



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 419 OF 2019

TIMOTHY ODHIAMBO OTIENO.....CLAIMANT

- VERSUS -

THE NAIROBI HOSPITAL.....RESPONDENT

KENYA HOSPITAL ASSOCIATION.....INTERESTED PARTY

(Before Hon. Justice Byram Ongaya on Friday 5th July, 2019)

RULING

The claimant filed the application on 27.06.2019 through Musyoki Mogaka & Company Advocates. The application was under Article 2(1), 10, 20 (1), 27, 28, 41, 47, 48, 50(2) (a) (b) (c), 232, 236 of the Constitution of Kenya 2010, section 5(1) (a), (2), (3) and 45 of the Employment Act Cap.226, Laws of Kenya and all other enabling provisions. The substantive prayers urged for the applicant are as follows:

- 1) That pending the inter parties hearing and determination of the application herein, the Honourable Court be pleased to order the following:
 - a) Suspend, revoke and or reverse the summary dismissal letter dated 09.05.2019.
 - b) A temporary injunction issue against the respondent from restraining, blocking and or otherwise denying the claimant access to his office.
 - c) An order directing the respondent to allow the claimant to return to his office and his duties as per his job description and be maintained in his position as the Director – ICT, The Nairobi Hospital.
 - d) An order directing the respondent to continue remitting the claimant’s wages in a timely fashion.
 - e) An order against the Board, Directors, and or Human Resource Department from bringing any further disciplinary actions and or proceedings against the claimant without leave of the Honourable Court.
- 2) That in alternative, pending the hearing and determination of the application an order be issued preserving the office of the Director – ICT, The Nairobi Hospital, together with its job description by:
 - a) Restraining the respondent from advertising the position of Director –ICT.
 - b) Restraining the respondent from making any direct, interim, and or in an acting capacity and appointment to the position of the Director – ICT the Nairobi Hospital.
 - c) Restraining the respondent from carrying out any restructuring, dismantling, changes and or affecting the office of the Director – ICT and its job description and or duties and obligations of the said office.

The applicant made similar prayers pending the hearing and determination of the suit and further prayed that the costs of the application be provided for.

The application was based on the annexed supporting affidavit of Timothy Odhiambo Otiemo and upon the following grounds:

a) The respondent summarily dismissed the claimant from employment on 09.05.2019 upon a determination of a disciplinary committee hearing held on 08.05.2019. The decision followed the show-cause notice dated 09.04.2019, the applicant's reply dated 09.04.2019, suspension dated 09.04.2019, invitation to disciplinary hearing dated 06.05.2019, disciplinary meeting of 08.04.2019, and extension of suspension dated 08.05.2019. The summary dismissal dated 09.05.2019 was on the ground that the claimant had installed a Malware and a Linux software operating system in his laptop without official approval and which breached the respondent's general code of conduct and ethics; internet security policy TNH/ICT.Pol.004; and ICT Asset Management Policy – TNH/ICT.Pol.006.

b) The claimant appealed against the summary dismissal by his letter dated 20.05.2019 but, according to the claimant, the respondent declined to receive the principal copy. The appeal has not been determined by the respondent.

c) The termination by way of summary dismissal was unfair, unprocedural and illegal and the claimant has filed the present suit.

d) The respondent has designed and attempted to restructure, advertise and or do away with the claimant's office and leave him without recourse unless the Court intervenes as prayed for.

e) The summary dismissal is within the circumstance that the interested party has sued the respondent in HCCC No. E097 of 2019 where the interested party has strongly opposed any change and or termination in senior leadership of the respondent during the pendency of the said suit.

f) The claimant has a *prima facie* case with high chances of success, he comes with clean hands, the Court has jurisdiction to grant the prayers, if prayers are not granted the claimant will suffer grievous and irreparable harm and the balance of convenience favours the grant of the prayers.

The respondent and the Interested Party opposed the application by filing on 02.07.2019 (through Kaplan & Stratton Advocates) the replying affidavit of Dorcas Kiai, the respondent's Human Resources Director. The respondent and interested party also filed on 02.07.2019 the grounds of opposition thus:

a) An order of reinstatement or setting aside of the claimant's dismissal cannot be issued pursuant to an interlocutory application and can only be issued after a full substantive hearing.

b) The injunction application does not disclose a *prima facie* case and the claimant can be compensated by damages as set out under his memorandum of claim and as per the Employment Act 2007. Consequently, the balance of convenience tilts in favour of the respondent.

c) The claimant is not entitled to any injunctive orders as a result of the fact that his employment contract was terminated on account of gross misconduct for breach of *inter alia* the respondent's code of conduct in respect of the use of unauthorized software.

The parties' advocates made their respective submissions for and against the application. The Court has considered the submissions and the material on record and makes findings as follows.

First, in the memorandum of claim the claimant prays for *inter alia* reinstatement. There is no dispute that the claimant has since been summarily dismissed from the respondent's employment. The Court returns that as submitted for the respondent and the interested party, reinstating the claimant at an interlocutory stage would amount to granting a final order without taking of evidence on the seriously contested facts. The claimant has not at the interlocutory stage established a compelling matter of fact or law that would constitute an exception towards justifying the grant of such final remedy at the interlocutory stage or a temporary mandatory injunction as prayed for. The authorities cited for the respondent and the interested party on the point are clear and the Court is guided accordingly. In **Kenya Tea Growers Association and Another –Versus- Kenya Plantation & Agricultural Workers Union Civil Appeal 258 of 2012 at Nairobi** (Waki, Nambuye & Gatembu JJ.A) the Court of Appeal stated, “....**We agree entirely with the statement by Rika J in Alfred Nyungu Kimungui Vs Bomas of Kenya [2013]eKLR, that “Ordinarily, reinstatement of an employee is a substantive remedy, not a temporary relief. The law does not contemplate that reinstatement issues (sic) as a provisional measure. It is a remedy that should normally be granted upon full hearing of the employer, and the employee.”**

Second, the applicant asks the Court to preserve the vacancy in the office of the Director – ICT, the Nairobi Hospital, and to prevent the respondent from restructuring to abolish the office or from appointing another person in that office in an acting capacity. The material before the Court show that consequential to the claimant's summary dismissal, there is undisputedly a vacancy in the office of the Director – ICT, the Nairobi Hospital. Further the parties are in agreement that the functions and duties of the office of the Director – ICT, the Nairobi Hospital is very important to the operation of the respondent. The Court therefore returns that the applicant has failed to establish good reason to justify the Court's interference with the respondent's discharge of its human resource powers over the office. In particular there is no established reason for the respondent to be prevented from initiating and implementing measures and actions for continued service delivery in the all important office of the Director – ICT, the Nairobi Hospital. The Court follows the holding by Rika J in **Alfred Nyungu Kimungui Vs Bomas of Kenya [2013]eKLR** thus, “**The Employment Act does not intend that Courts take away managerial prerogatives from employers. To give the interim order would mean the employer does not have any more say in the contract of employment it has authored. This would be contrary to the intention of the Employment Act, which seeks to merely protect the weaker of the bargaining partners, not deprive the employer the power to run its business altogether.**” And further, “**14. The Industrial Court should be cautious in exercising its jurisdiction, so as not to appear to take over and exercise managerial prerogatives at workplaces. Grant of interim orders that have the effect of limiting genuine exercise by the management of its rights at the workplace should be avoided. Termination of employment, and initiation of disciplinary processes at the work place, are presumed to be management prerogatives. The Court should be slow in intervening, particularly at interlocutory stages otherwise the Court would be**

deemed to be directing the employers in regulation of their employees.”

In such cases seeking to interfere with the employer’s powers, the court follows its opinion in the ruling in Geoffrey Mworira-Versus-Water Resources Management Authority and 2 others [2015]eKLR thus, “The principles are clear.

The court will very sparingly interfere in the employer’s entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of the Constitution or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer’s internal process.”

With respect to the scope of the prayer made on preservation of the office of the Director – ICT, the Nairobi Hospital, the Court returns that the claimant has failed to establish the test as outlined in the cited case and which would justify an injunction against the respondent from undertaking its human resource functions with respect to the office of the Director – ICT, the Nairobi Hospital.

The Court returns that at the interlocutory stage, the claimant has not established that the respondent is proceeding in breach of contract, unlawfully, or in such other manner amounting to manifest injustice with respect to the accruing vacancy and the Court will decline to grant the prayers as made.

Third, it was urged for the applicant that the office of the Director – ICT, the Nairobi Hospital is indispensable in the respondent’s health service delivery and it was in the best interest of the patients that the claimant is allowed to resume duty to save lives. The Court finds that the respondent and not the claimant is liable for its service delivery and consequential to the summary dismissal and a vacancy in the office, the claimant has not established how he’d thereby become liable for service delivery at the hospital’s establishment. The Court returns that it is the Hospital rather than the claimant that is responsible in that regard.

Fourth, in the circumstances of the case, the Court finds that the applicant has failed to establish a *prima facie* case with high chances of success because whether the termination was unfair or not is a highly contested issue of law and fact as at the present interlocutory stage and the issue will properly be resolved after the full hearing of the dispute. Further as submitted for the respondent the Employment Act, 2007 provides for the remedy of compensation and in absence of a special circumstance established at the present interlocutory stage, the claimant has not established the irreparable injury he’d suffer if the interlocutory orders are not granted – and if reinstatement is granted as a final order, it will be with full retroactive benefits. Needless to repeat, the balance of convenience therefore favours the respondent’s taking of appropriate steps towards good service delivery in view of the vacancy in the office of the Director – ICT, the Nairobi Hospital, and flowing from the summary dismissal of the claimant.

In conclusion, the application dated 27.06.2019 and filed for the claimant on 27.06.2019 is hereby determined with orders:

- a) The application is dismissed with costs in the cause.
- b) The parties to take appropriate steps towards the efficient and effective hearing and determination of the main suit.

Signed, dated and delivered in court at **Nairobi** this **Friday 5th July, 2019.**

BYRAM ONGAYA

JUDGE