



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO.E003 OF 2022

RUTH WANJIKU MURAYA..... 1ST APPLICANT/CLAIMANT

GRACE WAITHERA MACHARIA..... 2ND APPLICANT/CLAIMANT

BORU GUYO MOLE..... 3RD APPLICANT/CLAIMANT

JOAB OOKO.....4TH APPLICANT/CLAIMANT

BENJAMIN MUTUKU NZIOKA.....5TH APPLICANT/CLAIMANT

VERSUS

JUDICIAL SERVICE COMMISSIONRESPONDENT

(Being an application to preserve the filling of the positions of the Applicants/Claimants of Accountants)

RULING

1. The applicants filed a notice of motion application dated 5th January, 2022 on 7th January, 2022, seeking an order in the following terms: -

1. **THAT** this Application be certified as urgent and the service of the same be dispensed with in the first instance and the same be heard on priority basis.

2. **THAT** this Honourable Court be pleased to issue an interim order directed to the respondent to deem the applicants were reinstated employees upon acquittal on 10.1.2020 and are entitled to payment of salary arrears withheld from the date of interdiction to acquittal pending the hearing and determination of this application.

3. **THAT** this Honourable Court be pleased to issue an order directed to the respondent not to fill the positions of the applicants herein of accountants pending the hearing and determination of this suit.

4. **THAT** this Honourable Court be pleased to dispose of this matter within 60 days from the date of filing owing to its urgency.

5. **THAT** this Honourable Court be pleased to certify this suit as urgent, be determined by documentary evidence and the Applicant/Claimants be granted leave to file affidavit evidence and written submissions after close of pleadings.

6. **THAT** the cost of this Application be provided for.

2. The application is founded on grounds set out on the face of the notice of motion to wit; that the applicants were interdicted on 5th November, 2013 following criminal charges instituted against them on 15th November, 2013 in Criminal Case No. 1457 of 2013.

3. That the criminal trial proceeded and the applicants were acquitted on 10th January, 2020 by the Chief Magistrate.

4. That the respondent subsequently dismissed the applicants on 22nd December, 2021 irregularly, since the charges against them had been determined by the trial Court by dint of provisions of Rule 18 (3) of 3rd Schedule of Judicial Service Commission Act of 2011.

5. That the primary relief sought by the applicants in the main suit is an order for reinstatement which relief is statutorily time bound and hence the applicant would suffer irreparable harm if the relief sought is not granted pending the hearing and determination of the suit.

6. That the applicants seek therefore, the positions they previously held to be preserved and not be filled. That the same have not been filled for a period of eight (8) years and so the respondent stand to suffer no prejudice if the interim orders sought are granted.

7. That the applicants were dismissed on the basis of new charges not canvassed in the criminal trial, which was a denial of justice.

8. The application is supported by an affidavit of the 1st applicant Ruth Wanjiku Muraya, who deposes that the applicants upon acquittal were deemed reinstated and are entitled to payments of arrear salary from the date of interdiction up to the date of acquittal. That the disciplinary process commenced vide a show cause letter dated 6th August, 2021 after acquittal was a scheme to constructively dismiss the applicants from employment and not to pay them the arrear salary.

9. The application is opposed vide a replying affidavit of the Chief Registrar of the Judiciary, Anne A. Amadi, who deposes that the respondent opposes the grant of the interim reliefs sought.

10. That the applicants were interdicted on 5th November, 2013 following issuance of an investigation report on the theft of Kshs 80,013,302.

11. That subsequently, the applicants were charged with the offence of conspiracy to commit a felony contrary to Section 393 of the Penal Code.

12. That the disciplinary process was held in abeyance until the completion of the said criminal proceedings in case No. 2457 of 2013.

13. That the 1st, 3rd, 4th and 5th applicants were acquitted by a judgment delivered on 10th January, 2020. However, fresh disciplinary proceedings were instituted against the applicants on 6th August, 2021. That the applicants were called upon to show cause why they should not be dismissed from service on account of gross misconduct and negligence of duty leading to the loss of Kshs 80,013,302.

14. That the disciplinary process instituted by Judicial Service Commission does not derogate from the fact of acquittal provided the charges are not substantially the same.

15. That Section 18(3) part IV of the 3rd Schedule of the Judicial Service Act, No. 1 of 2021 provides that: -

“An officer acquitted of a criminal charge shall not be dismissed or otherwise punished on any charge upon which he has been acquitted, but nothing in this paragraph shall prevent their being dismissed or otherwise punished on any other charge arising out of their conduct in the matter, unless the charge raises substantially the same issues as those on which they have been acquitted.”

16. That these matters may only be interrogated during the hearing of the suit on the merits and cannot be pre-determined at the interlocutory stage. That furthermore, the question whether the applicants are entitled to reinstatement and payment of arrear salary from date of interdiction to the date of acquittal is contingent on a two prolonged inquiry by the Court namely: -

(a) Whether the disciplinary process was fair and lawful

and

(b) Whether there was a valid reason to terminate the employment of the applicants.

17. That the application is premature, and therefore misconceived and same be dismissed with costs.

18. The applicants filed supplementary affidavit in which they stated that no evidence has been disclosed by the respondent to demonstrate that the dismissal of the applicants from their employment was valid.

19. That the outcome of the criminal case No. 1457 of 2013 was binding on the respondent under Regulation 18(3) of the Judicial Service Commission Act, 2011.

20. That in terms of Part 4. Clause 4.2 (f) of the Public Service Disciplinary Manual of May, 2016, the applicants are entitled to payment of salary arrears.

21. That under Section 16(3) of Judicial Service Act, 2011, an acquitted officer ought to receive the salary withheld unconditionally and the applicants were declared reinstated.

22. That in terms of Regulation 18(3), the respondents were barred from initiating disciplinary process against acquitted officers over the same issue which was substantially determined by the criminal Court.

23. That the application be granted as prayed.

Determination

24. The issue for determination is whether the applicants have satisfied the prerequisites of granting a mandatory injunction to reinstate the applicants to their previous employment with payment of full arrear salaries from date of interdiction.

25. The principles to guide the Court are well settled in the cases of *Giella –vs- Cassman Brown Limited [1978] E.A.* and in the case of *Mrao –vs- First American Bank & Another*. That the applicant must-

(a) establish a prima facie case with a probability of success.

(b) show he/she shall suffer irreparable harm incapable of redress by way of damages if the suit is eventually successful, and

(c) in case of doubt, where the balance of convenience lies.

26. The threshold is more onerous in the case of a mandatory injunction as it seeks to introduce that which is no longer in place and/or has been overtaken by events.

27. There is for example no explanation why the applicants did not approach Court before the disciplinary process was concluded and the termination effected.

28. There is also a fourth element introduced by the Supreme Court in the case of *Gatirau Munya –vs- Dickson Mwenda Githinji & 2 others [2014] eKLR*, that in matters concerning public officers and offices, the Court must weigh where public interest lies before issuing interim injunctive and/or conservatory reliefs.

29. It is the Court's finding that in the present case, since the termination of employment has already taken place, the facts in dispute must await determination on the merits. That indeed, the applicants have not demonstrated that they would suffer irreparable harm not capable of redress by way of damages in the event they are successful in the main suit.

30. The applicants being public officers in sensitive accounting sector, the balance of convenience and public interest leans in favour of the respondent.

31. Accordingly, the application lacks merit and is dismissed with costs in the cause. The suit to take its normal course on determination of the merits of the same.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF APRIL, 2022.

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. They have waived compliance with *Order 21 rule 1 of the Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by *Article 159(2)(d)* of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under *Article 48* of the Constitution and the provisions of *Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)* which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MATHEWS N. NDUMA

JUDGE

Appearances

Applicants in person represented by 1st Applicant.

M/s Saina for Respondent

Ekale – Court Assistant.



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