



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**  
**PETITION NO.121 OF 2016**

**[Formerly PETITION NO.6 OF 2016 – GARISSA HIGH COURT]**

**AHMED ADEN HIRE.....PETITIONER**

**VERSUS**

**NATIF JAMA.....1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF GARISSA.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Petition was filed at High Court, Garissa under Petition no.6 of 2016. The file was transferred to this Court under the current No.121 of 2016. The challenge to jurisdiction by the Respondents was thus addressed by the transfer.

2. The Notice of Motion filed by the Petitioner on 28<sup>th</sup> July 2016 and the Petition thereon is premised on the provisions of Article 1, 2, 10, 20, 22, 27, 28, 41, 47, 50, 73, 165 and 236 of the constitution, section 19 of the 6<sup>th</sup> schedule of the constitution; section 31 and 40 of the County Governments Act; Rules 19, 23, 24 and 26 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules and the substantive orders sought are that;

1. ...

2. Spent.

3. ...

7. *The Court be pleased to grant conservatory order to restrain and or prohibit*

*the 1<sup>st</sup> Respondent from terminating the services of the petitioner/applicant as the Executive Committee member for Environment, Energy, natural Resources, Wildlife Management and Tourism of the County Government of Garissa without regard to the provisions of section 41(2) of the Employment Act, 2007 as read together with the provisions of articles 47(2) and 236 of the constitution, 2010.*

3. The application is supported by the annexed affidavit of the Petitioner and on the grounds that the Petitioner was appointed the Respondents as part of the County Executive Committee and has served in various departments including Finance, Revenue, Economic Planning and County Affairs and later transferred to the current office of Environment, Energy, natural Resources, Wildlife Management and

Tourism.

4. That the Petitioner was taken ill immediately upon reporting to duty upon appointment to his current duties and was admitted at Nairobi South Hospital. While hospitalised, the Petitioner received letter of termination on the grounds of failing to report on duty. That this termination was heartless and contrary to fair labour practices, contrary to the law and the constitution. Due to termination of employment, the petitioner's legitimate expectations have been crushed, violated and infringed upon.

5. Further grounds are that the Petitioner has been subjected to unfair labour practices and mistreatment by the Respondents by the contravention of articles 41 and 47 of the Constitution and the actions of the Respondents render him jobless while still hospitalised and therefore causing him anguish and anxiety. The acts of the Respondents are in effect inhumane and infringe on the petitioner's right to dignity.

6. There is a good case to warrant the orders sought to prevent irreparable harm and loss.

7. In his affidavit, the Petitioner avers that upon his employment by the Respondents he became ill and was admitted into hospital and if the termination of his employment is not arrested he shall suffer irreparable loss and damage. The Petitioner is admitted at Nairobi South Hospital as evidenced by the general admission form.

8. In reply, the Respondents filed Grounds of Opposition and on the main set out that the Petitioner is a stranger and has no cause of action against the Respondents and he has failed to establish a prima facie case that has any chance of success as the Respondents cannot be stopped from employing qualified persons and there is no law that can compel the Respondents to continue paying the Petitioner whose employment contract has long come to an end. The Petitioner has come to Court with unclean hands and is not deserving of an injunction as he is guilty of concealment of material facts and material non-disclosure. The Petitioner has admitted that his employment contract has come to an end and cannot come to Court of equity seeking mandatory employment by the respondent. That the Petition is overtaken by events and the grant of an injunction is not tenable. Termination was on 25<sup>th</sup> July 2016 and the Respondents have since replaced him.

9. Further grounds in opposition by the Respondents are that the Petitioner has failed to satisfy the principles set out in the case of **Giella versus Cassman Brown & Co Ltd [1973] EA** as no prima facie case has been set out to warrant the grant of the orders sought. The substantive order (7) as set out cannot issue at this stage as it is final in nature. The Respondents acted legally, regularly and lawfully in the exercise of the statutory power under section 31 and 40 of the County Government Act in dismissing the Petitioner from employment. The Petitioner was dismissed following his failure to account for Kshs.20 million and gross misconduct by failing to report to the 1<sup>st</sup> respondent's letters in time.

10. That the application should be dismissed with costs.

11. Both parties made their oral submissions.

12. The Petitioner submit that the Respondents have not filed any affidavit to challenge the facts as set out by the petitioner. The Petitioner was never given notice or chance to a hearing before his termination which is contrary to fair administrative action. Section 31 of the CGA give the 1<sup>st</sup> Respondent power to terminate but due process must be followed. In **Philgona Atieno Ooko versus Governor Siaya County & 4 others [2016] eKLR** the Court held that under the CGA a governor must show due process. This was reiterated by the Court of Appeal in **CGA & Another versus Cecilia Wangechi**, that under section 31 of the CGA, the pleasure doctrine does not apply with regard to termination of employees of the county. The 1<sup>st</sup> Respondent must exercise power reasonably and without arbitrariness.

13. The Respondents submit that the only substantive issue that remains for the Court to address at this stage in terms and the orders sought is order (7) in the Notice of Motion. The order for reinstatement can only issue upon both parties being heard and not at the inter parte stage. Termination has taken effect in

this case and the orders sought and grounds thereto do not set out a prima facie case to justify the same as held in **Giella versus Cassman Brown & Co Ltd.**

14. The Respondents also submit that **County Government of Nyeri & Another versus Cecilia Wangechi [2015] eKLR**; the Court of Appeal held that section 31 of the CGA grant the governor the right to dismiss an employee where confidence is lost. The right to dismiss is therefore secured. Where a county executive committee members fail to account, the 1<sup>st</sup> Respondent has the right to dismiss. In such an instance, an interim reinstatement cannot be granted as held in **Tom Luusa Munyasya & another versus Governor, Makueni County & Another [2014] eKLR**. Reinstatement is a final order that should issue only upon hearing both parties. To reinstate means that an employee should receive a salary and if the Court makes a finding that the termination was lawful, the dues paid to an employee cannot be recovered unlike the case where an employer such as the Respondents are directed to pay damages or compensation.

### **Determination**

15. As noted above, the Petition herein commenced as Petition No.6 of 2016 before the high Court, Garissa. Parties were initially heard and interim orders granted;

- 1) *An order be extracted and served as per prayer 2 of the Notice of Motion as given by the court;*
- 2) *Those interim orders be extended pending hearing of the petition;*
- 3) *Parties be at liberty to exchange replies;*
- 4) *Parties have agreed to have the matter transferred to the Employment and Labour Relations Court – Nairobi;*
- 5) *No order as to costs; and*
- 6) *Mention in Nairobi Employment and Labour {Employment} Court on 28/9/2016.*

16. With the transfer of the matter before this court, a critical element was resolved. The jurisdiction of the Court over employment and labour relations. Also resolved was the Rules of procedure applicable with regard to matters before this court, the Employment and Labour Relations Court (Procedure) Rules, 2016.

The Petitioner is clear in his pleadings and in the Notice of Motion with regard to the Orders sought, termination had taken effect at the time he filed the Petition and the Notice of Motion. The letter of termination attached to the application is dated 25<sup>th</sup> July 2016 and the Petition and application were both filed on 28<sup>th</sup> July 2016. Employment of the Petitioner with the Respondents had therefore ceased at the time he came to Court and obtained the interim orders. The orders were from a Court without jurisdiction, which issue has since been addressed after the fact of the issuance of interim orders. Though parties have not gone into this issue, the implications of the same is severe to the nature of application and orders sought.

17. Section 12 of the Employment and Labour Relations Court Act give the Court power to make various orders and the order of reinstatement is singled out as requiring various considerations before being granted. Section 12(3) (vii) requires that;

- (vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or*

18. Some of the considerations and circumstances are outlined under section 49 of the Act and the Rules of the Court now requires at Rule 17(10) that;

(10) *Notwithstanding anything contained in this Rule, the Court shall not grant an ex parte order that reinstates into employment an employee whose services have been terminated.*

19. The rationale is that the order of reinstatement is a specific performance order with finality. To issue such an order in the interim is essentially to deny the other party a chance to their defence unless there exceptional circumstances that the Court is appraised of to warrant the grant of the same in the interim. In **Alfred Nyungu Kimungui versus Bomas of Kenya {2013} eKLR**; though the decision was made on 28<sup>th</sup> May 2013 before the new Rules of procedure came into force on 5<sup>th</sup> August 2016, the context is not lost where the Court held that;

*The Employment Act 2007 places the burden of justifying termination decision, and showing the fairness of procedure, on the employer. In rare cases where interim reinstatement may be granted, the termination must be shown to be patently unfair, that even the ultimate remedies of compensation or reinstatement with back wages, would not have redressed the injury suffered by the employee in the pendency of the full hearing. Certain forms of termination grounds, the kind that result in automatically unfair termination such as pregnancy, race, gender or religious discrimination, may warrant the rare exercise of the Court's discretion in issue of interim reinstatement. This is more so particularly under the new liberal Constitution of Kenya, which frees the hands of the Courts in administration of justice. [Emphasis added]*

20. Reinstatement of an employee who has been terminated before coming to Court should therefore not issue. This remedy is available upon hearing and determination of all issues and can issue together with payment of back wages or as the Court may deem appropriate. looking at the exceptional grounds upon which the Court may be moved so as to order a reinstatement at the *ex parte* stage, caution must be taken that the list set out under section 5(3)(a) though not exclusive, each case is addressed on its own merits;

*(a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status;*

21. In this case, the Petitioner avers that his employment was terminated by the Respondents while he was admitted at Nairobi South Hospital. The Petitioner in his Supporting Affidavit at paragraph 6 states that;

*I was taken ill immediately after reporting on duty in his new docket and was rushed to hospital and is presently admitted at the Nairobi South Hospital. Attached herewith and marked AA.2 is a copy of the general admission form.*

22. Annexure "AA2" is the *General Admission Form*. The form notes that the Petitioner was admitted in the hospital on 23<sup>rd</sup> July 2016. The person noted as responsible for the account is Ms Mizrah Mohd and related to the Petitioner as the wife.

23. The above dates and events leading to the termination of the Petitioner and without going into the merits of the Petition are important as in the letter of termination, the 1<sup>st</sup> Respondent notes that;

*This has reference to your letter dated 20<sup>th</sup> July 2016 in response to my previous letters to you. After careful consideration, I find your explanations unacceptable in view of the following;*

*a) regarding the disbursement of June 2013 recurrent funds, your failure to act on the issues discussed and agreed upon at the meeting of 29<sup>th</sup> June 2016 is unacceptable ...*

*b) your inability to make a timely response to my letter of 8<sup>th</sup> July 2013 represents a gross failure of duty ...*

*In addition to the foregoing matters, it is regrettable that you have been out of your station of work for over the last 2 weeks and have not assumed your new role as CEC for Environment and Energy. Of court, neither have I granted any approval to your being out of office, nor am I aware*

of any circumstances leading to such lengthy absenteeism from your official station of work.  
[Emphasis added].

24. Absence from work without approval by the employer is a settled ground for summary dismissal pursuant to section 44(4) of the Employment Act. However, where such absence is due to sickness, illness or poor health, section 30 of the Employment Act sets out the guidelines that an employee should follow.

25. In **Dorothy Ndung’u versus Machakos University, Cause No.1321 of 2016**; the Court in addressing the question of an employee who is taken ill held;

*Sick leave is a right of every employee. However, in asserting the right, section 30 of the Employment Act has given safeguards to ensure that the same is enjoyed within reasonable measures and that the employer does not visit injustice upon an employee who is sick and who requires urgent medical attention. the law is therefore set out in a manner that an employee suffering from illness, sickness or is unwell and thus unable to attend duty is given a reasonable latitude to enjoy the right to sick leave but in return, where absence from work is required, to ensure that the employer has knowledge of the same within reasonable time. Section 30 thus provides;*

*30 (1) After two consecutive months of service with his employer, an employee shall be entitled to sick leave of not less than seven days with full pay and thereafter to sick leave of seven days with half pay, in each period of twelve consecutive months of service, subject to production by the employee of a certificate of incapacity to work signed by a duly qualified medical practitioner or a person acting on the practitioner’s behalf in charge of a dispensary or medical aid centre.*

*(2) **For an employee to be entitled to sick leave with full pay under subsection (1), the employee shall notify or cause to be notified as soon as is reasonably practicable his employer of his absence and the reasons for it.***

*(3) For the purposes of sub-section (1) and (2) “full pay” includes wages at the basic rate excluding deductions from the wages allowable under section 19.*

[Emphasis added].

*Section 30 of the Employment Act must be read in full and not in portions. The section gives the right to sick leave and creates a duty upon the employee to production by the employee of a certificate of incapacity to work signed by a duly qualified medical practitioner or a person acting on the practitioner’s behalf in charge of a dispensary or medical aid centre. As this is a conditional right which causes an employee to be absent from work due to sickness and any unlawful absence from work is a serious subject of section 44(4) conditions for summary dismissal, section 30(2) goes ahead to create another duty upon an employee **the employee shall notify or cause to be notified as soon as is reasonably practicable his employer of his absence and the reasons for it.**  
[emphasis added].*

26. It is therefore not sufficient for the Petitioner herein to submit that the Respondents were aware that he was taken ill and that the 1<sup>st</sup> Respondent visited him in hospital. Far from it, the law upon which the Petitioner is seeking to rely upon to assert his right to a reinstatement is specific in terms of his duty and obligation to inform the employer as to the reason(s) of his absence from work. Where such reasons relate to sickness, section 30 of the Employment Act apply. Did the Petitioner comply?

27. The annexure “AA.2” attached to the supporting affidavit is not the kind of medical certificate required to be sent to the employer. Such a document where available is not for the consumption or attention of the court, the employer should be the primary recipient of the medical certificate as soon as is reasonably practical for the employee to submit the same. even where the employee is not reasonably and practically able to submit such a medical certificate, the law has made it flexible for a third party to make the submission to the employer for and on behalf of the employee as held in **Peris Nyambura Kimani**

**versus Dalbit Petroleum Group, Petition No.63 of 2014;**

*.....the Petitioner stated in her affidavit that she travelled back from abroad on 1<sup>st</sup>October 2014 and on 2<sup>nd</sup> had an appointment with her doctor as she was having a complicated pregnancy. She was given 6 days sick off and caused to be notified of her employer by the 6<sup>th</sup> of October 2014. She has attached her certificate of incapacity. [Emphasis added].*

28. In this case, I find no effort by the Petitioner to set out why he was absent from work and what exceptional circumstances existed or continue to exist to warrant the grant of the orders of reinstatement pending the pending of the main petition. Even where the Petitioner has cited his admission to Nairobi South Hospital as the reason of absence from duty, such admission was on 23<sup>rd</sup> July 2016 but his absence is stated to have been since two (2) weeks prior to such a date. No effort is made to explain the absence in the intervening period and what efforts were made to bring the hospital admission to the attention of the employer as soon as was practically possible. In the admission form, the Petitioner has set out his wife as the person settling the accounts. Indeed such a person is allowed to notify the employer of the petitioner's circumstances. This was not done.

29. To therefore allow a reinstatement in the interim and based on the above analysis and matters as set out would be prejudicial to the Respondent as the employer.

**I therefore find;**

**(a) The application by the Petitioner lacks merit, the same shall not be allowed at this stage. This application is therefore dismissed. Parties shall be heard on the main petition; and**

**(b) As the Petitioner has enjoyed interim orders, and the Respondents have complied with the same, there shall be no orders as to costs.**

**Delivered in open court at Nairobi this 5<sup>th</sup> day of December 2016.**

**M. MBARU**

**JUDGE**

In the presence of:

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