law has prescribed a standard by which an employee whose employment is unfairly terminated may be compensated.

111. It is the finding of the court that the second factor has not been established.

112. As regards the balance of convenience, it is clear that the applicant has not demonstrated that the balance it is his favour.

113. For the above stated reasons, it is the finding of the court that the applicant has not satisfied the triple requirements enunciated in *Giella v Cassman Brown* (supra) for the issuance of an interlocutory injunction in the instant case.

114. Finally, as to whether an order of reinstatement should issue, the court is guided by the law as follows.

115. Section 49(3) of the *Employment Act* provides;

Where in the opinion of the labour officer, an employee's summarily 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.

b. re-engage the employee in work comparable to that in which the employee was employed prior to his dismissal or other reasonably suitable work, at the same wage.

116. It is trite that analogous to other remedies under section 49 of the *Employment Act*, 2007, the remedy of reinstatement is discretionary. It is not an automatic right. Its award or refusal is dependent upon the facts and merits of each case. (See *Kenya Airways Ltd v Aviation & Allied Workers Union Kenya & 3 others* 2014 (eKLR))

117. As regards the timing of the remedy of reinstatement, the court is guided by the Court of Appeal decision in *Kenya Tea Growers Association & another v Kenya Plantation & Agricultural Workers Union* (2018) eKLR where the stated as follows;

> " Reinstatement is one of the remedies under section 49 of the *Employment Act* that the court may give to an employee whose services have been terminated by the employer either through wrongful dismissal or unfair termination. However, the remedy is discretionary and before the court can give such remedy, it has to take into account the factors stipulated in section 49 (4) of the Act which include . . ."

118. The court is further guided by the sentiments of Rika J. in *Joab Mehta Oudia v Coffee Development Board of Trustees* (supra) as follows;

> " There is no justification for interim reinstatement, stay of termination or orders barring the respondent from proceeding to fill the position that was held by the claimant. The law presumes that the employee would be in a position to move to court expeditiously on the merit and if deserving, have the substantive orders of reinstatement or re-engagement. Nothing is lost to the employee as the law allows him to receive back wages in addition to these remedies."

119. Similar sentiments were expressed by Radido J. in *Sosten Kipruto Kerich v Monarch Insurance Co Ltd* (supra). The learned judge was categorical that "Reinstatement is primarily a final remedy which is granted after parties have been heard on the merits . . ."

120. Flowing directly from the foregoing, it is clear that the remedy of reinstatement is neither contemplated by the *Employment Act* nor case law as an interim remedy. It is invariably a final remedy.

121. Relatedly, the emerging jurisprudence does not appear to have recognized exceptions to the general rule and the applicant has not cited any.

122. Significantly, apart from the allegations of unfair dismissal from employment, the applicant has furnished no evidence of any exceptional or special circumstances that would justify the award of the remedy of reinstatement at the interlocutory stage.

123. Neither the injury to his reputation nor the alleged special harm, distress or damage have been particularised or proven.

124. In sum, the applicant has not availed sufficient material for the court to make a finding that the remedy of reinstatement is deserving at this stage.

125. The upshot of the foregoing is that the notice of motion application dated April 6, 2022 is unmerited and is accordingly dismissed with no orders as to costs.

126. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 5TH DAY OF DECEMBER 2022

DR. JACOB GAKERI

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 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.

DR. JACOB GAKERI

JUDGE