



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 5 OF 2019

STELLA NDUNGE KIMATU also known as

STELLA NDUNGE MUE.....CLAIMANT

-VERSUS-

TEACHER SERVICE COMMISSION.....RESPONDENT

RULING

Introduction

1. The application before the court is the claimant's Notice of Motion dated 7.1.2019 seeking the following orders:-

(a) Spent

(b) Spent

(c) Spent

(d) Pending the hearing and determination of the suit, the Honourable Court be pleased to order the Respondent to reinstate/restore and continue to pay the Applicant, the salary and allowances enjoyed before her demotion/salary cut under the position of Senior Teacher 1, Job Group L including the arrears accrued from the month of May 2018 to the date of reinstatement of the salary and allowances.

(e) Costs of this application be provided for.

2. The application is premised on the grounds set out are in the body of the motion and the supporting affidavit sworn on 7.1.2019. The gist of the motion is that the claimant was unlawfully and unfairly demoted and her salary reduced by almost half without prior consultation. She therefore seeks reinstatement to her former position and to continue earning the salary she was earning before the demotion in May 2018.

3. The respondent opposed the application through the Replying Affidavit sworn on 1.3.2019 by Pamela Ochieng, the respondent's Deputy Director in charge of HR Management and Development. She admitted that by letter dated 19.5.2015 that the claimant was promoted to Graduate Teacher Job Group K effectively 1.10.2014 after attaining a Bachelor of Education Degree from the University and thereafter to Job Group L in December 2017 on a common cadre promotion. It is however the respondent's case that the said promotion was irregular and inadvertently done because it disregarded the criteria set out in the Codes of Regulation for Teachers (CORT), Scheme of Service and administrative circulars regarding the respondent's promotion of teacher from one grade to another. That upon discovery of the irregular promotion, on or about 18.5.2018, the respondent reversed the same and regularised the error by placing the claimant in her correct job Group and adjusting her salary to reflect her correct designation in accordance with the CORT, Scheme of Service for Teachers and administrative circulars in place at the time.

4. It was further deposed that since July 2003, the respondent suspended the automatic promotions in recognition and upon presentation of higher qualifications due to exhaustion of vacancies in the establishment and the unavailability of funds. She denied that a demotion was done on the claimant and maintained that what was done was to regularize an irregular promotion in order to ensure that all teachers are treated equally. She therefore prayed for the application to be dismissed with costs.

5. The issue for determination is whether the applicant has made out a case to warrant reinstatement pending trial of the suit.

Applicant's Submissions

6. The applicant submitted that her application was one of mandatory injunction and relied on Court of Appeal decisions in *Kenya Breweries Limited & Another V Washington O. Okeyo [2002]eKLR* and *Africa Safari Club Ltd V Commissioner of Police & Others [2012]eKLR* to argue that mandatory injunction is normally granted if special circumstances are proved like if the case is clear and one that ought to be decided at once or if the defendant attempts to steal a march on the plaintiff so as to render the anticipated orders overtaken by events.

7. The applicant submitted that her case meets the said legal threshold because the respondent acted arbitrarily and unlawfully by down grading/demoting her reducing her salary from Kshs.69,021 to Kshs.40,995 without prior consultation. That such action complicated matters for her because she had loan obligations including a bank loan she was servicing. She further contended that rules of Natural Justice, and the ILO Conventions to which Kenya is a party, prohibits reduction or review of salary downwards without prior discussions between the employer and employee. She relied on *Mdisa Akinyi Ayoyi v Claudion Benaglia t/a Roya Tulia Resort [2018]eKLR* to support the foregoing contentions.

8. The applicant further submitted that her right to fair administrative action under Article 47(2) of the constitution was violated when she was demoted and her salary reduced without following a fair procedure including being given a prior hearing. She therefore concluded by contending that the said unlawful and unilateral determination and reduction of salary constitutes special circumstances to warrant granting of the order sought herein.

Respondent's submission

9. The respondent's case is that upon discovery of the irregular promotion of the claimant to Job Group L, she had a duty to rectify the irregularity at once.

10. She further submitted that the orders sought in the application are the same one sought in the main suit and as such, they cannot be granted at the interlocutory stage without according the parties an opportunity to argue the merits of the case. That the unlawfulness of the impugned decision to adjust the claimant's salary downwards can only be determined on merits upon the trial and not at the interlocutory stage. She relied on *Gladys Boss Shollei v Judicial Service Commission [2013]eKLR* to fortify the foregoing contention.

11. The respondent further submitted that the application has not met the threshold for granting interlocutory injunction as set out in *Giella vs Cassman Brown [1973]EA*. That an applicant must prove a *prima facie* case with a probability of success; the order will not be granted unless the applicant might suffer irreparable harm; and if the court is in doubt, the court to decide the application on a balance of convenience. She contended that the applicant has not proved a prima facie case with probability of success against the respondent. She further contended that any loss that might be occasioned by declining the order sought can be compensated by damages. She relied on *Dennis Nyagaka Ratemo v the Kenya Film Commission & Another (2014)eKLR* to emphasize the foregoing submission. She therefore prayed for the application to be dismissed with costs.

Analysis and determination

12. There is no dispute that the claimant presented a degree certificate to the respondent in 2014 and she was accordingly promoted to a Graduate teacher Job Group K and later promoted to Senior Teacher Job Group L earning Kshs.69,021 per month effective December 2017. There is also no dispute that on 18.5.2018, the claimant's promotion was reversed to the position of Primary Teacher II and her salary reduced to 38,050 per month.

13. The main issue for determination arising from the facts of the case and the submissions presented by both parties is whether the reversal of the promotions given to the claimant after graduating from the university, and the reduction of her salary from Kshs.69,021 to Kshs.38,050 per month was unfair and unlawful. The second issue, which is dependent on the answer to the first question, is whether, the claimant should be reinstated to her position of Senior Teacher Job Group L with the salary for that position.

14. The respondent has objected to the grant of reinstatement and salary for Job group L before trial. On the other hand the applicant contended that the unilateral change of her terms of service without prior consultation amounted to a special circumstances warranting the mandatory order sought because it was not only a breach of her contract of service but a violation of her constitutional right to fair administrative action as envisaged under Article 47(2) of the Constitution.

15. After careful consideration of the material presented to the court by both parties, it is vivid that the issues for determination in the instant motion are the same ones to be determined in the main suit. It is also clear that the orders sought in the motion are similar to the ones sought in the suit. It follows therefore that determination of the aforesaid issues herein will end up resolving the main suit before giving the parties an opportunity to tender their evidence for consideration on merits.

16. I agree with the respondent that the unlawfulness of the impugned decision by the respondent can best be determined after trial. I further agree with the respondent that any injury occasioned to the applicant if the order sought is withheld can adequately be compensated by damages because it can easily be quantified from the salary variation before and after the impugned decision. In *Dennis Nyagaka Ratemo v Kenya Film Commission & Another [2014]eKLR* this court hold that:

“even if the Respondent was to proceed on the basis of a flawed disciplinary process, the Claimant can have restoration after a full Court hearing by grant of reinstatement, reengagement to a position of equal value, the back salaries to the date of the suspension, and without loss of benefits, status and privileges. The Respondent if the orders are granted, would be deprived of the right to administer the contract of employment, and have the right to manage its business severely infringed by the Court on the

basis of prima facie facts.”

17. Having carefully applied my mind to the facts of the motion before me, the law and the precedents cited, I return that the orders sought in the motion herein will have to await the outcome of the trial of the main suit. The reason for that view being that the court has a duty to safeguard the right to fair trial, which accrues to both parties equally under the constitution of Kenya. The court is also under a duty to ensure that reinstatement which, in this suit, is tantamount to ordering specific performance, is done only on special circumstances and after hearing evidence from both parties.

Conclusion and Disposition

18. I have found that the main issues for determination in the motion revolve around the unlawfulness of the impugned decision of downgrading the claimant and reducing her salary; and whether the claimant should be restored to Job Group L with the corresponding salary. I have also found that the said issues are the same one to be determined in the main suit and the same orders in the motion are repeated in the suit. Finally I have directed that in order to safeguard the right to a fair hearing, the said issues for determination in the motion including the order for reinstatement shall await trial of the main suit especially bearing in mind that the court should not be quick to order specific performance unless the employer is acting mischievously to steal a March on the employee or if, unlike in the present case, the employee stands to suffer irreparable harm.

In the end, the application is declined but due to the circumstances of the case, I direct a date be fixed on a priority basis even today. Costs shall be in the cause.

Dated, Signed and Delivered in Open Court at Nairobi this 27th day of September, 2019.

ONESMUS N. MAKAU

JUDGE