

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 14 OF 2020

KENYA UNION OF PRE-PRIMARY EDUCATION TEACHERS.....CLAIMANT

AND

SECRETARY, LAIKIPIA COUNTY PUBLIC SERVICE BOARD.....1ST RESPONDENT

COUNTY SECRETARY, LAIKIPIA COUNTY GOVERNMENT.....2ND RESPONDENT

RULING

1. The motion before me is the Claimant's application dated 24th July 2020. In the main, the motion sought a review of the Court's ruling delivered in Court on 15th July 2020. The Claimant sought the setting aside of the Court order issued on 22nd July 2020 and served upon the Claimant on 23rd July 2020 dismissing the application dated 29th June 2020. The Claimant thus sought the reinstatement of the application dated and setting it down for inter-parties hearing. In addition, the Claimant sought the joinder of the Chief Officer - Department of Education Laikipia County Government in the suit as the 3rd Respondent and that the Claimant/Applicant be allowed to amend its application to correct a typo where the number of members appears as 423 instead of 428. The motion was supported by the affidavit of Samuel Opiyo and the grounds expressed on the face of the motion.

2. The Respondents were opposed and filed grounds of opposition. Parties were directed to file written submissions to dispose the notice of motion application and the Claimant duly filed submissions in which the Claimant submitted that the authorized representative was unable to log onto the virtual Court platform via TEAMS due to network breakdown of the only gadget formatted for that purpose and that it was not until 11.00 a.m., two hours into the Court session that the Claimant was able to log onto the virtual Court. The Claimant maintains and regrets the inadvertent failure to attend Court due to unforeseen fault and this written submission is a deliberate attempt to install a backup remedy so as to avoid repeat of similar occurrence. The Claimant submitted that Rule 22(2) of the Employment and Labour Relations Court Procedure Rules provides that where a party fails to attend Court on the day of hearing, the Court may dismiss the suit except for good reason to be recorded. The Claimant posits that the Court exercised its discretion and as a result the Claimant wishes to convince this honourable Court to reinstate the application dated 29th June 2020 which was dismissed for failure to attend Court as this was occasioned by technological fault and the same is regretted. The Claimant submitted that Article 27(1) of the Constitution of Kenya 2010 provides that every person is equal before the law and has the right to equal protection and equal benefit of the law. The Claimant submitted that "Law" in this context includes case law as emanates through judicial determinations and pronouncements from Courts of competent jurisdiction. The Claimant therefore pleaded that Court resolves to reinstate the application dated 29th June 2020 in the interest of justice. The Claimant cited Civil Appeal No. 82 of 2017 Meru reported as **Joseph Kinywa v G.O. Ombachi [2019] eKLR** and submitted that the instant application for reinstatement is meritorious and unassailable and that this honourable Court guided by the principle of natural justice as couched in the provisions of Articles 50 and 159 of the Constitution of Kenya 2010 finds it fit to allow it as prayed.

3. The Respondents submitted that the only issue for determination is whether a case has been made out for the exercise of the Court's discretion in the review of its orders of 15th July 2020 and consequently in readmitting the dismissed application for hearing. The Respondent submitted that a perusal of the dismissed application shows that it seeks for an interlocutory mandatory injunction orders, the nature of which cannot issue at this interim stage. The Respondent submitted that it is well settled in law that interim mandatory injunction orders can only be granted in exceptional circumstances and in the clearest of cases. The Respondent relied on the case of **East African Fine Spinners Ltd (In Receivership) & 3 Others v Bedi Investments Ltd** Civil Appl. NAI. 72/94 (UR) where Gicheru JA (as he then was) cited Megarry J in **Shepherd Homes Ltd v Sandahm (1971) 1 CH. 34**, stating in part:

....., it is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will, of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation.....

The Respondent also cited the case of **Locabail International Finance Ltd v Agroexport and others The Sea Hawk (1986) 1 All ER 908** in which the Court held:

A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff.

Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction

4. The Respondent submitted that in this case, the factual account of the contestations between the parties is set to be established at trial. The Respondents contend that there is no privity of contract between the members of the Claimant and the Respondents that may found a cause of action against them. The Respondents submit it would therefore be premature for this Court to grant any of the orders sought in the Dismissed Application were it to have been reinstated and admitted for hearing. The Respondents submitted that consequently, it would be a better use of precious judicial time if the subject application were to be refused and the parties directed to attend to preparation for trial. It was submitted that furthermore, the orders sought in the Dismissed Application are similar in terms to the prayers sought in the main claim in that the remedies sought in the Statement of Claim dated 29th June 2020 can only be issued after the factual determinations that are seemingly the subject of the Dismissed Application. The Respondents submitted that in the observance of its overriding objective of ensuring a just, efficient and cost effective administration of justice, it would be best that this Court refuses to allow the present application as the issues raised in the dismissed application are those that will be for determination at trial in the main suit. The Respondents assert that in any case, there is no discernible prejudice that is likely to be suffered by the Claimant if the subject application is refused considering that the contentions included in the Dismissed Application are part of the issues that are likely to be formulated for determination at trial since the Claimant in their affidavit in support to the application has alleged prejudice upon the Grievants that it represents, this has not been made out or specified. The Respondents submitted that the obvious prejudice they are likely to suffer were the orders sought granted is that there would be a delay in the resolution of the substantive matter in dispute between the parties and the likely scenario is that the Court would first consider the issues raised in the dismissed application once reinstated and again reconsider the same issues at trial. The Respondents submitted that furthermore, it is of note that the application has an additional prayer through which it seeks to add the Chief Officer Department of Education in the County Government of Laikipia as a party. The Respondents submitted that such person is not an employer and neither is he involved in the recruitment process of the Claimant's Grievants. The Respondents submit that Sections 62, 63 as read together with Section 72 of the County Government Act No. 17 of 2012 indicates that the role of the Chief Officer is to advise or make recommendations on the need of an office in the County to the Public Service Board/Commission and to deploy the officers who have already been hired within their department. The Respondents submitted that to this extent they are not a necessary party and that the Claimant has not demonstrated how the chief officer is involved in the recruitment process or how she will be necessary to the suit. The Respondents submit that allowing the application would introduce new parties to the suit and which would unnecessarily escalate costs. The Respondents submitted that the factual account of the reason why the Claimant could not attend Court on 15th July 2020 has not been proved in evidence and cannot be authenticated. They submitted that there is no evidence the Claimant's attempted to join the particular day, nor is there evidence of the phone having been formatted or having broken down on the material day of hearing, there is no evidence of efforts having been made to promptly communicate the challenges to the Deputy Registrar or parties to the suit complaining or asking for indulgence. The Respondents submit that the Claimant's non-attendance was intentional and out of sheer ignorance. The Respondents submitted that this Court is enjoined to exercise discretion judiciously and carefully considering the respective rights of the adversarial parties. The Respondents submitted that considering the circumstances of the case, the balance tilts in favour of the Respondents in having the application disallowed with costs and directions issued for the matter to proceed on to trial expeditiously on priority basis.

5. The Court in considering the application has taken into account the above submissions, the law cited and authorities. Because the Claimant seeks reinstatement of a dismissed motion, it has a burden to lay before the Court material that would be sufficient to have the Court's discretion exercised in its favour. There is no reason to consider the dismissed application at this stage as the motion remains dismissed unless reinstated by the Court. In relation to the dismissed application, it is asserted that there was a technical breakdown and it was only 2 hours later that the Claimant was allegedly able to log in by which time the application had suffered the fate of dismissal. To put this scenario into perspective, it is important to recast the new normal. Presently, in response to the Covid-19 pandemic, the Court has been using Microsoft TEAMS to facilitate the hearing of cases online. The practicability of using the platform are very easy as all one requires is to log in using the link provided by the Court. There is no major technical hitch expected except network issues which, where they occur, can be easily demonstrated. The allegations made to the effect that the machine formatted to use Microsoft TEAMS failed on the 15th July 2020 has not been demonstrated. No evidence is availed of any effort made to contact the ELRC Registry at Nyeri or the Deputy Registrar Nyeri to advise of the alleged challenges or seek for a solution. The Claimant did not even attempt to contact the advocate for the Respondents further casting this assertion in great doubt. The reinstatement application additionally introduces an aspect that ought not to be part of the reinstatement application. The Claimant seeks to enjoin the Chief Officer, Department of Education in the County Government of Laikipia as a party. Whereas a party in a suit can seek joinder, the basis for joinder must be clear. In this case the Claimant seeks to enjoin an employee of the Laikipia County Government as the 3rd Respondent. No basis was laid for the joinder and like the reinstatement motion it would fail. In the final analysis I dismiss the motion filed by the Claimant with costs to the Respondents and order the suit to be set down for hearing on a date to be agreed on and communicated to the parties immediately after this Ruling.

It is so ordered.

Dated and delivered at Nyeri this 12th day of October 2020

Nzioki wa Makau

JUDGE