



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO E883 OF 2021

DENNIS OTIENO MUTULA.....APPLICANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

RULING

1. The Applicant has moved this Court vide a Notice of Motion application dated 27th October, 2021 filed under a Certificate of Urgency. The motion application is supported by the Affidavit of Dennis Otieno Mutula, the Applicant herein.

2. The application seeks the following main orders;

1. Spent.

2. Spent.

3. THAT at the interpartes hearing hereof and pending the hearing and determination of this suit, this Honorable Court be pleased to issue conservatory orders staying the respondent's letter of dismissal dated 13th October, 2021 dismissing the claimant from employment and reinstate the claimant to his job.

4. THAT this Honourable Court be pleased to issue orders of mandatory injunction compelling the respondent to supply to the applicant the Attendance Register, from which the attendance data referred to in the letter dated 29th July, 2021 and 13th October, 2021 was derived from.

5. THAT this Honourable Court be pleased to issue orders of mandatory injunction compelling the respondent to supply to the Applicant the memo Ref: KRA/SIRM/003/026 referred to in the letter dated 29th July, 2021.

6. THAT costs of this application to be borne by the respondent.

3. The main grounds upon which the application is premised, is that the Respondent issued the Applicant with a letter dated 13th October, 2021 dismissing him from employment on grounds that he had absented himself from duty. He avers that it is not true that he absconded duty and to that end, he has spelt out several reasons to justify his assertion.

4. The Application was certified urgent on 28th October, 2021 and the Applicant directed to serve the Application upon the Respondent on or before 29th October, 2021. The application was fixed for interpartes hearing on 3rd November, 2021.

5. The Applicant's Counsel Mr. Julius Juma swore an Affidavit of Service on 2nd November, 2021 through which he deponed that he had effected service of the Application, the court order of 28th October, 2021 together with the other pleadings in respect of the main suit upon the Respondent electronically through the following addresses; AllcounselSD@kra.go.ke, hr@kra.go.ke, Wilson.gaconi@kra.go.ke. He averred that he had previously corresponded electronically with the Respondent's legal department via the address, AllcounselSD@kra.go.ke, while he was given the other two email addresses by the Applicant. He annexed the print outs of the said emails on the Affidavit.

6. The Respondent did not file any response to the Application and was absent in Court when the Application came up for hearing. Being satisfied with the return of service filed by the Applicant's counsel, the Application proceeded for hearing in absence of the Respondent.

7. The Applicant through his counsel Mr. Julius Juma urged this Court to allow the Application by issuing conservatory orders staying the Applicant's letter of dismissal dated 13th October, 2021 and compelling the Respondent to supply him with the attendance register from which the attendance data was derived from, as well as the memo Ref: KRA/SIRM/003/026.

8. The first order sought by the Applicant at this interim stage is injunctive in nature and whose issuance is guided by the principles set out in the celebrated case of **Giella v Cassman Brown [1973] EA 358 at page 360** where Spry VP held that:

“... First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (E.A. Industries v. Trufoods, [1972] E.A. 420.)”

9. In summary, the Applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the orders, he is likely to suffer irreparable injury. Further, if the Court is in doubt, it should decide the matter on a balance of convenience.

Prima facie case

10. The Court of Appeal in the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR** defined a prima facie case in the following terms;

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case 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.”

11. In this instance, the main consideration ought to be whether the Applicant has pointed out to a right that has apparently been infringed. The court must remind itself at this juncture, that this is not mini trial hence will not examine the evidence presented microscopically.

12. The Applicant has alleged that he was dismissed on account of absconding duty and which allegation he has denied. He has advanced the following main reasons to discount the allegations levelled against him by the Respondent;

- i. that on the dates he is alleged to have absconded duty, he was on official leave;
- ii. that some of the dates he is alleged to have been absent without leave, were gazetted as public holidays, for instance, New Year's Day, Good Friday, Easter Monday, Idd-ul-Fitr and Madaraka day;
- iii. that sometimes in the months of February and March, 2021 when he is alleged to have absconded duty, he had not logged onto his office computer as the same was being reformatted by the Respondent's ICT department, hence he worked offline on tax payer's physical files;
- iv. that he actually prepared and submitted weekly reports besides sending emails during the material time;
- v. that specifically, on 23rd March, 2021, he had attended the funeral ceremony of former Deputy Commissioner, Ms. Beatrice Gichohi, with the permission of his supervisor and where other members of staff were also in attendance; and
- vi. that he was appraised over the material period and his performance was exemplary.

13. The Applicant further averred that the Respondent merely relied on the log on activity print outs on his computer to dismiss him from employment. That despite his explanations both orally and in writing, he was dismissed from employment. The Applicant has annexed several documents to fortify his application. This includes the print outs of the log on activity from 1st January, 2021 to 8th July, 2021, a print out of his leave report in respect of 2021, his appraisal report in respect of 2020/2021 financial year and email print outs in respect of various dates.

14. I have considered the application, the grounds set out in the Supporting Affidavit annexed thereto, together with the evidence presented at this interim stage and having applied the same against the principle set out in the **Mrao case (supra)**, I find that the Applicant has justified that he has an arguable prima facie case.

15. Establishing a prima facie case is not an end in itself and cannot form sufficient basis to grant an interlocutory injunction, hence the court must further be satisfied that the injury to be suffered by an Applicant in the event the injunction is not granted, will be irreparable.

Irreparable injury

16. The concept of irreparable injury was espoused by the Court of Appeal in the case of **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR**, as follows; **“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 remedy.”**

17. In line with the above holding, the question then should be, will the Applicant suffer irreparable injury in the event he is not granted the injunctive orders he seeks at this stage? the answer lies in the nature of the remedies available to the Applicant in the final determination of the claim.

18. Pursuant to the provisions of **section 12(3) of the Employment and Labour Relations Court Act**, this court is clothed with powers to grant a wide range of orders ranging from award of damages; reinstatement; prohibitory orders; orders for specific performance and declaratory orders.

19. Indeed, the Applicant will stand to be granted either of the remedies set out above, in the event his main claim succeeds. This includes an order of reinstatement which he now seeks in the interim and which I also note is part of the prayers he seeks in his claim. Therefore, the Applicant does not stand to suffer irreparable injury in the event he is not granted the orders he seeks at this stage.

20. In the case of **Nguruman (supra)**, the Court of Appeal further held that;

“if damages recoverable in law is an adequate remedy and 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. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. 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.”

21. This court wholly adopts the position taken in the above precedent and in the circumstances, I will decline to grant the order staying the dismissal of the Applicant which in any event is now past. It is noteworthy that a relief of this nature cannot act retrospectively and undo what has already been done.

22. The Applicant also seeks an order of mandatory injunction to compel the Respondent to supply him with the attendance register from which the attendance data was derived, and the memo Ref: KRA/SIRM/003/026 referred to in letter dated 29th July, 2021, (show cause letter).

23. The Applicant is very particular in his application to the effect that he requires the “attendance register” from the Respondent. Notwithstanding this specific request, I note that at paragraph 17 of the Applicant’s Supporting Affidavit, he avers as follows, **“THAT I know of my own knowledge that the respondent does not have an attendance register and I challenge them to produce it”**.

24. Hence, whereas the Applicant acknowledges the non-existence of the attendance register, he still urges the court to issue a mandatory injunction compelling the Respondent to produce the same. Besides, I have perused the Applicant’s show cause letter annexed to the claim and note that the same does not make any reference to an “attendance register”. It is therefore not clear what purpose it would serve to issue and order compelling the Respondent to produce a document which may be non-existent at all. The court will not issue orders in vain.

25. Be that as it may, the court has noted the Applicant’s averments at paragraph 13 of his Supporting Affidavit, to the effect that during the disciplinary hearing, he asked to be furnished with the attendance data showing that he had absconded duty but none was availed to him.

26. I have also noted that the show cause letter issued to the Applicant makes reference to **“attendance data”** and **“memo dated 16th June, 2021, Ref: KRA/SIRM/003/026”**. It is therefore apparent that the referenced memo exists or ought to exist given that it is what informed the Applicant’s disciplinary action and eventual dismissal from employment. Similarly, it is apparent that there is some primary source that the attendance data was extracted from.

27. In the circumstances, the court orders the Respondent to furnish the Applicant with the **Memo dated 16th June, 2021, Ref: KRA/SIRM/003/026** and **any such document and/or information wherefrom the attendance data was extracted**.

28. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF NOVEMBER, 2021

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STELLA RUTTO

JUDGE

Appearance:

Mr. Julius Juma for the Applicant

No appearance by the Respondent

Court Assistant Barille Sora

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 had 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.

STELLA RUTTO

JUDGE