



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO 137 OF 2016

IN THE MATTER OF ALLEGED VIOLATION AND INFRINGEMENT OF THE RIGHTS AND FREEDOMS IN ARTICLES 2, 3, 10, 19(1) & (2), 20(1) & (2), 21(1), 23, 25(c), 27(1), (2), (3) & (5), 29(a), (c), (d) & (f), 30, 33(1)(a), 35(1)(b), 41(1) & (2) (b), 47(1) & (2), 48, 50(1) & (2)(d) & (e), 73, 75,258(1) and 259(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED VIOLATION OF THE EMPLOYMENT ACT SECTIONS 5, 6, 9, 10, 28 & 40

AND

IN THE MATTER OF ALLEGED VIOLATION OF THE EAPCC HUMAN RESOURCES POLICY MANUAL, 2012

AND

IN THE MATTER OF THE INDUSTRIAL COURT ACT, SECTION 12

BETWEEN

LUCY RIMANTO MOLONKET.....PETITIONER

AND

SIMON PETER OLE NKERI.....1ST RESPONDENT

WILLIAM LAY.....2ND RESPONDENT

KUNGU GATABAKI.....3RD RESPONDENT

JACKSON KINYANJUL.....4TH RESPONDENT

DR. ANTHONY OMIRIKWA.....5TH RESPONDENT

PROF. SARONE OLE SENA.....6TH RESPONDENT

EAST AFRICAN PORTLAND CEMENT COMPANY LIMITED.....7TH RESPONDENT

CABINET SECRETARY, MINISTRY OF INDUSTRY, TRADE AND CO-OPERATIVES.....8TH RESPONDENT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION.....1ST INTERESTED PARTY

DIRECTOR, CRIMINAL INVESTIGATION DEPARTMENT.....2ND INTERESTED PARTY

JUDGMENT

Introduction

1. This Petition was triggered by the Petitioner's redeployment from the position of Head of Sales and Marketing to Head of Special Projects, within the 7th Respondent's establishment. The redeployment was communicated by letter dated 30th September 2016.
2. The Petitioner terms the redeployment as harassment by the 1st Respondent, with the support of the 7th Respondent's Board of Directors.
3. On their part, the Respondents maintain that the redeployment was a normal reorganisation and placement of human capital within the 7th Respondent.

The Petition

4. By her Petition dated 10th November 2016, the Petitioner seeks the following remedies:
 - a. A declaration that the Petitioner's constitutional right to a fair trial as guaranteed by Articles 25(c) and 50 (1) & (2)(d) of the Constitution has been violated by the 1st to 6th Respondents;
 - b. A declaration that the Petitioner's constitutional right to equality and freedom from discrimination as guaranteed by Article 27(1), (2), (3) & (5) of the Constitution has been violated by the 1st to 6th Respondents;
 - c. A declaration that the Petitioner's constitutional rights to human dignity and freedom and security of the person as guaranteed by Articles 28, 29(a), (c), (d) & (f) of the Constitution have been violated by the 1st to 6th Respondents;
 - d. A declaration that the Petitioner's constitutional right against forced labour as guaranteed by Article 30(2) of the Constitution has been violated by the 1st to 6th Respondents;
 - e. A declaration that the Petitioner's constitutional right to access to information as guaranteed by Article 35(1)(b) of the Constitution has been violated by the 1st to 6th Respondents;
 - f. A declaration that the Petitioner's constitutional right to fair labour practices as guaranteed by Article 41(1) & (2)(b) of the Constitution has been violated by the 1st to 6th Respondents;
 - g. A declaration that the Petitioner's constitutional right to fair administrative action as guaranteed by Article 47(1) & (2) of the Constitution has been violated by the 1st to 6th Respondents;
 - h. An order that the Petitioner be compensated in the sum of Kshs. 10,000,000 or any other amount that the Court deems sufficient and/or appropriate by the 1st to 6th Respondents for violating the Petitioner's constitutional rights;
 - i. A declaration that the decision of the 1st to 6th Respondents purporting to transfer the Petitioner to a non-existent position of '*Head of Special Projects*' through an alleged Board of Directors' meeting held on 30th September 2016 and communicated to the Petitioner by a letter of even date is illegal, null and void;
 - j. An order of mandamus to compel the 1st to 6th Respondents to reinstate the Petitioner to the position of Head of Sales and Marketing of the 7th Respondent;
 - k. A declaration that the appointment of the 1st Respondent as the Managing Director/ Chief Executive Officer of the 7th Respondent was irregular, illegal, null and void;
 - l. An order of certiorari to remove into this Court and quash the Gazette Notice No 5992 issued on 2nd August 2016, by the Cabinet Secretary for Industry, Trade and Co-operatives, appointing the 1st Respondent as the Managing Director/Chief Executive Officer of the 7th Respondent for a period of 3 years, with effect from 5th August 2016, and revoking the appointment of Kephlar Tande, with effect from the same date;
 - m. An order of mandamus to compel the 1st and 2nd Interested Parties to release the reports on the integrity and criminal cases concerning the 1st Respondent;
 - n. A permanent injunction restraining the Respondent, their agents, servants, employees and/or representatives or any person(s) working under their instructions from intimidating, blackmailing, witch-hunting, discriminating, in-subordinating, ignoring, frustrating or in any way harassing the Petitioner;
 - o. A declaration that the 1st to 6th Respondents are unfit to hold any public office.

5. In the alternative, the Petitioner seeks an order directing the 7th Respondent to pay her the sum of Kshs. 21,63,500 being salary for the remainder of her contract of employment running from 1st December 2016 to 30th June 2019.

6. The Petitioner also asks for general and aggravated damages as well as costs of the Petition.

7. The Petitioner takes issue with the recruitment process leading to the appointment of the 1st Respondent as Managing Director/Chief Executive Officer of the 7th Respondent, which she terms as flawed and irregular.

8. The Petitioner states that the 1st Respondent is not fit to hold this office and accuses him of harassing and frustrating her at work, citing the following particulars against the 1st Respondent:

- a. Bypassing the Petitioner and giving directions to members of staff working in the Petitioner's Department;
- b. Calling members of the Petitioner's Department for meetings and failing to invite the Petitioner, yet she was the Head of Department;
- c. Purporting to appoint the Petitioner to the position of '*Head of Special Projects*', by letter dated 30th September 2016, a position that is non-existent in the 7th Respondent's structure;
- d. Asking the Petitioner to proceed on leave so that the 7th Respondent could formulate a job description for her;
- e. Refusing to give the Petitioner an office to operate from;
- f. Instructing the Petitioner not to attend the Executive Committee, which draws its membership from Heads of Department.

9. The Petitioner states that the frustrations and harassment by the 1st Respondent violated her right to fair labour practices protected under Article 41(1) & (2) of the Constitution.

10. The Petitioner claims to have lodged a complaint of sexual harassment against the 1st Respondent to the Board through the 2nd Respondent, by letter dated 4th October 2016. In the same letter, the Petitioner asked to be reinstated to the position of Head of Sales and Marketing.

11. The Petitioner further claims that on 21st October 2016 she made an oral report of the sexual harassment to the 2nd Respondent, with the expectation that the report would be escalated to the Board for deliberation and action. The Petitioner accuses the 2nd Respondent and the Board of unresponsiveness and inaction regarding her complaint.

12. In addition, the Petitioner accuses the 1st Respondent of blackmail and intimidation by making unfounded negative utterances against the Petitioner, suggesting that money may have been lost in the Sales and Marketing Department during the Petitioner's tenure.

13. The Petitioner expresses apprehension that she was being victimised for reporting a sexual harassment incident against the 1st Respondent.

The Response

14. The 2nd Respondent, William Lay, the Chairman of the 7th Respondent's Board of Directors, swore a replying affidavit on behalf of the 1st to 7th Respondents, on 23rd November 2016.

15. Lay depones that the 7th Respondent is managed by a Board of Directors (the Board) made up of the 1st to 6th Respondents and the Principal Secretary, State Department of Industry & Enterprise Development, Ministry of Industry, Trade & Co-operatives.

16. Lay lists the core functions of the Board as set out in the Board Charter as follows:

- a. Setting policy, procedures and providing strategic direction to the 7th Respondent;
- b. Providing and adopting clear documented framework of sound policies and procedures for all areas of the 7th Respondent's operations and covering all the relevant risks; including but not limited to human resource development, investments, asset liability funds management *including capital and liquidity, management information systems, planning and budgeting, accounting and internal controls*;
- c. Communicating these policies and procedures to all staff involved in their implementation;
- d. Formulating the future direction of the 7th Respondent including planning, implementing, controlling and ensuring periodic revisions/reviews as circumstances shall dictate;

e. Reviewing the 7th Respondent's organisational structure as and when it deems appropriate and ensuring that appropriate structures are in place for the proper and seamless functioning of the 7th Respondent;

f. Appointing competent, qualified and experienced staff to manage the activities and affairs of the 7th Respondent in a prudent and safe manner;

g. Overseeing the appointment of other senior executives and ensuring that they are fit and proper to manage and supervise the 7th Respondent's key business and functions;

h. Supervising the Senior Management's performance effectively and on a continuing basis.

17. The Board Chairman confirms that the Petitioner joined the employment of the 7th Respondent on 20th May 2009, in the position of Regional Sales Manager, Nairobi and thereafter rose through the ranks to the position of Head of Sales and Marketing as at 23rd June 2014.

19. The Chairman further confirms that the 8th Respondent, through Gazette Notice No 5992, appointed the 1st Respondent as the Managing Director/ Chief Executive Officer of the 7th Respondent, with effect from 5th August 2016.

19. The Board Chairman depones that the 7th Respondent has been facing financial difficulties, incurring a loss of Kshs. 1,584,571,000 in the Financial Year ended 30th June 2016. He adds that in an effort to revamp and turn around the fortunes of the 7th Respondent, the Board had embarked on an exercise of financial restructuring and reorganisation of the structure of the 7th Respondent.

20. Lay points out that the said restructuring was also aimed at paving way for an independent forensic audit of the 7th Respondent, in light of numerous allegations of fraud and corruption.

21. He states that following a Board resolution of 11th August 2016, the 1st Respondent, on 12th August 2016, communicated the decision to move Stephen Kyalo Nthei from Internal Audit & Risk Management to Finance as Head of Financial Management and Enos Otieno Aluch from Finance to Internal Audit as Head of Internal Audit & Risk Management.

22. He adds that at a subsequent Board meeting held on 30th September 2016, the Board resolved to effect key changes among the 7th Respondent's senior managers so as to rejuvenate operations and turn around the 7th Respondent's fortunes. As a result, eleven (11) senior managers, including the Claimant, were transferred to head new departments.

23. In light of the foregoing, the Claimant was appointed as Head of Special Projects and her previous position was taken up by Abraham Kibet Kiptanui.

24. Regarding the appointment of the 1st Respondent as the 7th Respondent's Managing Director/Chief Executive Officer, the Board Chairman takes the view that the allegations made by the Petitioner are extraneous and have no bearing on the Petitioner's claim. He states that the said appointment was undertaken in accordance with the law and due process.

25. Lay further contends that if the Petitioner had an issue with the appointment of the 1st Respondent, she ought to have utilised the relevant mechanism to challenge it when it was effected. He terms the Petitioner's belated attempt to challenge the appointment, four (4) months after, as malicious and ill motivated.

26. Regarding the complaint of sexual harassment by the Petitioner against the 1st Respondent, the Board Chairman states the following:

a. On 21st September 2016, at a meeting of the Board, the issue of alleged sexual harassment of the Petitioner by the 1st Respondent was raised. The Board resolved that despite there being no formal complaint against the 1st Respondent, the allegations be investigated in accordance with the 7th Respondent's policies and procedures;

b. On 4th October 2016, the Board Chairman received a formal complaint from the Petitioner, setting out the allegation of sexual harassment and frustration by the 1st Respondent;

c. On receiving the complaint and in compliance with the resolution of the Board and the 7th Respondent's Human Resources Policy Manual, the Board Chairman commenced investigations into the said complaint and convened a hearing on 14th October 2016 to hear both parties in relation to the complaint;

d. The hearing was conducted by a select committee made up of the Company Secretary, Ms Sheila Kahuki, the Gender Officer, Ms Rose Kokonya and the Board Chairman;

e. During the said hearing, the Petitioner was heard on her complaint dated 4th October 2016 and the 1st Respondent was thereafter provided with a copy of the complaint and asked to comment on it;

f. The 1st Respondent responded to the allegations at length and he was then asked to provide a written response, which he forwarded vide letter dated 17th October 2016;

g. The Board Chairman then informed the 1st Respondent that the Petitioner had alleged that the 1st Respondent's bodyguard, Nathan Kayiaa Loonkishu had witnessed the alleged sexual harassment incident and sought to know whether the said bodyguard would be available to testify. The 1st Respondent confirmed availability of his bodyguard, who appeared before the select committee and gave his account of the events of the material day, when the said sexual harassment incident is said to have taken place. Loonkishu was then asked to provide a written statement, which he did;

h. The select committee thereafter undertook a review of the surrounding facts and the evidence tendered by the parties, regarding the complaint by the Petitioner and on completion of the investigations, the Board Chairman formally notified the Petitioner and the 1st Respondent of the outcome, vide letter dated 21st November 2016 addressed to both the Petitioner and the 1st Respondent;

i. The minutes of the hearing which took place on 14th October 2016 were also availed to both the Petitioner and the 1st Respondent

27. Lay depones that the allegation by the Petitioner that her appointment to the position of Head of Special Projects was part of the harassment being meted on her by the 1st Respondent is false.

28. Regarding the position of Head of Special Projects, the Board Chairman states that a detailed job description was availed to the Petitioner, who had taken up the appointment on 30th November 2016, without raising any objection. The Petitioner is said to have submitted a handover report to the new Head of Sales and Marketing, Abraham Kiprotich, which report was submitted to the 1st Respondent on 7th October 2016.

29. The Chairman takes the view that if the Petitioner had an issue with her appointment to the position of Head of Special Projects, she should have invoked the grievance management procedure contained in the 7th Respondent's Human Resources Policy Manual. According to the Chairman, the present proceedings are premature.

30. Lay denies the Petitioner's allegations that her constitutional rights were violated. In particular, he denies that the Petitioner was discriminated against or subjected to unfair labour practices and that the 1st Respondent was shielded by the Board.

Findings and Determination

31. Flowing from the pleadings and submissions filed by the parties, two (2) issues call for determination in this Petition:

- a. Whether the Petitioner's rights under the Constitution have been violated;
- b. Whether the Petitioner is entitled to the remedies sought.

Violation of Constitutional Rights?

32. The Petitioner's complaint stems from her redeployment from the position of Head of Sales and Marketing to what she refers to as a non-existent position of *Head of Special Projects*.

33. The Respondents' case is that the Petitioner's redeployment was part of the employer's internal managerial prerogative, with which the Court should not interfere. In the replying affidavit sworn by the 7th Respondent's Board Chairman on 23d November 2016, reference is made to the Board Charter, which sets out the functions of the Board including:

- a. Setting policy, procedures and providing strategic direction to the 7th Respondent;
- b. ...;
- c.;
- d.;
- e. Reviewing the 7th Respondent's organisational structure as and when it deems appropriate and ensuring that appropriate structures are in place for the proper and seamless functioning of the 7th Respondent;
- f. Appointing competent, qualified and experienced staff to manage the activities and affairs of the 7th Respondent in a prudent and safe manner;
- g. Overseeing the appointment of other senior executives and ensuring that they are fit and proper to manage and supervise the 7th Respondent's key business and functions;
- h. Supervising the Senior Management's performance effectively and on a continuing basis.

34. It was submitted on behalf of the Respondents that the Board Charter mandates the Board to review, reorganise and restructure the 7th Respondent as appropriate. It was further submitted that in restructuring the management of the 7th Respondent so as to establish the position of Head of Special Projects, the Board was well within its mandate.

35. The Respondents urge the Court to protect the employer's prerogative to execute its human resource functions. They rely on the decision in *Goefrey Mworira v Water Resources Management Authority & 2 others [2015] eKLR* where **Ongaya J** held:

“The Court will very sparingly interfere in the employer’s entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy or any other human resource function.”

36. The Respondents further rely on the decision in *Mary Nyangasi Ratemo & 9 others v Kenya Police Staff Sacco Limited & another [2013] eKLR* where **Mbaru J** stated:

“Therefore the right to transfer an employee from one duty station to the other remains the prerogative of the employer. This becomes an implied right of the employer as the entity in need of the employee services and due to work demands. Such an employee can be moved, relocated, placed or transferred as required by the employer. A court cannot interfere with this implied right unless an employee shows that this is done with disregard to fair labour practices.”

37. In its decision in *Ken T. Sungu v Kenya Ports Authority [202] eKLR* this Court stated the following:

“No doubt, an employer’s prerogative to deploy its workforce to meet operational requirements should not be disturbed. However, when it is alleged that this prerogative is being used for collateral purposes.....the Court must raise it antennas.... The employer’s prerogative to deploy and transfer employees is well secured. However, that prerogative must be exercised for pure reasons to meet the operational needs of the employer. If.....it is exercised for collateral reasons, the Court must intervene.”

38. In her Petition, the Petitioner makes many allegations against the Respondents, with particularised attack against the 1st Respondent, whose suitability to serve in the office of Managing Director/Chief Executive Officer of the 7th Respondent, she questions.

39. I need at this stage to deal with the accusations of sexual harassment made by the Petitioner against the 1st Respondent. In its decision in *Ooko & another v SRM & 3 others (Civil Appeal 195 & 197 of 2019 (Consolidated)) [2022] KECA 44 (KLR)* the Court of Appeal defined sexual harassment as:

“...a type of employment discrimination consisting in verbal or physical abuse of a sexual nature, including lewd remarks, salacious looks and unwelcome touching.”

40. The Appellate Court went further to define the duty of an employer in a complaint of sexual harassment as follows:

“Upon receipt of a sexual harassment complaint, a positive obligation fell on the employer to follow through with the complaint to ensure that sexual harassment was eradicated, redressed and did not occur again.”

41. In the present Petition, there is evidence that once the Petitioner's complaint of sexual harassment was received, it was picked up and investigated by a select committee led by the Chairman of the Board of Directors. Both the Petitioner and the 1st Respondent were given an opportunity to make representations, orally and in writing. In addition, the 1st Respondent's bodyguard, who was said to have been present when the alleged sexual harassment incident occurred, also made oral and written representations in which he denied witnessing any such incident.

42. The outcome of the investigation and the decision of the select committee was communicated to the Petitioner. It is therefore incorrect to say that the 7th Respondent's Board of Directors was unresponsive to the Petitioner's complaint. Further, looking at the evidence adduced before the select committee, this Court finds no fault in its decision that the allegation of sexual harassment was not proved.

43. I will now revert back to the issue of the Petitioner's redeployment from the position of Head of Sales and Marketing to Head of Special Projects. There is evidence that the redeployment was preceded by a restructuring of the 7th Respondent, which was sanctioned by the Board of Directors. There is also evidence that other managers at the Petitioner's level were redeployed. There is therefore nothing to suggest that the redeployment was targeted at the Petitioner as some form of harassment or intimidation.

44. What is more, from her pleadings it would appear that the Petitioner had a personal vendetta against the 1st Respondent, whose integrity she questioned, stating that he was subject to criminal investigations.

45. However, by a replying affidavit sworn on 6th December 2016, by Patrick Owiny, the Deputy Director-Ethics Monitoring Compliance, the Ethics and Anti-Corruption Commission, the 1st Interested Party herein, denied having any record of complaints received from the Petitioner or any other person or entity regarding the conduct of the 1st Respondent, as provided under Section 42 of the Leadership and Integrity Act, 2012.

46. Owiny further deponed that the 1st Respondent did not have any criminal or integrity issues pending before the Ethics and Anti-

Corruption Commission to warrant the prayers sought against the 1st Interested Party in the Petition.

47. In addition, the Cabinet Secretary, Ministry of Industry, Trade and Co-operatives, Adan Mohamed, who is the 8th Respondent in this Petition, swore a replying affidavit on 13th January 2017, stating that under the provisions of Section 5(3) of the State Corporations Act he was mandated to appoint the Managing Director/Chief Executive Officer of the 7th Respondent, upon recommendation by the Board of Directors.

48. The Cabinet Secretary deponed that he received a letter dated 14th January 2015, from the Chairman of the 7th Respondent's Board of Directors, communicating the Board's decision to recommend three (3) candidates for consideration and possible appointment as Managing Director/Chief Executive Officer of the 7th Respondent. The said letter was accompanied by a signed copy of the Board resolution.

49. The Cabinet Secretary further deponed that after due consideration of the 3 candidates recommended, he made a decision to appoint the 1st Respondent as the Managing Director/Chief Executive Officer of the 7th Respondent for a period of three (3) years with effect from 5th August 2016.

50. The Cabinet Secretary stated that in making his decision, he was alive to the fact that the 7th Respondent was an institution with serious management challenges. He added that he had not received any complaint from the Petitioner, members of the 7th Respondent's Board or any of the shortlisted candidates regarding the recruitment process.

51. The Petitioner's allegations of the 1st Respondent's unsuitability to serve in the position of the 7th Respondent's Managing Director/Chief Executive Officer were therefore not supported by any evidence.

52. Having determined that the Petitioner's redeployment was a normal human resource function, well within the employer's prerogative and not an adverse action against the Petitioner, I find and hold that the right to be heard was inapplicable in this case.

53. Similarly, I find that none of the alleged violation of the Petitioner's constitutional rights was proved.

54. In the end, the entire Petition fails and is dismissed.

55. Each party will bear their own costs.

56. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF APRIL, 2022

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JUDGE

Appearance:

Mr. Osiemo for the Petitioner

Ms. Cherotich h/b for Ms. Ogula for the 1st to 7th Respondents

Ms. Chesiyana for the 8th Respondent and the 1st & 2nd Interested Parties