



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC. CAUSE NO. 2517 OF 2017

CHRIS OANDACLAIMANT

-VERSUS-

KENYA AIRWAYS.....RESPONDENT

RULING

1. On 28.12.2017, the claimant filed this suit seeking among others reinstatement to his position as the respondent's Head of Supply Chain. Simultaneously, with the claim he filed application dated 28.12.2017 seeking to restrain the respondent from replacing him pending trial on the basis that he had sought reinstatement. The injunction was granted on interim basis by Mbaru J on the said date when she sat as the duty Judge.
2. On 14.3.2018, the matter came to be for inter-partes hearing but the parties compromised the application by extending the interim order till the determination of the suit, in order to fast-track the trial. Things did not go as expected and the respondent brought the Notice of Motion dated 23.2.2021 seeking for the following orders:
 - (a) The orders given on 14.3.2018 be discharged;
 - (b) Costs of the application be provided for.
3. The application is not supported by any affidavit and it is opposed by the claimant vide the Grounds of Opposition dated 10.6.2021. The application was disposed of by written submissions.
4. The respondent/applicant's case is that the prayer for reinstatement is now time barred and not feasible because three years have elapsed since the termination of the claimant's employment; that pursuant to Section 12(3) (vii) of the Employment and Labour Relation Court Act, the court cannot extend the time within which to order reinstatement; and that the impugned order ought to be discharged in the interest of substantive justice.
5. The claimant is however, of a contrary view that the entire claim including the prayer for reinstatement should go for trial; that the application amounts to litigating the matter piecemeal; that reinstatement is one of the primary remedies upon which a finding of unfair termination of employment hence intrinsically tied to the process and cannot be hived off and separately determined without trial on the termination process; that section 12(3) (vii) of the ELRC Act is permissive in nature and does permit the court to order reinstatement subject to such conditions as the court may deem fit and desirable; that the application does not further the overriding objective of the court, it is bad in law since the order was given by consent of the parties and it lack merits.
6. Having carefully considered the application, affidavits and submissions, the only issue for determination is whether the applicant has shown sufficient cause to warrant discharging of the impugned orders.
7. The applicant contends that the basis of the impugned order was that the claimant was seeking reinstatement to his position in the respondent as the Head of Supply Chain but the said prayer has become untenable by the lapse of three years since the separation. The claimant insists that the application is bad in law and lacks merits and insists that the suit should go to trial without hiving off the issue of reinstatement prematurely.
8. Section 12 (3) of the ELRC Act provides that the Court shall have the power to grant any of the several reliefs set out thereunder including:

“(vii) an order for reinstatement of any employee within three years of the dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law.”

9. The foregoing provision is not ambiguous in any way. The parliament in its wisdom capped the period within which the court can order reinstatement to 3 years. The said law has not been changed and the constitutionality of the said provision of the law has not been impugned in the suit. The period from 16.10.2017 when the claimant was dismissed to 23.2.2021 when the instant application was made was 3 years and 3 months. To date the said period has increased to 4 years. It follows that the prayer for reinstatement is now overtaken by events and therefore not feasible.

10. In view of the foregoing I find that the application has merits and sufficient cause has been shown for discharging the orders issued on 14.3.2018. The orders are of no benefit to the claimant since the court cannot grant reinstatement contrary to the jurisdiction donated under section 12 of the ELRC Act. On the other hand the orders are likely to prejudice the respondent if it is forced to wait the hearing and determination of the suit before filling the vacancy left by the claimant four years ago.

11. In the end I allow the application but no party is condemned to pay the costs of the application.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 15TH DAY 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 15th 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