



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. E721 OF 2021**

**JAEI ACHIENG ONYANGO.....APPLICANT**

**-VERSUS-**

**HOUSING FINANCE DEVELOPMENT & INVESTMENT.....RESPONDENT**

**RULING**

1. The Applicant filed a Notice of Motion dated 23.2.2021 seeking the following orders:

- a. That this Honourable Court do issue an interim order suspending the Respondent's letter dated 16.4.2020 terminating her employment pending hearing and determination of the application.
- b. That pending hearing and determination of the application, the Honourable Court be pleased to grant an order compelling the respondents to unconditionally reinstate the claimant to her position of Head of Property Sales in the Property Point Department with full powers, salary, all benefits and rights thereof.
- c. That pending hearing and determination of the Claim, the Honourable Court be pleased to grant an order compelling the respondents to unconditionally reinstate the claimant to his position of Head of Property Sales in the Property Point Department with full powers, salary, all benefits and rights thereof.
- d. That the costs of this application be provided for.

2. The application is premised on grounds set out on the body of the motion and it is supported by the Affidavit sworn by the claimant on even date. The respondent has opposed the application through the affidavit sworn on 18.2.2020 by its Group HR Director Mr. Tom Shivo.

**Applicant's case**

3. The gist of applicant's case is that she was employed by the respondent as the Head of Property Sales on 2.5.2018; that by a letter dated 16.4.2020 she was informed that her services had been terminated on account of redundancy; that she was not served with a valid notice and the Labour officer was also not notified of the redundancy; that the termination was unfair because it was done contrary to the provisions of section 40 of the Employment Act and the respondent's HR Manual; that she has suffered and continues to suffer irreparable harm; and that it is in the interest of justice that the orders sought be granted.

4. She relied on both persuasive and binding decision to urge that the failure to serve at least one month notice before the intended redundancy upon her and the area labour officer was contrary to the mandatory requirement under section 40 of the Employment Act. The said precedents include the decision of the Court of Appeal in **Kenya Airways v Aviation & Allied Workers union Kenya & 3others [2014] e KLR** where the court held that the purpose of the redundancy notice is to give an opportunity to the parties to consider measures to be taken to avert or to minimize the termination and/or to mitigate the adverse effects of any termination.

5. According to the applicant, the respondent's right to reorganize its structures must be done in compliance with the law and after consultations.

**Respondents' case**

6. The Respondents' case is that in early 2020, it sought to implement certain structural changes to the organization so as to give effect its overall business strategy; that one of the changes was the absorption of the respondent's business operations by the HFC Limited; that as a result of the said absorption into the HFC's banking, the claimant's role ceased to exist and became redundant; that it held consultations with the claimant on the matter and issued her with a termination letter; and that the letter offered to pay her salary up to 30.4.2020, severance pay, salary in lieu of notice, accrued leave and pension plus 20% rebate on her loans.

7. It is further respondent's case that the redundancy was done in compliance with the law and its own HR Manual; that the redundancy package offered was higher than what is provided by the law; and that an order of reinstatement would not be practicable because her role has ceased to exist.

8. The respondents further relied on **Giella Cassman Brown & Co Ltd [1973] EA 358** and **Alfred Nyungu Kimungui v Bomas of Kenya [2013] eKLR** among other precedents to urge that the applicant has not met the threshold for granting interlocutory injunction and reinstatement. According to the respondent, the applicant has not established a prima facie case with chances of success and she has not demonstrated that she will suffer irreparable harm if the order sought is denied.

#### **Issues for determination**

9. Having carefully considered the pleadings, application, affidavits and submissions filed by the parties, the main issue for determination is whether the respondent should be compelled to reinstate the Applicant to her position with full benefits pending hearing and determination of the suit.

#### **Reinstatement pending trial.**

10. 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 Court Act the Court. The emerging jurisprudence from this court and the Court of Appeal is that, before the court can order reinstatement, it must be guided by the provisions of section 49(4) of the Employment Act. In the case of **Kenya Airways Limited v Aviation Workers Union Kenya & 3 Others [2014] eKLR** the Court of Appeal held that the relevant factors to be taken into account when considering reinstatement are provided under section 49(4) of the Employment Act and they include: -

*“...the wishes and expectation of the employee; common law principle that there should be no order of specific performance in a contract of service except in very exceptional circumstances; the practicability of the reinstatement; any compensation paid by the employer; and chances of the employee securing alternative employment.”*

11. The said factors, in my view can only be properly brought out by evidence during the hearing of the main suit and not at the interlocutory stage. I gather support from **Kenya Tea Growers Association & another v Kenya Plantation & Agricultural Workers Union [2018] eKLR** the Court of Appeal held:

*“...In our view, the circumstances in the present case militated against granting the order for reinstatement particularly at an interlocutory stage...”*

*We agree entirely with the statement by Rika, J in Alfred Nyungu Kimungii vs Bomas of Kenya [2013] eKLR that “Ordinarily, reinstatement of an employee is a substantive remedy, not a temporary relief. The law does not contemplate that reinstatement issues (sic) as a provisional measure. It is a remedy that should normally be granted upon the full hearing of the employer, and the employee.”*

12. Reinstatement of an employee is tantamount to ordering specific performance in a contract of service and as such, in line with **section 49(4) of the Employment Act** and the holding in the **Kenya Airways case**, *supra*, the employee must demonstrate exceptional circumstances to justify the same and in addition show that it is practicable.

13. In this case, however, the Applicant has not demonstrated any exceptional circumstances to justify his reinstatement but only contended that the respondent did not have valid reason for the termination and that the procedure set out under section 40 of the Employment Act was not followed.

14. In my view, the foregoing contention constitutes the main issues for determination during trial of the main suit when evidence from the parties will be tendered. Therefore I decline to order reinstatement at this interlocutory stage because I am not properly seized of the material evidence to enable me make an informed decision on the said relief. Costs of the application shall be in the cause.

**DATED AND DELIVERED IN NAIROBI THIS 23<sup>RD</sup> DAY OF SEPTEMBER, 2021.**

**ONESMUS N. MAKAU**

**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> April 2020, this ruling has been delivered to the parties online via Google Teams with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**