



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**MISC. CAUSE NO. 5 OF 2017**

*(Before D. K. N. Marete)*

**SAMWEL KIPKORIR BUNGEI.....1ST APPLICANT**

**WILLIAM KIPROP TUWEI.....2ND APPLICANT**

**VERSUS**

**TINDERET TEA ESTATE (1989) LIMITED.....RESPONDENT**

**RULING**

This is an application by way of Notice of Motion dated 2nd October, 2017 seeking the following orders of court;

1. **THAT** the application be and is hereby certified as urgent and the same be heard on a priority basis.
2. **THAT** the Respondent be and is hereby directed to unconditionally reinstate the Applicants to their work stations within 14 days of this order.
3. **THAT** the Respondent be and is hereby directed to pay to the Applicants the arrears of their full salary for the period from February, 2016 and November, 2015 respectively to the date of full payment and to continue doing so as per the existing contract and the Employment Act.
4. **THAT in the alternative to (2) & above**, the Respondent be and is hereby directed to issue a formal communication to the Applicant regarding their employment status particularly their suspension and/or interdiction and they be paid arrears of their half-pay for the period from February, 2016 and November, 2015 respectively to the date of full payment and to continue doing so until the conclusion of the court case, namely, Kapsabet Principal Magistrate's Court Criminal Case No. 711 of 2016.
5. **THAT** costs of this application be borne by the Respondent.

It is grounded as follows;

- i. The Applicants are employees of the Respondent wherein they serve as general workers.
- ii. The Applicants were charged in court in February, 2016 vide Kapsabet Principal Magistrate's

Court Criminal Case No.711 of 2016.

iii. *The Applicants were unlawfully stopped from accessing their workplace and to-date no formal communication has been issued to them either in the form of interdiction, suspension or termination and have thus not been paid any salary over 20 months.*

iv. *The Applicants are entitled to be presumed innocent until proven guilty. They are also constitutionally entitled to have their human dignity respected and upheld; to be subjected to fair labour practices and to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*

v. *They were entitled to be suspended at half-pay if need be until conclusion of the case at which point they would be paid the balance if they were subsequently acquitted.*

vi. *To-date, the Respondent has failed to respond to their demands for no lawful cause.*

vii. *The Applicants have been greatly prejudiced by the uncertainty of their employment status as they have neither been suspended, interdicted nor their services terminated and they are not being paid their due salary despite being legally still employees of the Respondent.*

vii. *The Respondent is legally bound to strictly comply with the law with respect to employees facing criminal court cases.*

ix. *It is in the interest of justice and fairness that the orders sought are granted.*

x. *The application is made in good faith and without undue delay.*

xi. *It is thus just and expedient that this application be allowed.*

The respondent opposes the application in her Grounds of Opposition dated 16th October, 2017 set out as follows;

1. **THAT** *the Applicants have been away from work for periods of over one year each.*

2. **THAT** *reinstatement is a specific performance remedy that is only granted in the rarest of cases, and that this case does not stand out to be such case and thus such prayer for reinstatement should fail.*

3. **THAT** *this Application does not meet the threshold of the Application outlined in Rule 16 of the Industrial Court (Procedure) Rules (2010 now repealed).*

4. **THAT** *the Applicants have not lodged a claim that demonstrates existence of a prima facie case.*

5. **THAT** *the Applicants application is incompetent misconceived and bad in law.*

It is the respondent's further response that the applicant, who were her employees in the security department were arrested and charged in court through Nandi Hills Police Station as a consequence of incessant incidences of house fires at the respondent staff quarters. The applicant's, who worked and were paid on a daily basis have not reported back to work ever since. This is despite having being released on bail. Their application and the prayers therein are not deserving of any attention and therefore should be dismissed.

The respondent's further aver a case of incompleteness of this cause in that the applicant have not launched a claim as expression of a *prima facie* case. Further, the respondent submits that this application is a violation of rule 16 of the Industrial Court (Procedure) Rules, 2010 (now repealed) and does not meet its expectations.

The application came for hearing on 11th November, 2017 when counsel for the applicants submitted on a quest for a clarification of the employment status of the applicants. It is the applicant's case that they had been denied entry to the work place despite there being no letters for suspension, warning, interdiction or even termination. They further state that these issues were addressed to the respondent but she has been evasive.

The applicant further seeks to rely on the authority of **Daniel Kimondo Muteru vs. Teachers Service Commission, Employment and Labour Relations Court (Nyeri) Cause No. 25 of 2016** but did not elaborate on how this related to the application.

The applicant in opposition of the application submitted that the application is coaxed on repealed provisions of the procedure rules – those of 2010. Again, they have failed to raise a substantive claim thereby being unable to establish a prima facie case to warrant a grant of the application.

I agree with the respondent. This application is not a serious search into the issues it raises. If it is, then it falters on procedure. It is prudent that in instances like we are in, parties couple interlocutory application with substantive suits as a fall back and basis for determination of the substantive issues in dispute. It is trite practice and law that the issues prayed for in the application, to wit, reinstatement *et al* are not determinable at interlocutory level.

I am therefore inclined to disallow the application for lack of form and seriousness. The parties shall bear their cost of the application.

Delivered, dated and signed this 15th day of November 2017.

**D. K. Njagi Marete**

**JUDGE**

Appearances

1. Mr. Magut instructed by Magut & Sang Advocates for the applicant
2. Miss Kipyego instructed by Kibichiy & Company Advocates for the respondent