



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 165 OF 2020

(Before Hon. Lady Justice Hellen S. Wasilwa on 11th June, 2020)

TERRY WIJENJE.....CLAIMANT

VERSUS

DIRECTLINE ASSURANCE COMPANY LIMITED.....1ST RESPONDENT

ROYAL MEDIA SERVICES LIMITED.....2ND RESPONDENT

SAMUEL KAMAU MACHARIA.....4TH RESPONDENT

PURITY GATHONI MACHARIA.....5TH RESPONDENT

ISAAC NGARU.....6TH RESPONDENT

DAVID NGUGI.....7TH RESPONDENT

RULING

1. The application before this Court is the Claimant’s application dated 3/4/2020. She seeks to stay the resolution passed on 18/3/2020 where the 6th and 7th Respondents were appointed as principal officer and managing director of the 1st Respondent company, respectively.
2. The Applicant seeks her unconditional reinstatement to the position of the Principal/Chief Executive Officer and Managing Director of the 1st Respondent company without any loss of benefits and with all prior rights, access and approvals incidental to the position, in compliance with the orders from the Insurance Appeals Tribunal.
3. The Applicant is also seeking payment of all withheld dues and salaries from December 2019 and an order for stay of recovery of outstanding loans including any penalties and interest she owes the 1st Respondent Company save for the deduction from her salary as contractually agreed, upon her reinstatement.
4. Lastly, she urges this court to grant any further orders as it may deem just and expedient to grant.
5. The Application is supported by the grounds set out in the motion and Applicant’s Supporting Affidavit sworn on 3/4/2020.
6. The Respondents have opposed the Application vide the Grounds of Opposition filed on 28/4/2020. Further, the 1st and 7th Respondents have opposed this application vide the 7th Respondent’s Replying Affidavit sworn on 21/4/2020.

The Applicant’s Case

7. The Applicant avers that her appointment as the 1st Respondent’s principal officer was revoked by the Insurance Regulatory Authority following allegations that she filed false company returns. On 4/12/2019, the Insurance Appeals Tribunal issued orders staying the Regulator’s decision to revoke her appointment.

8. Nevertheless, the 1st Respondent still took disciplinary action against her, which culminated into the termination of her services on 17/12/2019 as its CEO and MD. She avers that she was never afforded a hearing or provided with the evidence that the 1st Respondent was relying upon. This violated her right to a fair hearing and fair administrative action.

9. On 27/2/2020, the Tribunal issued a ruling that quashed the regulator's decision to revoke her appointment. It is her case that once the decision was quashed, she had the legitimate expectation that she would be reinstated to her previous position. However, in the shareholders special general meeting held on 18/3/2020 the 6th and 7th Respondents were appointed by 2nd, 3rd, 4th and 5th Respondents, to replace her.

10. The Applicant avers that 1st Respondent's actions denied her a right to earn a living which made her unable to service her loans. It is her apprehension that the 1st Respondent may take step to recover the loan, following a resolution to that effect on 18/3/2020. She urges this Court to issue the orders sought, in the interest of justice.

The Respondents' Case

11. The Respondents contend that the application lacks merit hence should be dismissed. This is because the Applicant is guilty of laches as the actions complained of lapsed. Further, she has contravened the provisions of section 23 (4) of the Insurance Act. Additionally, this is not a rare and plain case that warrants the grant of an order of mandatory injunction.

12. The Respondents contend that this Court lacks the jurisdiction to grant prayers sought in the main suit, at an interlocutory stage because of the possibility of disposing of the suit before it is heard.

13. The 1st and 7th Respondents contend that the Applicant has not established a *prima facie* case to warrant the orders sought. They aver that the Applicant has in her possession, her personal file which is the property of the 1st Respondent and further aver that her salary was Kshs. 2,666,667.00.

14. The 1st and 7th Respondents contend that the Applicant was amongst the directors who came up with a fraudulent scheme to enable Janus Limited and AKM Investments Limited maintain their status quo in the shareholding. As a result, these companies were paid Kshs.507,549,773.00 as dividends and also entered into a contract for sale of their shares, for 3 billion Kenya Shillings, which agreement was executed by the Applicant.

15. They further contend that the Applicant participated in the impugned special general meeting as she sent a proxy to represent her company, Janus Limited, who was present and supported the proposal of the appointment of a non-executive director. It is their position that Applicant is approbating and reprobating by alleging that the meeting had quorum while challenging that particular quorum.

16. The 1st and 7th Respondents contend that the Applicant is in breach of clause 4 of the loan agreement for failing to charge the property known as LR No. 12325/7. They aver that the Applicant has not disclosed the existence of Civil Case E278 of 2019 wherein she is the 7th Defendant.

The Applicant's Rejoinder

17. In her Further Affidavit sworn on 5/5/2020 in response to the Respondents' averments, the Applicant contends that an order for reinstatement is an order that this court can grant.

18. It is the Applicant's position that there was no reason to continue with the disciplinary action against her once the Tribunal stayed the Authority's decision to revoke her appointment. She avers that the 1st Respondent was aware of the appeal proceedings and the order since they were a party to the same and had been served with the order.

19. The Applicant contends that her salary has always been disclosed in the 1st Respondent's audited accounts which they approved at annual general meetings.

20. She also contends that the alleged false returns have not been availed to this court. It is contended that the Respondent has not adduced evidence to prove that she was given the opportunity to respond to the allegations made against her.

21. The Applicant avers that the 1st Respondent has a lien over the shares owned by her company which is a sufficient security for the loan she was advanced. She maintains that the meeting lacked quorum because some of the shareholders were not represented hence the decision to remove her from her positions and appoint the 6th and 7th Respondents was null and void.

22. The Application was disposed of by way of written submissions with the Claimant filing hers on 6/5/2020. There is no record of the Respondents' submissions in the court file.

The Applicant's Submissions

23. The Applicant submits that this court has the jurisdiction to grant an order for reinstatement in this matter pursuant to Section 12 (3) (vii) of the Employment and Labour Relations Court Act and Section 49 of the Employment Act. She argues that though such an order is a final order, it can be granted at an interlocutory stage. This was the holding in the cases of **Hamisi Bweni Dzila vs. County Assembly of Kwale & Another [2020] eKLR**, **Felix O. Siata vs. Kenya Revenue Authority [2018] eKLR** and **Joan Wairimu Wanyutu vs. Social Service**

League, MP Shah Hospital [2019] eKLR.

24. The Applicant submits that the 1st Respondent's actions were marred with ill will due to their insistence to take disciplinary action against her and eventually terminating her services, despite the Tribunal's order staying the revocation of her appointment. As such, the termination was wrongful.
25. Further, she was not afforded a hearing, supplied with the evidence the 1st Respondent had against her, neither was there quorum in the special general meeting that passed a resolution to replace her. She relies on the case of **Johnson Otieno Adera vs. Anti-Counterfeit Agency & 3 Others [2015] eKLR** where the Court declared the board's decision null and void for being improperly constituted.
26. It is submitted that the Applicant has satisfied the conditions set out in section 49 (4) of the Employment Act as she has served the 1st Respondent for 12 years, the circumstances surrounding the termination of her employment were unfair and motivated by ill will, the probability of securing employment elsewhere is low and no prejudice will be occasioned to the Respondents especially the 7th Respondent whose employment is yet to be approved and the 6th Respondent who has only served for 6 months.
27. The Applicant submits that this cause was filed within 3 months from the date the cause of action arose hence there was no delay.
28. The Applicant therefore submits that she has established a case for an award of a mandatory injunction. She relies on the case of **Joseph Matuu Mutinda vs. Government of Makeni County & Another [2017] eKLR** which observed that an order for interlocutory reinstatement to employment was similar to an order for interlocutory mandatory injunction.
29. I have examined the averments and submissions of the Parties herein. The issue complained of by the Applicant emanates from a decision made by the Insurance Appeals Tribunal quashing a decision made to terminate her services by the Respondents. That being the position, it is evident that the Appeals Tribunal reinstated her to work.
30. The Applicant has not explained why she has not executed the orders issued in her favour by the Appeals Tribunal.
31. The Claim before me is also a fresh matter and not an appeal against the decision of the Appeals Tribunal.
32. In this Court's view, the Applicant has recourse to enforce the orders of the Tribunal. She chose to file an Application and a Claim before this Court in which case, the orders sought in the Application and in the Claimant are similar.
33. This stands out as a duplication of Claim before the Tribunal and also before this Court.
34. I do not wish to get into the merits of the Claim at this stage by resolving the application. I therefore decline to grant any orders in this application and order that the Applicant proceeds with the Main Claim or chooses to execute the orders issued to her at the Appeals Tribunal.
35. Costs in the cause.

Dated and delivered in Chambers via zoom this 11th day of June, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kamau Kuria for Respondents – Present

Mugenyu for Applicant – Present