



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 725 OF 2017

LOICE MUTAI.....CLAIMANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

RULING

1. By a Notice of Motion dated 18th April 2017 and filed in court on 19th April 2017, the Claimant seeks an order directing the Respondent to reinstate her back to work.

2. The application, which is supported by the Claimant's application is based on the following grounds:

a) That the Claimant worked in the Respondent's Customs Department from 10th January 2011 until 3rd October 2013 when she was suspended;

b) That by her letter dated 17th October 2013, the Claimant responded to all the allegations made against her and later appeared before the Disciplinary Committee on 24th November 2015. However, the Respondent was yet to communicate its decision to the Claimant. The Respondent had also declined to supply the Claimant with the documents relied on in relation to her case;

c) That the Claimant's suspension had dragged on for long thus violating her rights under the Constitution and the law, as well as the Respondent's Employee Code of Conduct and guidelines on handling cases of public officers suspected of involvement in corrupt practices issued on 24th May 2010;

d) That it is in the interest of justice that the application be allowed as prayed.

3. In its grounds of opposition filed on 2nd May 2017, the Respondent states as follows:

a) That the Claimant seeks to prosecute her claim at the interlocutory stage;

b) That the application is misconceived as the Claimant has not been dismissed to warrant reinstatement under Section 12(3) of the Employment and Labour Relations Court Act;

c) That the determination as to the legality or otherwise of the delay in taking administrative action can only be explained by way of taking evidence during the hearing upon presentation of facts;

d) That there is *prima facie*, sufficient ground on the suspension letter for the Respondent to

exercise the right of disciplinary action against the Claimant;

e) That the Claimant has not demonstrated that she will suffer irreparable harm if the application is not granted;

f) That no exceptional circumstances have been demonstrated to warrant an order for reinstatement;

g) That the hearing of the claim would be rendered nugatory if the order for reinstatement is granted.

4. By consent of the parties, the application was canvassed by way of written submissions. In her submissions filed on 9th May 2017, the Claimant states that her right to fair administrative action under Article 47 of the Constitution and the Fair Administrative Action Act have been violated.

5. On its part, the Respondent submits that the relationship between the parties being one of employer/employee does not come within the purview of fair administrative action. In advancing its argument, the Respondent referred to the decision in *Edwin Nyamanga v Silver Holdings Ltd [2014] eKLR* where **Radido J** rendered himself as follows:

“The Court is of the view that the issue of the inter play between an employer’s decision to terminate the services of an employee ought to be resolved on the basis of Article 41 of the Constitution and the primary employment/labour relation statutes such as Employment Act, Labour Institutions Act and Labour Relations Act and not Article of the Constitution.”

6. I hold a similar view. I do not think that the enactment of Article 47 of the Constitution and the attendant statute, which deal with the exercise of power by public bodies, was intended to drag the employment relationship from the realm of private law into public law. I say so because within the Bill of Rights in which Article 47 is domiciled, resides Article 41 which deals specifically with labour rights. This is in addition to a robust regime of employment and labour laws. This provides adequate safeguards and the tendency to mar the demarcation between public law and private law in employment is, in my view, an unnecessary overload on our jurisprudence.

7. That settled, I will now consider the question whether the Claimant is entitled to the remedy of reinstatement at the interlocutory stage. The Claimant relied on two decisions by **Wasilwa J**, being *Evelyne Anyango Obondo v Kenya Revenue Authority [2017] eKLR* and *Phelgona Auma Onyango v Kenya Revenue Authority [2017] eKLR* in which the learned Judge terminated a delayed disciplinary process and ordered reinstatement.

8. It would appear that the current application is materially similar to the two cases cited above. I however and with much respect to my learned sister Judge, take a different view on this matter. To my mind, reinstatement is a summative remedy to be granted after hearing the full case of the parties and only in very exceptional circumstances.

9. No doubt, the Court has wide discretion to grant orders. Discretion must however always be exercised judiciously and with circumspection. This is more so because by ordering reinstatement, the Court is in effect, reversing a management decision. The Court must therefore tread with caution, especially at the interlocutory stage, when not all the facts are on the table. In my view, an employee seeking reinstatement must earn their stripes by going through a full trial.

10. The shortcut through an interlocutory application is a dangerous one as it could result in the reinstatement of an employee with a tainted employment record. Much worse, it could set a dangerous precedent where employees avoid the rigours of a full trial by presenting a pitiable case at the interlocutory stage.

11. It is clear to me that an employer who keeps an employee on suspension for an unduly long time has some explaining to do. This does not however relieve the employee of the burden of proving that they in

fact deserve the premiere remedy of reinstatement. To this extent, I fully associate myself with the decision in *Alfred Nyungu Kimungui v Bomas of Kenya [2013] eKLR* where **Rika J** declined to grant interim reinstatement.

12. For the foregoing reasons, the Claimant's application fails and is dismissed with costs in the cause.

13. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 13TH DAY OF OCTOBER 2017

LINNET NDOLO

JUDGE

Appearance:

Mr. Odhiambo for the Claimant

Mr. Chabala for the Respondent