



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 465 OF 2018

VINCENT MWANZIA KIMWELE	1 <sup>st</sup> CLAIMANT
ESTHER WANJIKU KARANJA	2 <sup>nd</sup> CLAIMANT
NOBERT KIPLAGAT KIPKEMEI	3 <sup>rd</sup> CLAIMANT
JULIAN AKOTH NAMANDA	4 <sup>th</sup> CLAIMANT

v

ALMA NJERI	1 <sup>st</sup> RESPONDENT
JOSEPH DJEMBA OMEONGA	2 <sup>nd</sup> RESPONDENT
JAMES MUIRURI	3 <sup>rd</sup> RESPONDENT
THE BOARD OF TRUSTEES, FATIMA MATERNITY HOSPITAL	4 <sup>th</sup> RESPONDENT

**RULING**

1. The Claimants moved Court on 5 April 2018 against the 1<sup>st</sup> to 3<sup>rd</sup> Respondents seeking orders

1. ...

2. **THAT** an Order allowing the Claimants to access their work stations and offices at Fatima Maternity Hospital pending the hearing and determination of this application.

3. **THAT** there be a prohibitory order against the Respondents, their agents or servants restraining them from barring the Claimants from entering their work stations pending the hearing and determination of this application.

4. **THAT** there be a prohibitory order against the Respondents, their agents or servants restraining them from ejecting the Claimants from their work stations pending the hearing and determination of this suit.

5. **THAT** the Officer In-Charge, Ongata Rongai Police Station does enforce compliance with the above orders.

6. **THAT** the costs of this application be provided for.

2. When the application was placed *ex parte* before the Court on the same day, the Court directed that it be served for *inter partes* hearing on 9 April 2018.

3. On 6 April 2018, the Claimants filed an *Amended Memorandum of Claim* to include the *Board of Trustees*, Fatima Maternity Hospital as the 4<sup>th</sup> Respondent.

4. However, the application did not proceed as scheduled because the Respondents had not had time to file responses.

5. The application was therefore heard on 10 April 2018 after the 3<sup>rd</sup> Respondent had filed a replying affidavit in opposition to the application.
6. The Court has considered the motion, the supporting affidavit, replying affidavit and oral submissions.
7. Orders 1, 2 and 3 as proposed in the motion were seeking *transient orders* which lapsed by default when they were not granted at the *ex-parte* stage, and that therefore leaves only proposed order 4 as the one requiring the Court's determination.
8. The Claimants in the instant case allege that the 1<sup>st</sup> to 3<sup>rd</sup> Respondents ejected them from the work place without authority.
9. According to the affidavit in support of the application, the employer denied being privy to the ejection when confronted on the phone after police intervention.
10. In the replying affidavit, the Respondents exhibited a suspension letter dated 3 April 2018 to the Claimants advising them that the question of their ejection from the work place by fellow employees was under investigations and that they would be on suspension without pay for 30 days.

#### **Evaluation**

11. As a matter of law, it is doubtful whether there is any obligation upon an employer to give/provide work to an employee.
12. The obligation upon the employer is to pay wages as they fall due (see sections 17 and 18 of the Employment Act, 2007).
13. On the question of suspension with or without pay, common law/case law is clear that such suspension without pay would constitute breach of contract (see *McKenzie v Smith* (1976) IRLR 345).
14. Considering that the employer is seized of the question of the purported unlawful ejection of the Claimants from the work place, and that the obligation of the employer is to pay wages, the Court is of the view that the order sought should not be granted.
15. However, the 4<sup>th</sup> Respondent ought to take legal advice on the without pay suspension lest it wants to risk payments of substantial damages for breach of contract.
16. Motion dated 5 April 2018 is dismissed with no order as to costs.

**Delivered, dated and signed in open Court in Nairobi on this 11<sup>th</sup> day of May 2018.**

**RADIDO STEPHEN**

**JUDGE**

#### **Appearances**

For Claimants Mr. Ndolo instructed by Onyango Ndolo & Co. Advocates

For Respondents Mr. Miinda instructed by Riechi Miinda & Associates, Advocates

Court Assistant Lindsey