



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO E6579 OF 2020

JOHN MWAKOMA KISOMBE.....CLAIMANT

VERSUS

INCHCAPE KENYA LIMITED.....RESPONDENT

RULING

1. In his Notice of Motion dated 4th October 2021, the Claimant seeks the following:

- a) A conservatory order stopping the Respondent from filling the position of Service Advisor, pending the hearing and determination of the main claim;
- b) An order directing the Respondent to file a statement of audited accounts from January 2019 to the date of filing of the Motion;
- c) An order directing the Respondent to produce the following documents:
 - i) A list of all advertised jobs inclusive of respective titles and roles between January 2019 and 4th October 2021;
 - ii) A list of all titles and roles declared redundant between January 2019 and 4th October 2021;
 - iii) A list as relates to all vacancies advertised where employment was conferred between January 2019 and 4th October 2021, indicating whether the employee hired was working internally for the Respondent or was hired as an external candidate;
 - iv) A list of all terminations, including the reasons for termination, titles and roles between January 2019 and 4th October 2021; and
 - v) A copy of the Human Resource Policy, and all other policies and practices applicable at the Respondent during the Claimant's employment.

2. The Motion is supported by the Claimant's own affidavit and is based on the following grounds:

- a) A conservatory order restraining the Respondent from hiring a replacement will allow the Claimant's claim to be heard and determined in full in relation to the prayers sought before the Court;
- b) An order compelling the Respondent to produce the statement of accounts to verify its claim as relates to financial difficulties being the root cause of termination will be verified by the Claimant and the Court, as a fair reason in instituting the redundancy against the Claimant;
- c) An order of production of the listed documents will enable scrutiny of the Respondent's practices and compliance with the law, assessment of possibility of improper practices as suspected by the Claimant. A disclosure of the applicable Human Resource Policy will enable assessment as to whether the Respondent conducted itself in compliance with the requested policy and the law;
- d) The Respondent's action of hiring a person in the role that the Claimant served, while knowing that part of the Claimant's claim is for reinstatement, is evidence of bias, malice, intent to conceal material facts and an abuse of the court process.

3. The Respondent's response is by way of a replying affidavit sworn by its Human Resource Manager, Judy Ndegwa.
4. Ndegwa depones that the termination of the Claimant's employment on account of redundancy was justifiable as the Respondent was facing financial difficulties due to the COVID-19 Pandemic, increased taxes and reduced demand for its products.
5. Ndegwa further depones that the Respondent held a consultative meeting with its employees on the redundancy; appropriate notices were issued and the Claimant was paid his terminal dues.
6. Regarding recruitment in the year 2021, after the Claimant's exit, Ndegwa states that in the said year, the general financial outlook of the Respondent improved due to relaxation of the COVID-19 containment measures as well as increased demand of the Respondent's products. She however points that this improvement did not fully restore the Respondent's financial position.
7. Ndegwa goes on to depone that in September 2021, more than a year after the Claimant's position had been declared redundant, the Respondent issued an internal advertisement for positions within the organization. She states that the positions offered were of a different nature from those declared redundant in July 2020 and attracted a lower salary.
8. Ndegwa points out that substantial time had passed since termination of the Claimant's employment on account of redundancy and adds that it would not be in the interest of justice to restrain the Respondent from recruiting employees.
9. Regarding the Respondent's financial statements, Ndegwa states that the audit process was ongoing.
10. Ndegwa takes the view that production of the list of terminations as requested by the Claimant would lead to disclosure of names and personal information of persons who are not party to these proceedings, in breach of the right to privacy and other rights under the Data Protection Act, 2019.
11. Ndegwa further states that the information sought by the Claimant relates to and covers a period extending beyond that covered by the Claimant's cause of action.
12. The first prayer made by the Claimant in this Motion is for a conservatory order stopping the Respondent from filling the position of Service Advisor, pending the hearing and determination of the main claim.
13. This prayer falls within the ambit of interlocutory injunctions and the threshold for granting of such an order was established in ***Giella v Cassman Brown [1973] EA 358***.
14. In its decision in ***Nguruman Limited v Jan Bonde Nielsen and 2 others [2014] eKLR*** the Court of Appeal restated this threshold as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

(a) establish his case only at a prima facie level,

(b) demonstrate irreparable injury if a temporary injunction is not granted, and

(c) allay any doubts as to (b) by showing that the balance of convenience is in his favour. These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.”

15. The Claimant's employment was terminated on 9th July 2020 and he filed his Notice of Motion on 6th October 2021. Between the two events, a period of more than a year had lapsed. The Respondent, being a going concern is expected to have continued to carry on its operations after the Claimant's exit.

16. In its decision in ***Olive Ann Wahura Thiong'o v World Wide Fund for Nature-Regional Office for Africa [2016] eKLR*** this Court stated the following:

“...an order barring an employer from carrying out a management mandate such as recruitment should be given after much reflection and with circumspection.”

17. The intervening delay in bringing the present Motion, which the Claimant did not explain, leads to the inevitable conclusion that the Claimant's plea in this regard is an afterthought. This prayer is therefore declined.

18. With respect to the prayer for production of documents as listed by the Claimant, I have this to say; the documents sought are necessary for the Claimant to fully prosecute his case.

19. The Respondent is therefore directed to produce these documents within the next twenty-one (21) days from the date of this ruling.

20. The costs of this Motion will be in the cause.

21. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF FEBRUARY 2022

LINNET NDOLO

JUDGE

APPEARANCE:

MR. OMAKALWALA FOR THE CLAIMANT

MR. ANGWENYI FOR THE RESPONDENT