



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION 88 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF: ARTICLES 10(2C), 22 (1) AND (2)(a), 23(1), 41(1), (2b) 47, 48, 50(1), 165 AND 25 (1) & (2) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE ALLEGED CONTRAVENTION AND VIOLATION OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE ENFORCEMENT OF THE BILL OF RIGHTS PARTICULARLY ARTICLES 27(1) AND 41(1), (2B) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE CONSTITUTIONAL VALIDITY OF THE DECISION BY THE RESPONDENTS OF TERMINATING THE PETITIONERS CONTRACT AND INTERDICTING THEM VERBALLY WITHOUT GIVING THEM A FAIR HEARING IN TOTAL VIOLATION OF ARTICLE 47 (1) 85 (2) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE EMPLOYMENT ACT, 2007

AND

IN THE MATTER OF: LAWS OF KENYA 11 III MATTER OF: FAIR ADMINISTRATIVE ACT NO. 4 OF 2015

BETWEEN

PASCALLA MUMBUA MUTUA.....1ST APPLICANT/PETITIONER

MARY NDUKU KALOKI.....2ND APPLICANT/PETITIONER

VERSUS

NAIROBI LIGHT ACADEMY PRIMARY SCHOOL.....RESPONDENT

RULING

The Petitioners/Applicants, Pascalia Mumbua Mutua and Mary Nduku Kaloki filed a Notice of Motion application dated 3rd September 2018, brought under Articles 10(2c), 22(1) and (2)(a), (c), 23(1), 41(1), (2b), 47, 48, 50(1), 165 and 258(1) and (2)(c) of the Constitution of Kenya; and Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedures Rules 2013 against the Respondent, Nairobi Light Academy Primary School. They seek for Orders that:

- 1) This Application be certified as urgent and the same be heard ex-parte and interim orders be granted in the first instance.

- 2) Pending hearing and determination of the Application inter-partes, Conservatory orders do issue staying action on the 1st Respondent's Notice dated 24th August 2018 arbitrary terminating contract services of the Petitioners.
- 3) Pending hearing and determination of the Application inter-partes, Conservatory orders do issue restraining the Respondents from recruiting, filling the positions of the Petitioners or replacing them.
- 4) Pending hearing and determination of the Application inter-partes, Conservatory orders do issue restraining the Respondents either by themselves, their agents, servants or any other person acting under their instructions from blocking the Petitioners' access to their work place to perform their duties as cleaners or howsoever discriminating, victimizing, harassing or removing the Petitioners from their place of work or effecting unauthorized deductions or withholding the Petitioners' monthly salaries or transferring them.
- 5) Pending hearing and determination of the Petition, Conservatory orders do issue suspending all pending contract agreements and further compelling the 1st Respondent to issue the Petitioners with appointment letters and job identification cards with clear terms of permanent and pensionable service from the date they were employed.
- 6) Pending hearing and determination of the Petition, Conservatory orders do issue staying action on the 1st Respondent's Notice dated 24th August 2018 arbitrary terminating contract services of the Petitioners.
- 7) Pending hearing and determination of the Petition, Conservatory orders do issue restraining the Respondents from recruiting, filling the positions of the Petitioners or replacing them.
- 8) Pending hearing and determination of the Petition, Conservatory orders do issue restraining the Respondents either by themselves, their agents, servants or any other person acting under their instructions from blocking the Petitioners' access to their work place to perform their duties as cleaners or howsoever discriminating, victimizing, harassing or removing the Petitioners from their place of work or effecting unauthorized deductions or withholding the Petitioners' monthly salaries or transferring them.
- 9) The Court be pleased to make any other orders within its inherent jurisdiction.
- 10) The Respondents bear the Petitioners' costs of this application.

The Application is based on the grounds that:-

- 1) The Petitioners have continuously worked uninterrupted as Cleaners for the Respondent since 7th August 2009 (1st Petitioner) and since 22nd November 2011 (2nd Petitioner).
- 2) From the time the Petitioners were employed by the Respondent, they were never issued with any letters of appointment and a job identification card outlining their duties and their terms and conditions of service which is contrary to Section 45(3) of the Employment Act which protects an employee who has worked continuously for a period not less than 13 months from unfair termination of services.
- 3) The Respondent has instead been forcing the Petitioners to sign new probationary contracts every year which is contrary to Section 42(3) of the Employment Act which prohibits employment under a probationary contract for more than the aggregate period of 6 months.
- 4) 6 days after issuing the termination notices, the 1st Respondent summoned the Petitioners to his office on Friday 31st August 2018 and verbally told them not to report on duty on 1st September 2018 which is in total contravention of their constitutional rights to fair labour practices guaranteed under Article 41(1) of the Constitution of Kenya.
- 5) The said notices of termination did not give the Petitioners any reasons why their contracts were being unfairly terminated and yet they have never been accused of any wrongdoing for the last 10 years and 7 years respectively that they have worked for the Respondent.
- 6) The unfair termination of employment by the Respondent is aimed at getting rid of the Petitioners thus denying them their August 2018 salary and further denying them their terminal dues and replacing them with other unknown persons, without following proper procedure as provided for under the relevant provisions of the Employment Act.
- 7) The Petitioners have reliably been informed by their workmates that the Respondent was planning to recruit new people by Wednesday 5th September 2018 and if the Application is not heard urgently, the said application will be rendered nugatory and the Petitioners will suffer irreparable loss of employment and hence be subjected to untold suffering.

The Application is supported by two Affidavits sworn by the Petitioners wherein they state that the last contracts they signed was in 2015 but that the Respondent took their individual copies and denied them access to the contents of the said contracts. That the Respondent used to issue them with a copy of their payslips every month as employees number 1519 and 1535 respectively and that for the last two months, the 1st Respondent and his agents threatened them with a sacking for no reason. That he then issued them with the notices of termination on 24th August 2018, which stated that their contracts would end on 29th September 2018 and that the Respondent never invited them to sign any fresh contract forms for the years 2016, 2017 and 2018. That they do not therefore understand the contracts the Respondent is referring to in

purporting to terminate their contracts because there are no valid contracts to be relied upon. That the Respondent also contravened their right to fair remuneration and reasonable working conditions under the Constitution of Kenya and failed to detail to them how they would be paid for the services rendered for 10 and 7 years respectively upon issuing both of them with a termination letter.

This Court heard the application in Chambers on 5th September 2018 and issued orders on that:

- 1) The matter be certified urgent and admitted for hearing during vacation.
- 2) The Respondent is restrained from terminating the employment of the Petitioners pending interpartes hearing of the application dated 3rd September 2018.
- 3) The Application is fixed for inter-partes hearing on 19th September 2018.
- 4) The Applicant to serve the Respondent with Petition, Application and orders on or before close of day on 6th September 2018.

When the application came up for hearing on 19th September 2018, the Petitioners' advocate stated in court that when they filed a second application, the Respondent's advocate approached him for a settlement. The Respondent's advocate confirmed that they were in discussions and requested to be given time to exhaust the possibilities. The Court while extending the interim orders directed that the parties would report on the out of court negotiations.

Applicants/Petitioners' Submissions

The Application came up for hearing on 27th May 2019 and in the absence of the Respondent's advocate, Counsel for the Applicants/Petitioners submitted in court that the Application had not yet been responded to by the Respondents and is thus undefended. That with regard to the interim orders of 6th September 2018, they notified the court that the Respondent did not comply or obey the said orders. That when the parties were before court on the issue of contempt, the Respondent asked the court to allow them to negotiate with the Petitioners but the negotiations failed and that is why they were in court. The counsel for the petitioners relied on the provisions of the Constitution as set out on the face of the application. He informed the court that Orders 1, 2, 3 and 4 are spent with the remaining orders being 5, 6, 7, 8, 9 and 10. That in summary, the two Petitioners seek conservative orders to the effect that the Respondent should allow them to continue with their employment and in effect stay the notice of termination dated 24th August 2018 because they have been in employment for 7 years and 9 years respectively. The Petitioners' advocate urged the court to rely on the pleadings filed regarding the application in arriving at its decision.

Analysis and Determination

The Applicants have averred that they were verbally dismissed 6 days after receiving the Notices of termination of their employment even though the said Notices indicated that their last working day would be 29th September 2018. In **Cause 86 of 2017: Kenya Private Universities Workers Union -V- Presbyterian University of East Africa [2019] eKLR**, Makau J ruled as follows:

“The foregoing notwithstanding I wish to say that even if the application was competently before the court, the order sought would still be declined. First, stay of termination letter is a strange relief to be sought from a court of law and my assessment, giving the same would amount to reinstating the employee to his employment or ordering specific performance of the contract of service against the employer's wish and before hearing the case on merits.

Consequently, I direct that the claims in respect of Aaron Sailepu shall await determination on merits after hearing evidence at the trial or such other or further orders and directions of the court.”

In the present case, the only reason why conservatory orders were granted was because the applicant averred that they were sent home before the notices of termination had lapsed. That was way back in September 2018. The court notes that the applicants' contracts were lapsing on 29th September 2018. The court can only preserve that which exists. Court orders cannot be issued to revive an employment contract that no longer exists as that would amount to reinstatement, which the court can only order after hearing the parties and establishing unfair termination in terms of Section 49 of the Employment Act.

For these reasons the court declines to grant the orders sought by the applicants. The application is accordingly dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF JULY 2019

MAUREEN ONYANGO

JUDGE