



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**ELRC No. 377 OF 2021**

**JOSEPH KIPNG'ENO BELYON.....CLAIMANT /APPLICANT**

**VERSUS**

**KENYA PIPELINE COMPANY LIMITED.....RESPONDENT**

**RULING**

1. This Ruling relates to the Claimants' Notice of motion dated 6/5/2021 which seeks the following orders: -

*a) That this application be certified urgent and service be dispensed with in the first instance*

*b) That pending of the hearing and determination of the Application, this Honourable Court do issue Orders Restraining the respondent, either by themselves, their agents, assign, Representatives or anyone acting for or on their behalf or through them evicting locking out displacing or any other way interfering with the Applicant quiet and peaceful possession and enjoyment of Embakasi Estate House No one (1)*

*c) That pending the hearing and determination of the Application, this Honourable Court do issue Orders compelling the Respondent, either by themselves, their agents, assigns, Representatives or anyone acting for or on their behalf to reinstate the Claimant/Applicant to the payroll.*

*d) That pending the hearing and determination of this Application the court issue orders compelling the Respondent to reinstate the status quo as at the month of March 2019.*

*e) That pending the hearing and determination of the suit filed herewith, this Honourable court do issue Orders Restraining the Respondent, either by themselves, their agents, assigns, Representatives or anyone acting for or on this behalf or through them evicting, locking our displacing or any other way interfering with the Applicant's quiet and peaceful possession and enjoyment of Embakasi Estate House No. (1).*

*f) That pending the hearing and determination of the Suit filed herewith, this Honourable Court do issue Orders compelling the Respondent, either by themselves, their agents, assigns, Representatives or anyone acting for or on their behalf to reinstate the Claimant/Applicant to the payroll.*

*g) That pending the hearing and determination of this Application the court issue orders compelling the Respondent the Reinstate the status quo as at the months of January 2021.*

*h) That the costs of this Application be in the cause.*

2. The application is supported by the claimant's affidavit sworn on 6/5/2021 and it is opposed by the Respondent through the Affidavit sworn by its Senior HR officer Ms Emily W. Thathi on 19/5/2021 and a further affidavit sworn by its General manager (HR & Administration) Ms Nyambura Kimani on 16.6.2021.

3. The court granted interim order restraining the eviction of the claimant from the suit premises. The order was extended with consent of the parties on to attempt an out of court settlement. The negotiation, failed and the parties agreed to extend the interim order, pending this ruling.

**Claimant's case**

4. The claimant's case is that he was employed by the respondent on 21.10.1982. In the course of his employment he developed back problem and underwent four surgical operations from 1999 but he never regained his physical vibrancy. On 17.8.2018 he was adjudged as permanently disabled after medical examination at Mama Lucy Kibaki Hospital. On 7.3.2019, he was registered as a person living with disability (PLWD) and he was issued with Registration Card.
5. As a result of the foregoing matters the respondent revoked a notice issued for mandatory retirement at the age of 60 years and extended the same to 65 years vide the letter dated 13.3.2019. He reached 60 years on 21.5.2019 but continued working until 28.1.2020 when the Public Service Commission promulgated Public Service Regulations 2020 to govern among other affairs, retirement and extension.
6. On the same date the respondent issued him with a mandatory retirement notice effective 11.9.2020 and required him to avail Income Tax Exemption Certificate from Kenya Revenue Authority (KRA) to enable the employer to amend his details in the HR records. Due to Covid-19 pandemic, he was not able to secure the said certificate from KRA until April 2021 covering 1.2.2021 to 31.1.2026.
7. He maintained that his retirement age was extended to 65 years and he obtained Tax Exemption Certificate from KRA to cover the entire period of service. He was notified that his HR records were amended by the letter dated 13.3.2019 and he has since worked for over one year. Therefore he contended that the new retirement notice and demand to vacate his staff house is erroneous and prayed for his application to be allowed with costs.
8. He submitted that he has made out a prima facie case by showing that his legal right was breached when the respondent having extended his retirement age to 65, it served fresh notice for retirement and demanded that he vacates the staff house. For emphasis he relied on **Mrao Limited v First American Bank of Kenya Limited & 2 others [2003] eKLR**.
9. He further submitted that if the orders sought are denied, he will suffer loss which cannot be adequately compensated by damages. He pointed out that under section 49(1) of the Employment Act, damages are capped at salary for 12 months yet he has three years before retirement age of 65 years. He also contended that he will lose medical cover. For emphasis he relied on **Barclays Bank of Kenya v Banking Insurance Finance union [2019] eKLR** and **Ngurumani Ltd v Nelson & 2 others eKLR**.
10. Finally, he submitted that the balance of convenience tilts in his favour because he stands to lose his job immediately, lose medical cover and be evicted from the staff house.

#### **Respondent's case**

11. The respondent's case is that the claimant was issued with a 3 months' notice of mandatory retirement by the letter dated 6.2.2019 but immediately thereafter he sought registration as a person with disability from the National Council for persons with disability. He got a registration Card on 7.3.2019 and upon presentation of the card to the respondent, the retirement notice was revoked pending investigations on the nature of the disability. The claimant had worked for the company for 38 years without any notifying it that he had a disability and without seeking tax exemption until 3.3.2019.
12. The respondent further contended that efforts to reach the claimant to explain the nature of the disability was unsuccessful. The medical Report by Prof. J.A.O Mulimba dated 10.8.2018 recommended for claimant's early retirement due to his medical condition and not extension of the retirement age.
13. The respondent also contended that due to measures put in place by the President due to Covid – 19, the company decided to retire the claimant due to his age and health condition. The decision aimed at achieving prudent utilization of public resources because the claimant was capable of performing his duties from home and telling him to go to the office while in the said ill- health would be endangering him.
14. The respondent argued that the claimant has not been paying rent for the staff house since August 2020 and as such he wants orders from the court to continue residing in the house without payment of rent. The land belongs to the company and it has the right to exercise the right as the Landlord to distress for rent and/or eviction. The claimant was given sufficient notice to vacate but he sought an extension of 21 days and failed or neglected to move out. The claimant has his own house in Savannah Estate which he purchased by a mortgage facility given by the company under its Staff House Loan Scheme.
15. Finally, the respondent contended that the claimant has not shown that he will suffer loss which cannot be adequately compensated by way of damages if the orders sought are denied. Therefore it prayed for the application to be dismissed.
16. The respondent submitted that the claimant is not entitled to retire at 65 years because he has lived with disability since 1999 and has never sought registration with the National Council for people with disability and never sought tax exemption until he was served with retirement notice dated 6.2.2019. He did not meet the requirements for extension of retirement age under Regulation 70 of the PSC Regulations of 2020.
17. For emphasis the respondent relied on **Amaya Raphael Anabaswa v Mumias Sugar Co. Ltd Case No.81 of 2017** and **Kinyua Felix v Ministry of Education & 2 Others [2021] eKLR**.
18. The respondent maintained that the revocation of the retirement notice by the letter dated 19.3.2019 was only to facilitate investigations into the nature of the claimants disability; and that the medical report by Prof. JAO Mulimba recommended for claimant's early retirement rather than extension of the retirement age from 60 to 65 years.
19. As regards order for reinstatement to the pay roll, the respondent submitted that granting the same would determine the suit before trial. Reinstatement can only be granted on exceptional circumstances. It relied on **Anthony Omari Ongare v Teachers Service Commission**

20. The respondent further submitted that the reinstatement of status quo as at 19.3.2019 is not practicable because the position held by the claimant has since been permanently filled.

21. As regards injunction against eviction from the staff house, the respondent submitted that the claimant has not met the requirements set out by **Giella V cassman Brown & Co Ltd [1973] EA** including proof of a prima facie case with probability of success, that he will suffer irreparable harm and that the balance of convenience favour him. It submitted that the claimant is no longer its employee and as such he has lost the benefit of staff house. For emphasis it relied on decisions of this Court and Court of Appeal to fortify that submission.

#### **Analysis and determination**

22. I have carefully considered the material presented by the two sides. The issues for determination are:

- a) Whether the claimant's retirement age was extended to 65 years;*
- b) Whether he met the requirements for the said extension;*
- c) Whether he should be reinstated to the payroll pending hearing and determination of the suit;*
- d) Whether the respondent should be restrained from evicting him from staff house pending trial.*

#### **Extension of retirement to 65 years**

23. The claimant contended that his retirement notice was revoked by the letter dated 13.3.2019. The respondent contended that the said letter did not extend the retirement notice but only kept the retirement in abeyance pending investigations on the nature of the claimant's disability.

24. The letter dated 13.3.2019 stated as follows:

*“Dear Belyon,*

#### ***RE: MANDATORY RETIREMENT***

*Reference is made to a letter from the National Council for the Persons with Disabilities Ref: NCPWD/LD/3 VoL. I (287) in regard to your extension of retirement age and our letter Ref: Staff Belyon/ 1652 dated 6<sup>th</sup> February 2019 on the above subject.*

*This is to inform you that following the explanation from the National Council for Persons with Disabilities and submissions of copy of your NCPWD card Reg. No. NCPWD/P/472404 from the Council as proof of your disability, your retirement notice has been revoked with immediate effect.*

*Your records have been amended accordingly as per the mandatory age for Persons with Disabilities.*

*Yours Sincerely,*

*C.N. WAHOGO (MS)*

*For: MANAGING DIRECTOR”*

25. The above letter is not ambiguous in any way. It communicated to the claimant that the retirement notice dated 6.2.2019 had been revoked and his mandatory retirement age extended to align with the retirement age for persons with disabilities. The reason for the said revocation was stated in the letter. Consequently the answer to the first question is in the affirmative.

#### **Whether the claimant met the requirements for the extension.**

26. The respondent submitted that the claimant is not entitled to retire at the age of 65 years because he did not meet the requirements for extension under Regulation 70 of the PSC Regulations of 2020. The said regulation provides that the mandatory retirement in the public service is 60 years or 65 years for persons with disabilities. Paragraph (2) of Regulation 70 provides that:

*“A public officer shall be considered for retirement as a person with disability if the officer -*

- a) has a disability of permanent nature that can be perceived by significant sectors of the community and the disability has a substantial impact on the ability of the officer to carry out ordinary day to day activities;*
- b) has been registered in the public body's human resources database as a person with disability for at least three years*

*before the date of retirement:*

***Provided that the Commission may consider cases of disability that may occur less than three years before the date of retirement; and***

***c) is registered by the National Council for Persons with Disabilities and has a tax exemption certificate from the Kenya Revenue Authority as a person with disability;***

***Provided that registration by the Council or possession of a tax exemption certificate shall not be considered as automatic evidence of disability.”***

27. The above regulation was Gazetted on 28.1.2020 while the extension of the claimant’s retirement age was done by the letter dated 13.3.2019. The respondent did not show that the claimant did not meet the requirements for extension in the previous regulations. Consequently, I find and hold that the above regulation does not apply to the case herein because the 2020 regulations were not intended to apply retrospectively.

#### **Reinstated to the payroll**

28. The claimant contended that he was issued with a mandatory retirement notice dated 28.6.2020 to take effect on 11.9.2020 and requiring him to furnish tax exemption certificate from KRA to enable the respondent amend his details in its HR records. Due to covid-19 pandemic he was unable to meet the deadline due to scale down of operations as per the guidelines given by the President on 13.3.2020. With the assistance from the NCPWD he was able to obtain the tax exemption certificate on 1.4.2021.

29. He contended that by the letter dated 13.3.2019, the respondent confirmed that it had amended its records to indicate him as a person with disability. Since then he served for more than a year before September 2020 when the employer purported to retire him.

30. I have already made a finding that the claimant’s retirement age was lawfully extended from 60 to 65 years by the letter dated 13.3.2019 and as such the purported mandatory retirement vide the letter dated 28.6.2020 can only be construed as a premature termination. Whether or not the said termination was unfair and unlawful is a matter for determination at the trial because the claimant has made a prayer to that effect in the main suit.

31. The claimant has also sought reinstatement in the main suit and he now wants to be reinstated to the pay roll pending trial. However, it is now well settled that reinstatement is not an appropriate relief at the interlocutory stage. In **Anthony Omari Ongare v Teachers Service Commission [2017] eKLR** the court held that

***“The rationale is that the order of reinstate is final in nature and should only be issued in exceptional cases which warrant specific performance.”***

32. Again in **Ahmed Aden Hire v Nathif Jama & Garissa County Government [2016] eKLR** the court held that

***“The rationale is that the order of reinstatement is a specific performance order with finality. To issue such order in the interim is essentially to deny the other party a chance to their defence unless there are special circumstances that the court is appraised of to warrant the grant of the same in the interim.”***

33. In **Alfred Nyungu Kimungui v Bomas of Kenya [2013] eKLR** the court held that:

***“The employment Act places the burden of justifying termination decision and showing the fairness of the procedure on the employer. In rare cases where interim reinstatement may be granted, the termination must be shown to be patently unfair, that even the ultimate remedies of compensation or reinstatement with back wages would not have redressed the injury suffered by the employee in the pendency of the full hearing.”***

34. The claimant contended that compensation under section 49(1) is limited to maximum 12 months’ pay which will not adequately compensate him for the loss of the remaining three years before reaching retirement age of 65 years. He further contended that he will lose medical cover if he is not reinstated pending trial. However the respondent contended that the position occupied by the claimant has since been filled permanently.

35. Although no documentary evidence was tendered to substantiate that allegation, the court will give it the benefit of doubt because the claimant did not contest the same. Consequently, with a lot of sympathy to the claimant who needs an income and medical care, the order of restatement pending trial is declined for foregoing reason. However, I direct that the suit shall be heard on priority basis.

#### **Interlocutory Injunction to restrain eviction**

36. In Kenya the threshold for granting interlocutory injunction has not changed since the celebrated decision in **Giella v Cassman brown [1973] EA 358** where the following principles were set out:

a) That the applicant must establish a prima facie case with probability of success;

b) That the applicant must demonstrate that he stands to suffer irreparable harm if the order is withheld; and

c) If the court is in doubt, it should determine the application on a balance of convenience.

37. The claimant contended that his legal rights have been infringed by being retired prematurely and for that reason he should not be evicted from the staff house. However, the respondent maintained that the claimant is not entitled to retire at the age of 65 years.

38. I have already made a finding that the claimant was entitled to retire at 65 and therefore the purported retirement vide the letter dated 28.6.2010 amounted to premature termination of his employment. To that extent I agree with him that his legal right has been infringed until the employer discharges its burden of proving that the termination was fair and lawful. Consequently, I find and hold that the claimant has proved a prima facie case with probability of success.

39. Prima facie case was defined by the Court of Appeal in **Mrao Limited v First American of Kenya limited & 2 others [2003] e KLR** as follows: -

***“...in civil cases 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.”***

40. The claimant further contends that he will suffer irreparable loss if the order sought is denied. He contended that apart from losing the job, he will lose shelter and medical cover. However, the respondent contended if the order is denied, the claimant will not suffer any loss which cannot be compensated by damages. It further produced documentary evidence to prove that the claimant has house bought using its Staff Loan facility, and that he had given a written undertaking to vacate the company house before bringing this suit.

41. Having considered the rival contentions by the parties and the precedence cited, I am satisfied that the loss to be occasioned by the removal of the claimant from the staff house pending trial can be quantified in monetary terms. It is not difficult to assess cost of housing in monetary terms. He will therefore not suffer irreparable harm.

42. Both parties have argued that the balance of convenience tilts to the respective side. However, as things stand now, it is clear that the claimant has lost his job and therefore he has no right to occupy his former employer's staff quarters. He has to leave and claim it back or House Allowance if he succeeds in his suit for reinstatement.

43. In the end I dismiss the application with no costs. However considering his health condition, and his long service to the company I give him a grace period of 90 days from the date of this ruling to vacate the suit premises.

**DATED, SIGNED AND DELIVERED IN NAKURU THIS 29TH DAY OF OCTOBER, 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 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**