



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, MURGOR & ODEK, JJA)

CIVIL APPLICATION NO. 10 OF 2019

BETWEEN

ELIZABETH AGUTU ODHIAMBO.....APPLICANT

AND

WAUMINI SACCO SOCIETY LIMITED.... RESPONDENT

(Being an application for stay of execution of the Ruling of the Employment and Labour Relations Court at Nairobi (O. N. Makau J.) delivered on 20th December 2018 in ELRC Constitutional Petition No. 99 of 2018)

RULING OF THE COURT

1. At all material times in this matter, the applicant, *Elizabeth Agutu Odhiambo*, is an employee of the respondent in the position of marketing manager. Her contract of employment is dated 15th September 2017 renewable with the current one ending by effluxion of time on 1st October 2019.
2. On or about 26th September 2018, the applicant filed a constitutional petition against the respondent alleging breach of *Article 41 (1) and (2)* of the Constitution that confer upon her a right to fair labour practices. *Article 41 (1)* provides that “every person has the right to fair labour practices.”
Article 41 (2) (a) stipulates that every worker has a right to fair remuneration.
3. The grievance of the applicant against the respondent is that being the marketing manager of the respondent company, by letter dated 19th September 2018, she was demoted from the position of marketing manager and redeployed to the position of supervisor and then transferred from Nairobi to Nakuru effective 1st October 2018. That her monthly salary was also reduced from Ksh. 110,000/= to Ksh. 75,000/=.
4. The applicant contends that the demotion, transfer and salary reduction violate her constitutional rights under *Article 41 (1) and (2)* of the Constitution. It is further contended that through the aforesaid demotion, the respondent company violated its own human rights policy more particularly **Clauses 6.13.1 and 6.11.1**.
5. Aggrieved by the demotion, transfer and salary reduction, the applicant filed a Notice of Motion before the trial court seeking conservatory orders *inter alia* an injunction restraining the respondent company from removing her from the position of marketing manager. She also sought an order directing the respondent company to retain her in the position of marketing manager without any reduction of salary and without breaching the contract of employment between the parties. An order was also sought barring the respondent from recruiting any other person to the position of marketing manager.
6. Upon hearing the parties, by a ruling dated 20th December 2018, the learned Judge dismissed the application for injunctive orders. In dismissing the application, the Judge in relevant excerpts stated:

“24. ...I see no public interest in granting the orders sought by the applicant and as such the prayer for conservatory relief does not arise.....

30. After failure by the applicant to prove a prima facie case with probability of success, there is no need of considering whether or not the applicant stands to suffer irreparable harm. Irreparable harm is one which cannot be quantified in monetary terms or one which cannot adequately be compensated by damages. Considering the facts of this case, even if the petitioner had established a prima facie case with probability of success, I do not think injunction would have issued because the injury occasioned by redeployment and transfer can still be quantified into monetary terms.....

35. I have found that the applicant has not proved that her rights under her contract of service have been or are about to be infringed by the respondent through her redeployment, transfer and recruitment of a qualified person to fill the vacant position of market manager. I have also found that the applicant has not proved that she will suffer irreparable harm if the injunction order is withheld...”

7. Dissatisfied by the ruling of the trial court, the applicant has moved to this Court by way of Notice of Motion dated 8th January 2019 under **Rule 5 (2) (b)** of the **Rules of this Court** seeking *inter alia* an injunction restraining the respondent from removing the applicant from her position of marketing manager in accordance with her contract of employment dated 15th September, 2017. The applicant also seeks an order restraining the respondent from enlisting or recruiting any other person to the position of marketing manager pending the hearing and determination of an intended appeal.

8. The grounds in support of the Motion is that the intended appeal has overwhelming chances of success and is no doubt arguable as evident from the draft memorandum of appeal attached to the application. It is further averred the applicant stands to suffer substantial loss and or irreparable damage; that the intended appeal shall be rendered nugatory and irrelevant as the respondent may recruit and enlist another person to the position of marketing manager.

9. The instant Motion is supported by the applicant’s own affidavit. It is averred that the learned Judge’s finding that the applicant can adequately be compensated in damages is erroneous; that in the absence of an injunctive order restraining the respondent from recruiting another person to the position of marketing manager, the said position will no longer be available to the applicant and this is an irreparable loss. That if an injunctive order is not granted, the applicant will lose her position as marketing manager in the respondent company and her career progression will have been dented with little prospects of rising to the same position in the respondent company or any other company.

10. In the draft memorandum of appeal, it is urged the learned Judge erred *inter alia* in disregarding the applicant’s employment contract dated 15th September, 2017 (and which contract is valid until 1st October 2019); that the Judge erred in finding the applicant can be compensated in damages while the truth is that failing to grant the injunctive orders the applicant will be replaced in her position as marketing manager; that the Judge erred in making final orders in an interlocutory application; the Judge erred in adducing evidence on behalf of the respondent; the Judge erred by keeping a blind eye to the fact that the respondent had openly breached **Articles 41 (1) and (2)** of the Constitution and **Section 6.13.1** and **6.11.1** of the respondents human resource policy; that the Judge erred in delivering a ruling which was contradictory; and the Judge erred in finding that disputes arising from private claims from private citizens cannot qualify for grant of the injunctive orders sought by the applicant.

11. At the hearing of the instant application, learned counsel **Mr. N. O. Sumba** appeared for the applicant while learned counsel **Mr. Muendo M. Uryu** appeared for the respondent. Both counsel filed list of authorities in this matter.

APPLICANT’S SUBMISSIONS

12. Counsel for the applicant rehashed the background facts leading to the dispute between the parties. He reiterated the grounds in support of the application as stated in the supporting affidavit and as per the draft memorandum of appeal. Counsel urged this Court to make an order for *status quo ante* to be maintained pending the hearing and determination of the intended appeal. According to the applicant, the *status quo* is that the applicant remains the marketing manager of the respondent company with full pay until the hearing and determination of the intended appeal. It was submitted the intended appeal has been filed **being Civil Appeal No. 41 of 2019**.

13. On the merits of the instant application, counsel submitted that the intended appeal is arguable and has a high probability of success. That there are numerous arguable points as stated in the draft memorandum of appeal. Of significance is that the Judge erred in law in failing to find the respondent company was in breach of **Article 41 (1) and (2)** of the Constitution; that the Judge erred and failed to find the respondent had violated the applicant’s right to fair labour practice; and the Judge erred and failed to find the respondent violated its own human resource policy.

14. On the issue of irreparable injury, it was submitted that the Judge erred in failing to find that the applicant’s image and reputation will irreparably be dented and damaged if an injunctive order is not issued; that failure to grant the injunction sought would send a signal to prospective employers that the applicant was demoted and is a non-performer; that such a signal irreparably dents the career prospects of the applicant amongst other potential employers.

15. Of significance to this matter, the applicant’s counsel stated that subsequent to the present application being filed, on 13th June 2019, the respondent company has terminated the applicant’s contract of employment and presently, the applicant is out of employment.

RESPONDENT’S SUBMISSIONS

16. The respondent in opposing the instant application submitted that the orders sought have been overtaken by events. That it is true the applicant’s contract of employment has been terminated; that there is no valid and existing contract between the parties upon which this Court can issue restraining or injunctive orders. That indeed, on 13th June 2019 the respondent company invoked Clause 4 of the applicant’s contract of employment and terminated the same by giving her one-month salary in lieu of notice.

17. On the merits of the instant application, the respondent submitted the applicant had not established that any injury or loss suffered is irreparable and incapable of compensation by way of damages. It was submitted that even if the applicant was successful in her appeal, she can be compensated by way of damages. It was further submitted the applicant's contract of employment (if still valid) will come to an end on 1st October, 2019 and the respondent is not bound to renew the contract. Interestingly, counsel for the respondent also urged us to maintain the *status quo*. However, as far as the respondent is concerned, the *status quo* is that the applicant's contract of employment has already been terminated and a new person has already been appointed and confirmed to the position of marketing manager of the respondent company. Counsel submitted that the learned Judge correctly analyzed the facts of the case and applied the correct principles of law as enunciated in the case of **Giella -v- Cassman Brown & Company Ltd (1973) EA 358** in declining to grant the injunctive orders sought by the applicant.

ANALYSIS and DETERMINATION

18. Before us is a Notice of Motion dated 8th January 2019 seeking an injunction to restrain the respondent company from removing the applicant from her position of marketing manager pending the hearing and determination of an intended appeal. The Motion also seek an order restraining the respondent from recruiting any other person to the position of marketing manager.

19. This Court in the case of **Charter House Investments Ltd -v- Simon K. Sang and others, Civil Appeal No. 315 of 2004** stated:

“Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance of the status quo. The award of a temporary injunction by courts of equity has never been regarded as a matter of right, even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them and to third parties. In the Giella case (supra) the predecessor of this Court laid down the principle that for one to succeed in such an application, one must demonstrate a prima facie case with reasonable prospect of success; that he stands to suffer irreparable damage which cannot be compensated for by an award of damages; and that the balance of convenience tilts in his favour.”

20. In this application, we have considered the Notice Motion dated 8th January 2018, the grounds in support and opposition thereto, submissions by counsel and the authorities cited. In **Stanley Kang'ethe Kinyanjui -v- Tony Ketter & 5 Others, Civil Application No. NAI 31/2012**; this Court examined the manner in which it exercises its jurisdiction in relation to applications brought under **Article 5 (2) (b) of the Rules** of this Court and remarked as follows:

“[I]n dealing with Rule (5) (2) (b), the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the Judge's discretion to this Court”

21. This being a similar application, we must be satisfied of the twin guiding principles that the intended appeal is arguable; it is not frivolous and that unless a stay or injunction is granted, the appeal or the intended appeal, if successful, would be rendered nugatory – see **Githunguri -v- Jimba Credit Corporation Ltd. (No. 2) (1988) KLR 838; J.K. Industries Ltd. -v- Kenya Commercial Bank Ltd. [1982 – 88] 1 KAR 1088** and **Reliance Bank Limited (In Liquidation) -vs-Norlake Investments Limited – Civil Application No. 98 of 2002 (unreported)**.

22. As to whether the intended appeal is arguable, it is sufficient if a single *bona fide* arguable ground of appeal is raised. (See **Damji Pragji Mandavia -v- Sara Lee Household & Bodycare (K) Ltd, Civil Application No. NAI 345 of 2004**). Further, an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court; and one which is not frivolous. (See **Joseph Gitahi Gachau & Another -v- Pioneer Holdings (A) Ltd & 2 Others, Civil Application No. 124 of 2008**)

23. In this matter, the draft memorandum of appeal annexed to the instant application contains a raft of grounds and alleged errors of law and fact by the learned Judge. For instance, whether the learned Judge erred in finding that **Article 41 (1)** of the Constitution was not violated is an arguable point. Our perusal of the numerous grounds enumerated in the draft memorandum of appeal lead us to find that indeed the intended appeal is arguable.

24. On the nugatory aspects, we have taken into consideration the submission by both parties that the applicant's contract of employment (if still valid) will lapse through effluxion of time on 1st October 2019. We take judicial notice that **Civil Appeal No. 41 of 2019** which has been filed in this matter may be heard and determined after 1st October 2019. If we grant the injunctive orders sought in this application, this Court will in essence be renewing and extending the applicant's contract of employment beyond 1st October 2019. We are convinced that it would be improper for us to exercise our discretion to grant an injunctive order whose effect is to extend and or renew the applicant's contract of employment. In this context, we are persuaded by the merits of the dicta in **National Bank of Kenya Ltd - v- Pipeplastic Samkolit (K) Ltd & Another, Civil Appeal No.95 of 1999 (2001) KLR 112 (2002) EA 503**, where it was held that:

“A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved”

25. The applicant strongly submitted that the intended appeal shall be rendered not only an academic exercise but nugatory if the injunctive order sought is not granted. The applicant submitted if an injunction is not granted, the respondent company will recruit another person to occupy the position of marketing manager; that the said position will no longer be available to the applicant; that the reputation of the applicant will irreparably be dented as it will go on record that she was demoted; that third parties will think the applicant was demoted due to non-performance yet she has had positive evaluation in her job performance. Based on the irreparable damage that will ensue to the applicant's reputation and career prospects, the applicant submitted that the Judge erred in finding damages will adequately compensate the applicant for any loss or injury suffered.

26. We have considered the issue whether the applicant stands to suffer irreparable loss that cannot be compensated by way of damages. The relationship between the respondent and the applicant is one of employer/employee. Breach of contract of employment is *prima facie* compensated by way of damages. The law is well settled on the measure of damages for breach of a contract of employment. We have also taken into account that the applicant's contract of employment (if still valid) will come to an end on 1st October 2019. We are satisfied the learned Judge did not err in finding that any injury or loss suffered by the applicant can adequately be compensated by way of damages. We find the applicant has not satisfied us that the intended appeal will be rendered nugatory if the injunction sought is not granted.

27. On balance of convenience, we have once again considered that the applicant's contract of employment, (if still valid) will come to an end by effluxion of time on 1st October 2019. As stated above, this Court cannot extend or renew the applicant's contract of employment through an injunctive or restraining order. Even if the applicant were right that her reputation stands to be dented, damages for injury to reputation can still be pleaded and proved. Guided by this fact, the balance of convenience tilts in favour of us declining to grant the injunctive and restraining orders sought in the application.

28. For the foregoing reasons, we find that the learned Judge did not err in failing to grant the injunctive orders sought. On our part, we likewise decline to grant the injunctive and restraining orders sought in the Notice of Motion dated 8th January 2019. Accordingly, the Notice of Motion dated 8th January 2019 has no merit and is hereby dismissed with costs.

Dated and delivered at Nairobi this 19th day of July, 2019

M. K. KOOME

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

J.OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR