



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 581 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

DOLLY NYAMBURA MWANGICLAIMANT

VERSUS

FAULU MICRO FINANCE BANK LIMITEDRESPONDENT

RULING

Vide her application dated 2nd September 2019 and filed on 3rd September 2019, the Applicant sought the following orders –

1. That the Application herein be certified urgent, service be dispensed with in the first instance and leave be granted for the instant application to be heard during the High Court's vacation.
2. That pending the hearing and determination of this Application, the Respondent either by itself, its directors, its servants, agents and or employees be restrained from advertising, shortlisting, interviewing, recruiting or in any other way filling the position of Head Bancassurance Faulu Microfinance Bank Limited.
3. That pending the hearing and determination of this Application, a reinstatement order does issue reinstating the Claimant as Head Bancassurance Faulu Microfinance Bank Limited.
4. That pending the hearing and determination of this Claim, the Respondent either by itself, its directors, its servants, agents and or employees be restrained from advertising, shortlisting, interviewing, recruiting or in any other way filling the position of Head Bancassurance Faulu Microfinance Bank Limited.
5. That pending the hearing and determination of this Claim, a reinstatement order does issue reinstating the Claimant as Head Bancassurance Faulu Microfinance Bank Limited.
6. That the costs of this Application and interest thereon be provided for.
7. Any other and further relief that this court may deem fit and just to grant in the circumstances.

The application is made under Section 12(1)(a), 12(3)(i) and 12(4) of the Employment and Labour Relations Court Act, Rule 3(1) of the High Court [Practice and Procedure] Rules of the Judicature Act and all enabling provisions of the law. The application is supported by the grounds on the face thereof and the affidavit of DOLLY NYAMBURA MWANGI, the Applicant/Claimant.

The Applicant was employed by the Respondent as Head of Bancassurance on 12th September 2017 at a salary of Kshs.440,000 per month which was later increased to Kshs.453,200 per month. On 5th December 2018 she was placed on a Performance Management Improvement Plan (PIP). On 3rd January 2019 she was placed under another PIP which she alleges was backdated to 5th December 2018.

The Applicant avers that she surpassed her targets during the PIP but on 23rd May 2019, was issued with a show cause letter or alleged breaches of the Respondent's policies and procedures. She responded to the show cause letter on 24th May 2019. On 28th May 2019, she was invited for a disciplinary hearing to be held on 31st May 2019 and her employment terminated by letter dated 10th June 2019.

The Applicant avers that the termination of her employment was both substantively and procedurally unfair. That she appealed against the

termination and was invited for hearing of the appeal which did not proceed on 2nd August 2019 due to lack of a quorum. That she was again invited to a disciplinary hearing on 13th August 2019 when she was unwell necessitating the appeal hearing to be rescheduled to 20th August 2019. That again the hearing did not take place due to the presence of her advocate.

The Applicant avers that she learnt that the Respondent had on 5th July 2019 internally advertised her position of Head of Bancassurance before her appeal was heard.

It is the Applicant's averment that she has a prima facie case with overwhelming chances of success and that she would suffer irreparable harm incapable of compensation by way of damages should her prayers not be granted. She further pleads that the balance of convenience tilts in her favour and that the ends of justice would be met by the grant of the orders sought in her application.

The Respondent filed a replying affidavit of STEVE BIKO NYAGAH, the Respondent's Legal Officer who states that the application is fatally defective and devoid of merit, that the termination of the Applicant's employment was procedural and complied with the law. That the Applicant's dues were subsequently settled. He deposes that the Claimant has not demonstrated a prima case with probability of success.

In a further affidavit sworn on 25th October 2019, Steve Biko deposes that the Insurance Regulatory Authority wrote a letter dated 17th June 2019 informing the Respondent that the Applicant had informed the authority that she had ceased to be the Principal Officer of the Respondent. That the authority sought clarification on what led to the termination of the Applicant's employment.

Mr. Biko deposes that it is within the Applicant's knowledge that any insurance agent must provide a Principal officer. That upon removal of the Applicant as the Principal Officer of the Respondent, it is required to fill the vacancy. That this being a statutory requirement, the interim orders restraining the Respondent from filling the Applicant's position are prejudicial to the Respondent and contrary to statutory provisions.

In her further affidavit sworn on 27th November 2019, the Applicant deposes that she quit being the Principal Officer of the Respondent as she did not want to incur liability of the Respondent after leaving its employment. She deposes that the position of Principal officer is not tied to the position of Head of Bancassurance and thus the Respondent would not suffer any prejudice from the interim orders. That any staff of the Respondent who meets the qualifications set by the Insurance Regulations Committee can be appointed as Principal Officer without being Head of Bancassurance. The Applicant avers that the Respondent has already filled the position of head of Bancassurance in a bid to render her suit an exercise in futility.

Determination

Having considered the application and grounds in support thereof, the replying affidavit and the rival submissions by the parties, the issues for determination are whether the application meets the threshold for grant of the orders sought and whether the orders should be granted as prayed.

Section 49 of the Employment Act provides for the remedies that this court may grant to a party upon a finding that the termination of employment is either unfair or unjustified at subsection (1) and (3) as follows –

49. Remedies for wrongful dismissal and unfair termination

(1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—

(a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;

(b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or

(c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.

(2) ...

(3) Where in the opinion of a labour officer an employee's summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to—

(a) reinstate the employee and treat the employee in all respects as if the employee's employment had not been terminated; or

(b) re-engage the employee in work comparable to that in which the employee was employed prior to his dismissal, or other reasonably suitable work, at the same wage.

Section 12(3) the Employment and Labour Relations Court Act also empowers this court to grant the following remedies –

(3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—

- (i) interim preservation orders including injunctions in cases of urgency;**
- (ii) a prohibitory order;**
- (iii) an order for specific performance;**
- (iv) a declaratory order;**
- (v) an award of compensation in any circumstances contemplated under this Act or any written law;**
- (vi) an award of damages in any circumstances contemplated under this Act or any written law;**
- (vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or**
- (viii) any other appropriate relief as the Court may deem fit to grant.**

As submitted by the Respondent, a reading of Section 49 of the Employment Act together with Section 50 of the Act would imply that the remedies of compensation and reinstatement (re-engagement) are only available once the court has established that the termination of employment was either unjustified or unfair. Rule 17 of the Employment and Labour Relations Court (Procedure) Rules further provides for interlocutory orders in the following terms –

17. Interlocutory application and temporary injunctions

- (1) An interlocutory application shall be made by notice of motion and shall be heard in open Court.**
- (2) A party shall, after filing a motion, notify all the parties of the motion.**
- (3) The Court may, for good cause, hear an application ex parte and make an order upon terms as to costs and subject to such undertaking, if any, as the Court considers just:**

Provided that a party affected by that order may apply to set it aside.

- (4) An ex parte injunction may be granted only once for not more than fourteen days and shall not be extended thereafter except once by consent of the parties or by the order of the Court for a period not exceeding fourteen days.**
- (5) In a suit where an injunction is sought, a claimant**
or applicant may at any time in the suit, apply to the Court for an interim or temporary injunction to restrain the respondent from committing a breach of contract or an injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.
- (6) Where an application is made to the Court under paragraph (5) for a temporary or interim injunction, the Court may, by order, grant an injunction on such terms as it deems fit.**
- (7) Any order for injunction may be discharged, varied or set aside by the Court on application by any party dissatisfied with such order.**
- (8) A notice of motion shall state in general terms the grounds of the application and where the motion is supported by an affidavit, both the notice of motion and a copy of the affidavit shall be served on the other party.**
- (9) A party may respond to an application by filing grounds of opposition verified by an affidavit.**
- (10) Notwithstanding anything contained in this Rule, the Court shall not grant an ex parte order that reinstates into employment an employee whose services have been terminated.**

In the instant application, the applicant's employment was terminated on grounds of poor performance after she had been placed on performance improvement plans. The second reason for termination of employment was gross misconduct.

The case of **Anthony Omari Ongera v Teachers Service Commission [2017] eKLR** Mbaru J. made the following observations in respect to the rationale for reinstatement –

"The rationale is that the order of reinstatement is final in nature and should only issue in exceptional cases which warrant specific performance. In the case of Ahmed Aden Hire versus Natif Jama and County Government of Garissa, Petition No. 121 of 2016;

the Court is analysing the provisions of Section 49 of the Employment Act and Rule 17(10) of the Court Rules with regard to the orders of reinstatement held that;

*The rationale [of not reinstating an employee at the interlocutory stage] is that the order of reinstatement is a specific performance order with finality. To issue such an order in the interim is essentially to deny the other party a chance to their defence unless there exceptional circumstances that the Court is appraised of to warrant the grant of the same in the interim. In **Alfred Nyungu Kimungui versus Bomas of Kenya [2013] eKLR**; though the decision was made on 28th May 2013 before the new Rules of procedure came into force on 5th August 2016, the context is not lost where the Court held that;*

The Employment Act 2007 places the burden of justifying termination decision, and showing the fairness of 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. Certain forms of termination grounds, the kind that result in automatically unfair termination such as pregnancy, race, gender or religious discrimination, may warrant the rare exercise of the Court's discretion in issue of interim reinstatement. This is more so particularly under the new liberal Constitution of Kenya, which frees the hands of the Courts in administration of justice."

The orders sought by the Applicant would only be justified if there is likelihood for her reinstatement. However, the court also has to consider the other two principles for grant of interlocutory orders as established in the case of **Giella v Cassman Brown & Co Ltd [1973] EA 358** being that: -

- a) *The Applicant must show a prima facie case with a probability of success.*
- b) *The Applicant will suffer irreparable injury, which would not be adequately compensated by an award of damages.*
- c) *If the Court is in doubt, it will decide the application on the balance of convenience.*

Prima facie case was defined by the Court in the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] eKLR** as follows:

"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."

In the instant case, I think there is no illustration by the Applicant on the face of the record that her case is likely to succeed. This therefore remains a matter for consideration by the court once all the evidence by the parties is taken. I therefore do not find that the Applicant has established a prima facie case.

On the second limb, the Applicant must establish irreparable harm. In the case of **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**, the principle was dealt with as follows:

"On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. 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."

In her Memorandum of Claim, the Applicant seeks inter alia orders that –

1. *A declaration that the purported termination of the Claimant by the Respondent on 10th June 2019 was unfair, wrongful and unwarranted.*
2. *A reinstatement order directing the Respondent to reinstate the Claimant as the Respondent's Head of Bancassurance.*
3. *In the alternative to prayer (2), the Respondent prays for:*
 - a) *Ksh.1,359,600 being 3 months' salary in lieu of Notice.*
 - b) *Ksh.453,200 being severance pay for 2 years worked.*
 - c) *Ksh.5,438,400 being 12 months' compensation.*

d) Leave days earned but not taken.

e) Pension scheme dues as per the Faulu Staff Pension Trust Deed and the Retirement Benefits Authority Regulations.

4. Certificate of service.

5. Costs of this claim and interest thereon.

6. Any other and further relief that this Court may deem fit and just to grant in the circumstances.

The prayers sought in the instant application are only relevant with respect to prayer 2 in the Memorandum of Claim being the prayer for reinstatement. If the prayer for reinstatement is unlikely to be granted, then the application herein would automatically fail. Further if the Applicant can adequately be compensated by way of monetary compensation, the application would equally fail.

Section 49(4) of the Employment Act provides that reinstatement is only to be granted after taking into account the following considerations —

49. Remedies for wrongful dismissal and unfair termination

(1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—

(a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;

(b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or

(c) the equivalent of a number of months' wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.

(2) Any payments made by the employer under this section shall be subject to statutory deductions.

(3) Where in the opinion of a labour officer an employee's summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to—

(a) reinstate the employee and treat the employee in all respects as if the employee's employment had not been terminated; or

(b) re-engage the employee in work comparable to that in which the employee was employed prior to his dismissal, or other reasonably suitable work, at the same wage.

(4) A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following—

(a) the wishes of the employee;

(b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and

(c) the practicability of recommending reinstatement or re-engagement;

(d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;

(e) the employee's length of service with the employer;

(f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;

(g) the opportunities available to the employee for securing comparable or suitable employment with another employer;

(h) the value of any severance payable by law;

- (i) the right to press claims or any unpaid wages, expenses or other claims owing to the employee;**
- (j) any expenses reasonably incurred by the employee as a consequence of the termination;**
- (k) any conduct of the employee which to any extent caused or contributed to the termination;**
- (l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and**
- (m) any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee.**

The Applicant herein must therefore not only establish irreparable loss, but also the factors in Section 49(4) key among them the practicality of reinstatement or re-engagement and the common law principle that there should be no order of specific performance in a contract for service except in very exceptional circumstances.

The Applicant has not demonstrated either in her application or the submissions, the irreparable harm she is likely to suffer if the orders are not granted. She has not even attempted to demonstrated any exceptional circumstances that would justify her being entitled to an order of reinstatement.

As was stated in the case of **Julius Kipkeny Kolil and Another**

v Kenya Commercial Bank and 2 Others (2013) eKLR, the understanding is always that where damages may be an appropriate remedy, an order of injunction would not be granted.

I find that the Applicant has not demonstrated that she would suffer irreparable harm or that damages would not be adequate remedy should she succeed in her claim.

The final limb in the principles under **Giella** is that when in doubt, the Court would decide on the basis of a balance of convenience.

In the instant suit, I have already found that the Applicant has not established the first two principles. I will however still consider the final principle.

The Respondent submitted that the position of Head of Bancassurance held by the claimant was also the Principal Officer which according to Insurance Regulatory Authority, must be filled immediately. Although the Applicant stated there are other officers of the Respondent qualified for appointment as Principal Officer, no mention was made of the specific officers by name or position.

Having found that the claimant has not established the principle of prima facie case and irreparable harm, the final principle must of necessity tilt against her.

For the foregoing reason, I find that the Applicant has not demonstrated that she merits the grant of the order sought in her application. The result is that the application dated 2nd September 2019 fails. The same is accordingly dismissed. Costs shall abide the outcome of the main suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF NOVEMBER 2020

MAUREEN ONYANGO

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 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 has 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.

MAUREEN ONYANGO

JUDGE