



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 127 OF 2019**

**FRANCIS KISAVO KANYAO.....CLAIMANT**

**v**

**AFRICA COFFEE ROASTERS**

**(EPZ) LTD 1<sup>st</sup> RESPONDENT**

**JOHAN H.W. TOLLENAAR aka**

**JEROEN TOLLENAAR.....2<sup>nd</sup> RESPONDENT**

**RULING**

1. For determination is a motion dated 27 February 2019 by Francis Kisao Kanyao (applicant) seeking orders

1. ...

2. ...

3. Pending the hearing of the Claim, an injunction be issued to restrain the Respondents from effecting the oral termination of the employment of the Claimant/Applicant and/or removing him from his employment as the Chief Financial Officer of the 1<sup>st</sup> Respondent.

4. Pending service and hearing inter partes of this application, an injunction be issued to restrain the Respondents whether by themselves, their servants, advocates, agents and/or employees from recruiting, hiring or otherwise replacing the Claimant/Applicant as the 1<sup>st</sup> Respondent's Chief Financial Officer.

5. Pending the hearing of this Claim, an injunction be issued to restrain the Respondents whether by themselves, their servants, advocates, agents and/or employees from recruiting, hiring or otherwise replacing the Claimant/Applicant as the 1<sup>st</sup> Respondent's Chief Financial Officer.

6. Costs of this application be provided for.

2. When the application was placed before the Duty Court on 27 February 2019, it issued an order restraining the Respondents from effecting the oral notice of termination of employment of the Claimant/Applicant and/or removing him from his employment as the Chief Financial Officer of the 1<sup>st</sup> Respondent.

3. The order was to last until *inter-partes* hearing of the application.

4. The Respondents filed a replying affidavit sworn by the 2<sup>nd</sup> Respondent in opposition to the application, and the Court took oral arguments on 25 March 2019.

5. The Court has given due consideration to all the material placed before it.

6. It is common that the applicant's employment came to an end on 22 February 2019, when he was informed verbally of the termination of his employment.

7. However unfair or unlawful the action of the Respondents were, this being ordinary employment underpinned by contract and the general law of employment (the Employment Act, 2007), the employment relationship cannot be restored by an order of Court at an *interlocutory* stage.

8. Under section 49(1) of the Employment Act, 2007, *reinstatement* or any order akin to *reinstatement* is a final remedy, issuable after a hearing on the merits (different principles will apply where specific law provides for manner of removal of the employee).

9. The *termination* of the applicant's employment being a *fait accompli* before he moved the Court cannot be undone at this stage of the proceedings, and must await a hearing on the merits.

10. The applicant also sought orders stopping the Respondents from replacing him.

11. At this stage, the Court cannot tell whether at the end of the day, it would find in favour of the applicant, and make an order of *reinstatement*, and therefore it would not be prudent to hamstring the hands of the Respondents from exercising their *managerial prerogative*.

12. In the view of the Court, and there is *comparative jurisprudence* to that effect (see *Volkswagen SA (Pty) Ltd v Brand NO & Ors* (2001) 5 BLLR 924 and *Manyaka v Van Der Wetering Engineering (Pty) Ltd* (1997) 11 BLLR 1458), the mere fact that an employee has been replaced cannot be a bar to an order of *reinstatement*.

### **Arbitration**

13. The Respondents contended that because the contract of employment provided for arbitration, it was premature of the applicant to move the Court.

14. On the surface, the submission was technically correct, but considering the nature of reliefs/orders which were sought in the interlude, those were outside the mandate of an arbitrator.

15. But now that the *interlocutory application* is out of the way, the parties may wish to pursue arbitration.

### **Conclusion and Orders**

16. All in all, the Court finds that the applicant has not met the test for grant of *interim injunctive orders* sought, and the application is dismissed with no order on costs.

**Delivered, dated and signed in Nairobi on this 3<sup>rd</sup> day of April 2019.**

**Radido Stephen**

**Judge**

### **Appearances**

For applicant Ms. Wanjiru Ngige, instructed by Mohammed Muigai LLP, Advocates

For Respondent Mr. Inyangu, instructed by Ameli Inyangu & Partners Advocates

Court Assistant Lindsey