



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 87 OF 2020

JAMES ODERA.....CLAIMANT

VERSUS

CONCORD SAVINGS & CREDIT

COOPERATIVE SOCIETY LIMITED.....RESPONDENT

RULING

1. The Respondent/Applicant filed a Notice of Motion Application dated 19th February 2021 seeking to be heard for Orders:

i. Spent.

ii. *THAT pending the hearing and determination of the Application herein this Honourable Court be pleased to order that the Claimant JAMES ODERA the outgoing Chief Executive Officer of the Respondent remains out of office and restrain him from trespassing onto the Respondent's premises and interfering with the management and administration of the Respondent, hording the Respondent's computer passwords and entering the Respondent's premises and locking its offices at Centenary House Westlands.*

iii. *THAT this Honourable Court do set aside, vary and or review its interlocutory orders issued on 3rd March, 2020 on such terms as it deems fit*

iv. *THAT the OCS Kileleshwa or officers under his command do enforce prayer 1 of the Orders of the Court.*

v. *THAT this Honourable Tribunal do grant such further or other orders as it deems fit in the interest of justice.*

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

2. The Application is based on the grounds that the Claimant's 3 year contract dated 1st February 2018 expired on 31st January 2021 and the Respondent had resolved not to renew his contract in a board meeting held on 25th November 2020. That the Applicant notified the Claimant of the non-renewal in a letter dated 27th November 2020 and he was to do an official handover of the office on or before 31st January 2021. That the Claimant has however without justifiable cause refused to hand over, shut down the CEO's Office for several days, has trespassed back to the Respondent's premises and continues to act as the CEO unperturbed. That the Claimant has also become violent and assaulted the Chairperson of the Respondent when requested to hand over office and has further tried to illegally call for a Special General Meeting to have the members extend his time in office. Further, that the Order of the Court issued on 3rd March 2020 has since been overtaken by events by reason of the expiry of the Claimant's Contract of service and that the Respondent/Applicant is aggrieved as the Claimant's actions are illegal and border on criminal.

3. The Application is supported by an affidavit sworn by the Chairperson of the Management Board of the Respondent/Applicant Sacco, Rosemary Aseka, who avers that the Claimant was employed by the Respondent on 1st December 2014 vide a contract of service dated 29th October 2014. She annexes to her affidavit copies of the Letter of Contract Extension and the Letter of Renewal of Contract given to the Claimant, which she signed pursuant to the Respondent Board's resolutions. She further avers that the Claimant was issued with a Notice to Show Cause letter on allegations of impropriety and financial mismanagement and was afforded time to respond and when he never responded to the same, the Board subsequently summarily dismissed him vide a letter of 10th December 2019. That this led to the Claimant instituting the claim herein and through an interlocutory application, the Court reinstated him vide an Order of 3rd March 2020.

4. She avers that the Applicant complied with the Court order and the Claimant has been in office since then and that in the intervening

period, the Claimant has engaged in acts of insubordination, embezzlement and misappropriation of the Respondent's funds, which issues are a subject of police investigations and inquiry by the Commissioner of Co-operative Societies. That the Claimant's attempt to renew his contract through a Special General Meeting (SGM) was thwarted by a Tribunal Order after members lodged a claim against the Respondent and stopped the SGM and that the Director of the Co-operatives society also did a letter advising against the Claimant's move. That the Applicant's advocates have even issued the Claimant with demand and notice of intention to move court but he adamantly remains in office.

5. She further avers that she issued the Claimant with a letter of appreciation on 3rd February 2021 and requested that a handover be undertaken on 5th February 2021 but on the set day the Claimant assaulted her and caused breach of peace at the Applicant's offices. She annexes to her affidavit copies of the Medical Notes/P3 Form and the OB Number for the complaint of physical assault which she lodged with the police. She avers that the Claimant's actions are buoyed by the fact that he continues to enjoy the Order of the Court given on 3rd March 2020 which order she prays be discharged given that the Claimant's contract term has expired. She further avers that the Claimant's actions are occasioning irreparable harm to the Applicant as he has hoarded the Applicant's vital information and is preventing it from providing essential services to its members. That it is in the interest of justice that this Court grants the prayers sought in the application with costs.

6. The Claimant/Respondent filed a Replying Affidavit sworn on 3rd March 2021 averring that his contract which was set to expire on 22nd January 2021 was actually extended by the Respondent pending the reading and determination of the inquiry report. That there currently exists a crisis within the society's board because the misunderstanding amongst the Board Members has split the membership in half and consequently, maintaining the quorum of five persons has been impossible to achieve in any meeting. That the board has not met since 21st November 2019 and that all Board meetings held during the year 2020 and 2021 and referred to by Rosemary Aseka in her supporting affidavit are null and void as they lacked quorum. He further notes that the said Rosemary has not produced the minutes of the various alleged board meetings to prove she acted lawfully. He further avers that other than reinstatement and payment of salary, the board refused or neglected to comply with the requirement of the whole Order of the Court and he believes that the alleged meeting of 25th November 2020 was not legally constituted and all resolutions therefrom did not have force of law. He asserts that Rosemary Aseka was very anxious to see his departure from the Sacco and is disappointed to not have been able to secure the same. He also questions why neither the medical examination report nor the police abstract produced by Rosemary indicate his name to connect him with the alleged incidence.

7. He avers that the Commissioner for Co-operative Development wrote to the Sacco authorizing it to hold a Special General Meeting with one Agenda of presentation of enquiry report. That on 15th January 2021, Notice of SGM was issued with only one agenda and that the Commissioner for Co-operative Development by his letter dated 20th September 2019 ruled that Stephen Kisaka had ceased to be a Board member and a Member of the Sacco. That Rosemary Aseka wrote to the said Kisaka informing him of the said ruling by the Commissioner. He avers that there is no evidence why the orders sought should be granted as they are all frivolous and vexatious.

8. Ms. Janette, a Board Member of the Board of Directors of the Applicant Sacco, swore an Affidavit on 3rd March 2021 in support of the Claimant/Respondent's case and on authority of 3 fellow Board Members namely: Patricia Onsando, Florence Ombewa and Remick Muga. She avers that problems besetting the Claimant began when he took a different position from that of Rosemary Aseka concerning the election of Stephen Kisaka (Rosemary's candidate of choice) for a position in the Board. That this relationship worsened when the Claimant obtained orders from Court directing Rosemary to reinstate him which annoyed and humiliated Rosemary in the extreme. She deposed that although Rosemary had informed Stephen Kisaka of the commissioner's directive she still continued inviting him to sit in the Board meetings and maintained his name in the circulation list of Board members. That this hugely irked a section of the Board and resulted to two factions of four board members each emerging and that all the Board meetings claimed to have been held after 21st November 2019 did not have the required quorum because herself and the three Board members mentioned hereinabove did not attend any of the said meetings. She confirms that the Commissioner issued directives and communicated the same to the Respondent by a letter dated 21st November 2020 to the effect that no staff changes should be done until the inquiry report is presented to members and the expiry contracts for senior members are extended/ renewed.

9. In reply, Rosemary swore a Supplementary Affidavit on 9th March 2021 averring that Janette Rubadiri, Patricia Onsando, Florence Ombewa and Remick Muga have not been attending the Respondent's Sacco's Board meetings since 21st November 2019. That under the Applicant Sacco's By-law 45.2 of 2013, if a member of the Board fails to attend 3 consecutive meetings without being excused thereon, or otherwise fails to perform his/or her duties, their positions are declared vacant. That the 4 members therefore ceased to be Board members and have for the last 12 months not been involved in the management of the Sacco. She further avers that Stephen Kisaka attends the meetings of the Board because he was reinstated by an order of this Court and consequently an Order of the Tribunal as shown in her annexure RA-2. That in the absence of Janette Rubadiri and her ilk, the Board has severally met with a quorum of 5 Board members and overseen the management of the Respondent including the decisions to dismiss the Claimant and the resolution not to renew his contract. Rosemary avers that the letter dated 22nd January 2021 relied upon by Janette was made by 3 individuals who are not members of the Respondent's Board and is neither supported by any Board resolutions nor signed by her as the Chairperson of the Respondent. She asserts that the said letter holds no legal or moral basis to allow the Claimant to remain in office.

10. The Claimant/Respondent swore a Supplementary Replying Affidavit on 12th March 2021 averring that Stephen Kisaka attended the meetings with the intention to help make a quorum of 5 board members and legitimize the resolution of the Board. That as the time of the meeting of 25th November 2020 which allegedly decided on the non-renewal of his contract, Stephen Kisaka was not a member of the Respondent nor a Board Member of the Respondent. That the limited orders of the Court alleged to have reinstated Stephen Kisaka expired on 30th October 2019 and that there is no evidence that the said order was ever renewed or extended by this Honourable Court. He contends that the said order which was made *ex-parte* did not permit Stephen Kisaka to sit in any Board Meeting. Further, that after the Tribunal directed on 16th January 2021 that Stephen Kisaka stands disqualified as a member of the Management Committee, there has not been any order reinstating him as a member of the board and he should not have thus sat in the board meeting of 25th November 2020.

11. The Claimant/Respondent avers that 4 board members have not been attending board meetings because the Applicant had obtained an injunction from the Tribunal against the said four Board members, restricting them and 4 others from acting as members of the management Board and/or interfering with the management and administration of the Respondent. That there has been no resolution by the Board

declaring that the said 4 members were no longer board members or a Court Order decreeing so. The Claimant/Respondent also swore a Further Supplementary Replying Affidavit on 15th March 2021 averring that **Judicial Review Application No. 136 of 2019** was heard *inter partes* and judgment was entered dismissing Stephen Kisaka's case. That going by the said dismissal of the said suit, the contention by Rosemary Aseka that Stephen Kisaka was installed as a member of the Respondent's board cannot be correct and that the said chairperson of the Respondent is therefore guilty of concealment of material fact.

12. The application was to be disposed of by way of written submissions and the Respondent/Applicant submissions were to the effect that it filed the Motion herein pursuant to Rule 17(7), (6) and (5) of the Employment and Labour Relations Court (Procedure) Rules 2016. The Respondent/Applicant submitted that in **Samuel Mwinami v Social Service League & another [2016] eKLR** Mbaru J. while relying on the holding of the court in **Enock O Kinara v Postal Corporation of Kenya, Cause No. 2202 of 2016** asserted that such orders of discharge, variation, or setting aside as under Rule 17(7) of the ELRC (Procedure) Rules can only be issued on good and sufficient grounds and upon application by an applicant dissatisfied with the same and that the reasons for such dissatisfaction must be set out for the Court to vary, discharge or set aside existing orders. It submitted that the substratum of the Claimant's claim pending before court is his 3 years employment contract with the Respondent/Applicant and that since his contract expired on 31st January 2021, the substratum of the order for reinstatement has ceased to exist and that this alone is sufficient reason to have the order of 3rd March 2020 discharged, set aside or varied. It was further submitted that the Claimant has also never challenged the board's resolution not to renew his employment contract as being invalid and that his contract thus remains terminated.

13. The Respondent/Applicant submits that the other reason for seeking to set aside, vary and or review the Order is the conduct of the Claimant since obtaining the order as pleaded in its supporting affidavit. That since the Court's Order of 3rd March 2020, the Claimant has not taken a mention date for purposes of directions and has gone ahead to misuse the order and frustrate the employer as outlined in the Applicant's Affidavits hereinabove. That the Claimant is using the Court order to intimidate and oppress the Respondent and that the Court granting the said orders should not approve of his conduct and should instead deprive him of the order. The Applicant submitted that Mbaru J. asserted in the **Samuel Mwinami** case (*supra*) that an interlocutory injunction, being an equitable remedy, would be taken away (discharged) where it is shown that the person's conduct with respect to matters pertinent to the suit does not meet the approval of the Court which granted the orders which is the subject matter. The Respondent submitted that Mbaru J. further held that the orders of injunction are only meant to shield the party against violation of his rights or threatened violation of his legal rights and cannot be used to intimidate and oppress another party.

14. The Respondent/Applicant submitted that it would have resorted to crude ways of removing the Claimant from its offices but it opted to file in Court the application herein seeking for the order of injunction to be set aside or to be varied, as was asserted by the court in the case of **Wilson Tanui Barno & 2 others v Jeniffer Kositany [2015] eKLR**, which determined an application under Order 40 Rule 7 which is the equivalent of Rule 17(7), (6) and (5) of the Employment and Labour Relations Court (Procedure) Rules 2016. The Applicant implores this Honourable Court to allow the Application dated 19th February 2021 with costs.

15. The Claimant/Respondent was yet to file his Submissions by the time of penning this Ruling. The impugned Order made by Hon. Justice Stephen Radido on 3rd March, 2020 reads as follows:-

"The Applicant(Claimant) be and is hereby reinstated to his position as Chief Executive Officer enjoying all benefits related to his position pending the hearing and determination of the claim." The Respondent/Applicant now seeks to set aside, vary and or review the said interlocutory orders and further restrain the Claimant from accessing his office in the Applicant's premises; firstly, because the Claimant's contract of employment expired and was not renewed and secondly, because the Claimant is using the said interlocutory orders to intimidate and oppress the Respondent evidenced by his conduct after the Court granted him orders. The Respondent/Applicant is ultimately seeking to discharge, vary or set aside the interlocutory orders granted to the Claimant and also seeking an order of injunction against the Claimant pending determination of the Application herein. The Applicant's application is properly before this Court pursuant to Rule 17(7), (5) and (6) of the Employment and Labour Relations Court (Procedure) Rules 2016 which provide as follows:

17. (5) In a suit where an injunction is sought, a claimant or applicant may at any time in the suit, apply to the Court for an interim or temporary injunction to restrain the respondent from committing a breach of contract or an injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

(6) Where an application is made to the Court under paragraph (5) for a temporary or interim injunction, the Court may, by order, grant an injunction on such terms as it deems fit.

(7) Any order for injunction may be discharged, varied or set aside by the Court on application by any party dissatisfied with such order.

16. In the case of **Edwin Gichangi v Kenya Cultural Centre [2019] eKLR**, Radido J. had previously ordered reinstatement pending the hearing and determination of the Cause and in the application thus before him, clarified as follows:

"4. When the Court made the order reinstating (preserving the contract), the applicant to his position as Executive Director of the Respondent on 5 July 2019, it was not seeking to rewrite the contract between the parties.

5. The Court was only issuing an order to enable the fulfilment by each of the parties of their contractual duties and obligations, and since the contract upon which the order was anchored was expiring on 31 August 2019, the reinstatement order could not, logically survive beyond 31 August 2019."

17. I am of the view that the substratum of the Claimant's claim has been whittled away by the effluxion of time and the contract upon

which the order was anchored expired in January 2021. The reinstatement order of 3rd March 2020 therefore could not logically survive beyond January 2021. This in effect means that the orders the Claimant relies on lapsed when the Claimant/Respondent's contract of employment with the Respondent expired.

18. The Respondent/Applicant is also seeking an injunction against the Claimant in prayer 2 of its Application. The threshold for granting interlocutory injunction was enunciated in **Giella v Cassman Brown & Co. Ltd [1973] E.A 358** where Spry, the Vice President of the then Court of Appeal for Eastern Africa stated that:

"The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide the case on a balance of convenience."

19. The Court of Appeal in **Mrao Limited v First American of Kenya Limited & 2 others [2003] eKLR** defined a *prima facie* case to be 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 my opinion, the balance of convenience tilts in favour of the Respondent/Applicant herein. As the substratum of the order for reinstatement has ceased to exist is alone sufficient reason to have the order of 3rd March 2020 discharged. I hereby grant the Respondent/Applicant's application dated 19th February 2021 with costs against the Respondent.

It is so ordered.

Dated and delivered at Nairobi this 14th day of April 2021

Nzioki wa Makau

JUDGE