



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. E708 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

NAOMI JELIMO.....CLAIMANT

VERSUS

INSTITUTE OF HUMAN RESOURCE MANAGEMENT..... RESPONDENT

RULING

Introduction

The application before the Court is the Claimant's Notice of Motion dated 30th October 2020. It is brought under Rule 17 of the Employment and Labour Relations Court (Procedure) Rules 2016 together with all other enabling provisions of the law. The application basically seeks the following Orders:

- a) Spent.
- b) *That the Respondent be restrained from unfairly and unlawfully terminating the claimant's employment contract and/or engaging any other person into the position of Head of Human Resources and Member Services pending the Hearing and determination of this application in the first instance and thereafter pending hearing of the claim.*
- c) *That the decision placing the claimant on leave as communicated by the Ag. Executive Director of the respondent in the letter dated 23rd October, 2020 and the declining confirmation of appointment be set aside pending the Hearing and determination of this application in the first instance and thereafter pending hearing of the claim herein.*
- d) *That the Respondent be ordered to confirm the employment of the claimant to the position of the head of human Resource and Member Services pending the Hearing and determination of this application in the first instance and thereafter pending hearing of the claim herein.*
- e) *That costs of this motion be sourced by the respondent.*

The Application was based on the grounds set out therein and the supporting affidavit of Naomi Jelimo sworn on 30th October 2020 and Supplementary Affidavit Dated 28th November 2020. The Respondent opposed the application vide a Replying Affidavit by Irene Kimacia, the Respondent's Acting Executive Director, sworn on 17th November 2020.

Applicant's Case

The Applicant avers that she applied for the position of Human Resource and Member Services on 19th May 2020, was successful in the interview and was offered the job via a letter of appointment dated 15th July 2020. That the terms of employment engagement provided that she was to serve on probation for 3 months.

The Applicant further deposes that she served diligently from the 15th July 2020 to 23rd October 2020 when she received a non-confirmation of appointment letter from the Respondent's Ag Executive Director. That vide the said letter, the respondent informed her that following a performance review and recommendation from the Human Resource and Finance Committee a decision was made that she would not be

confirmed to the aforementioned position. She was therefore requested to hand over immediately to the Head of Operations and proceed on leave with the assurance that her salary was to be paid in full until the last day of her probation.

The Applicant avers that the intended termination of employment during the probation period is unfair and unlawful and gives a number of reasons which include inter alia:

- a) Failure by the respondent to give a one month notice of intended termination as required by section 2.5.10 of the Institute of Human Resource Management Human Resources Manual.
- b) Failure to involve or engage her in performance reviews as provided for in the Institute of Human Resource Management Human Resources Manual.
- c) Terminating her probation without exhausting all the options provided under the Institute of Human Resource Management Human Resources Manual.
- d) Placing her on indefinite leave which goes against the provisions of the Institute of Human Resource Management Human Resources Manual and the constitution of Kenya.
- e) Failure to give warnings on performance as provided for in the Institute of Human Resource Management Human Resources Manual.
- f) Discrimination against her as other employees who were engaged on probation terms were confirmed without any appraisals.

The applicant avers that based on the above grounds (among others) she is entitled to interim relief as prayed.

Respondent's case

The Respondent has vehemently opposed the application via the Replying Affidavit by Irene Kimacia, the Respondent's Acting Executive Director, sworn on 17th November 2020. The affiant confirms that the Applicant executed an employment contract that contained a probation period of three (3) months as one of its terms. She avers that upon a review of the Applicant's suitability and performance, she concluded that the applicant's performance and suitability was below average.

While explaining the factors that led to non-confirmation of the Applicant to the position in question, the Respondent points out a number of instances of misconduct and inability to adapt to the organization during the probationary period. They include inter alia:

- a) Complaint lodged by Frank Owen which amounted to professional misconduct by the Applicant.
- b) Actions by the Applicant that ultimately influenced the outcome of an election.
- c) Hostility towards the operations officer.

The Respondent also denies the allegation that the Applicant had been sent on an indefinite leave and avers that she was rightfully terminated from employment.

That the Respondent concluded that the applicant was incompatible with the organization and was a wrong fit for the position and consequently she issued her with a letter of non-confirmation on the instructions of the council.

The respondent concludes that the organisation has since lost trust and confidence in the applicant's ability to execute the mandate earlier offered to her. That the Applicant was rightfully terminated from employment and does not deserve the prayers sought.

Applicant's Submissions

In brief, counsel for the applicant relied on the facts as set out in the Affidavits of Naomi Jelimo and submitted that the Applicant has met the threshold of granting interlocutory injunction.

The counsel submitted that the Respondent is an employer classified as a Public Body by dint of Section 3 of the public Service Commission Act, 2017 having been established as a Statutory Public Body by the Human Resource Management Professionals Act No 52 of 2012. Counsel further contends that the Claimant was initially employed by the Lake Victoria North water Works Agency which is also a public body. He submits that by dint of section 41 (6) of the Public Service Commission Act, 2017, the Respondent had no authority to insert a term on probation into the contract of an employee who had previously engaged in a public entity. Counsel cites the case of **Hamisi Bweni Dzila v County Assembly of Kwale and another (2020) eKLR**.

The Respondent's counsel further submits that the sole reason advanced by the respondent in the letter of non-confirmation was "performance review" and as such the respondent cannot introduce new allegations which he refers to as baseless and wild. He further submits that matters of performance are fundamental terms of employment contract which must be provided for expressly in the employment contract for the employer to rely on as a basis for termination of employment. He cites the case of **Jane Samba Mukala v Ol Tukai Lodge Limited (2010) LLR 255 (ICK)**. Counsel also contends that the applicant was not involved in the alleged appraisals, if any were done, and

that the Acting Executive Director acted unilaterally and with malice decided that the Applicant's employment should not be confirmed.

Counsel also contends that the respondent is not being truthful by deposing that the position has been filled as there has been no advertisement of the position on the Public Service Commission website. On the issue of irreparable damages, counsel submits that the position in question is a senior one and only one exists. As such the claimant would suffer irreparable harm. Counsel therefore prays that the application be allowed with costs.

Respondent's submissions

The Respondent's counsel relied on the facts as set out in the Replying Affidavit. Counsel contends that that the termination took effect during the probation period. Further that, though the Respondent has elucidated sufficient reasons that led to the non-confirmation, the applicable law does not require the respondent to assign any reasons for ending a probationary contract as enunciated by **John Muthomi Mathiu v Mastermind Tobacco (K) Limited (2018) eKLR** and **Danish Jalango & another v Amicabbre Travel Services Limited**. Counsel on the strength of these rulings submits that the respondent was by not statute required to conduct a rigorous performance hearing or place applicant on a performance improvement programme before making the decision not to confirm the Applicant.

The Respondent's counsel further submitted that the applicant had not satisfied the conditions set before a prayer for interlocutory reinstatement is granted. He contends that the applicant has neither established a prima facie case nor proved that unless the interlocutory orders are granted she stands to suffer irreparable harm.

On the order sought by the applicant barring the respondent from filling the position previously held by the applicant, counsel submits that the prayer is not tenable as it would invite the court to interfere with the management prerogative to run its own organization. Counsel cites the case of **Joab Menta Oudia v Coffee Development Board of trustees (2014) eKLR**.

Counsel for the Respondent also submitted on the Applicant's submission that the Respondent is a Public Body by dint of Section 3 of the Public Service Commission Act, 2017. He submits that the respondent is a private and professional membership organization that relies on members' contributions for its sustenance and does not administer any funds from the Government or money raised through taxes. Further that it is not an agency or department of the Government performing any public related functions unlike the respondent in the case of Ezekiel Nyangoma that is cited by the Applicant.

With respect to the issue raised by the applicant that she was subjected to unnecessary probation by virtue of having worked previously in a public office, counsel while maintaining that the respondent is not a public body submits that such an issue can only be dealt with during trial and not at the interlocutory stage.

As regards to the Applicant's prayer that the respondent be directed to confirm the applicant to the position in issue, counsel submits that granting such an order in the interim would amount to finally determining the main issue in dispute without hearing the matter on merit.

Lastly counsel urges the court to expunge the annexures/exhibits referred to in the Applicant's affidavit of service as they have neither been sealed nor commissioned as provided for under the relevant provisions of the law.

Analysis and Determination

After careful consideration of the application, affidavits and the submissions by the parties, the main issue for determination is whether the applicant has met the legal threshold for this Court to grant interlocutory injunction pending trial. The threshold for granting interlocutory injunction was laid down in the celebrated case in **Giella v Cassman Brown [1973] EA 358** where the following principles were set out:

- a) *That the applicant must establish a prima facie case with probability of success.*
- b) *That the applicant must demonstrate that he stands to suffer irreparable harm if the order is withheld.*
- c) *If the court is in doubt, it should determine the application on a balance of convenience.*

Before proceeding to determine the main issues set out above, it is prudent to state that the first part of prayer (b), that "*the Respondent be restrained from unfairly and unlawfully terminating the claimant's employment*", has already been overtaken by events following the termination of the claimant's employment as has been confirmed by the parties in their submissions when they submitted on the issue of reinstatement.

In relation to the Respondent's prayer that the exhibits/annexures be expunged from the court's record, I have carefully gone through the court's record and confirm that the annexures are properly commissioned as required under the provisions of the oaths & Statutory Declaration Act.

Prima facie case was defined by the Court of Appeal in **Mrao Limited v First American of Kenya limited & 2 others [2003] e KLR** as follows: -

"...in civil cases is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

In the instant case the Applicant was still on probation when she received a letter of non-confirmation that effectively terminated her contract. The grounds for termination of the contract are as stated therein. It is trite law that a termination letter takes effect upon the issuance thereof and once it takes effect, the employment relationship comes to an end. The only way to reverse the letter of termination is by way of an order of reinstatement or re-engagement. This is the rationale of Section 49(3) of the Employment Act as read with Section 50 which provides –

(3) Where in the opinion of a labour officer an employee's summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to—

(a) reinstate the employee and treat the employee in all respects as if the employee's employment had not been terminated; or

(b) re-engage the employee in work comparable to that in which the employee was employed prior to his dismissal, or other reasonably suitable work, at the same wage.

The Applicant, in this case contends that the Respondent violated her contractual and constitutional rights. She claims that she was not involved in any appraisals before termination. Further that she was discriminated against by being appraised while her colleagues were confirmed without undergoing performance or suitability appraisals. She also claims that the Respondent unlawfully subjected her to unnecessary probation despite the fact that prior to joining the respondent's institution, she had worked in another public office where she was under permanent and pensionable terms. She also claims that the Respondent violated the Institute of Human Resource Management Human Resources Manual by failing to give monthly feedbacks on an employee progress and extending the probation period as provided for in the manual if she had not met the organizations' expectations. This gives rise to pertinent issues that call for examination by the court. It follows therefore that the applicant has established a prima facie case with probability of success upon trial.

On the issue of irreparable harm, I agree with submissions of Counsel for the Claimant that, the termination may cause irreparable harm. This is because it impacts on future employability of the claimant. The Applicant resigned from her previous engagement where she used to earn a gross salary of Kshs.253,400. Damages in this case although an alternative remedy provided by law, cannot remedy such a loss. Even if the court will award damages under Section 49 of the Employment Act after trial, the same is only a penalty inflicted on the employer to appease the employee and it cannot reverse the violation.

Having made the above findings, I must now consider the balance of convenience.

From the Replying Affidavit correspondence exchanged between the Claimant and the Respondent's Ag. Executive Director, it is obvious that the relationship between the two is thoroughly strained.

It would not be logical in the circumstances, to force the Claimant and the Respondent's Ag. Executive Director to work together. The balance of convenience would thus militate against granting orders of injunction.

In addition to the foregoing an injunctive order would have the consequence of reinstating the claimant, which according to Section 49(3) of the Employment Act may only be done upon making a finding of unfair termination and considering the factors under Section 49(4). This is supported by the case of **Gladys Boss Shollei v Judicial Service Commission Petition No 39 of 2013**.

For the foregoing reasons, I decline to grant the orders sought in the claimant's application with the result that the application fails. The same is dismissed with costs to abide the outcome of the main suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF JANUARY 2021

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. 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 1B 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.

MAUREEN ONYANGO

JUDGE