



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2149 OF 2017

ROSEMARY ASEKA.....CLAIMANT

v

SOUTH AFRICAN AIRWAYS (PROPRIETARY) LTD.....RESPONDENT

RULING

1. Rosemary Aseka (applicant) instituted legal proceedings against South African Airways (Proprietary) Ltd (Respondent) under certificate of urgency on 30 October 2017 seeking

1. ...

2. **THAT** Pending the hearing and determination of this Application inter-parties, this Honourable court be pleased to make an order staying the dismissal of the applicant/Claimant as contained in the letter dated 19th October, 2017 and instead, direct that the applicant resume her official duties and earns her full salary without loss of any benefits.

3. **THAT** Pending the hearing and determination of the main suit/Claim inter-parties, this Honourable court be pleased to make an order staying the dismissal of the applicant/Claimant as contained in the letter dated 19th October, 2017 and instead, direct that the applicant resume her official duties and earns her full salary without loss of any benefits.

4. **THAT** upon hearing the main suit inter-parties, this Honourable court be pleased to make an order setting aside the dismissal of the applicant/Claimant as contained in the letter dated 19th October, 2017.

5. **THAT** the costs of this application be borne by the respondent.

2. On 13 November 2017, Nzioki wa Makau J ordered that the applicant's position of Finance Supervisor should not be filed pending *inter partes* hearing of the application on 5 December 2017.

3. The Respondent filed grounds of opposition and replying affidavit on 1 December 2017, and the applicant made oral submissions during that appearance.

4. The submissions from the Respondent and reply from the applicant was scheduled to 15 December 2017, but due to an accident involving the applicant's advocate, the hearing was rescheduled to 16 January 2018.

5. The Court has given due consideration to the material placed before it and the oral submissions by the

advocates on the record.

6. In the view of the Court it is not necessary to outline in this ruling the facts and arguments presented by the parties because of the now acceptable legal position on *reinstatement or stay of dismissal* in ordinary employment claims.

7. It is not in dispute that the applicant's contract was terminated through a letter dated 16 October 2017 but backdated to 13 October 2017.

8. In light of the fact that the dismissal was already a *fait accompli* by the time the applicant moved Court on 30 October 2017, and that in terms of section 49 of the Employment Act, 2007, reinstatement is a final remedy, and further considering that reinstatement should only be ordered in very exceptional circumstances, it is the view of the Court that granting an order staying the dismissal of the applicant would not be legally prudent or feasible at this interlocutory stage.

9. The Court is also alive to the fact that the applicant has not suggested that her contract was underpinned by any specific statutory or contractual provisions to warrant its interference at this stage.

10. The application dated 24 October 2017 is therefore dismissed.

11. Costs in the Cause.

Delivered, dated and signed in Nairobi on this 26th day of January 2018.

Radido Stephen

Judge

Appearances

For applicant Mr. Jaoko instructed by Nchoe, Jaoko & Co. Advocates

For Respondent Mr. Amolo instructed by Amolo & Kibanya Advocates

Court Assistant Lindsey