REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

MISCELLANEOUS APPLICATION NO. E084 OF 2021

(Before Hon. Lady Justice Maureen Onyango)

ASIF AKRAM.....APPLICANT

VERSUS

LIVING GOODS-KENYA.....RESPONDENT

RULING

Introduction

1. Before the court for determination is a Notice of Motion Application dated 28th April 2021 in which the Claimant seeks the following orders:

a. Spent

b. That pending the reference of the matter to arbitration and pending the appointment of an arbitrator, the court be pleased to issue interim orders

c. That the court be pleased to issue an interim conservatory order to protect, preserve and/or conserve the status of the applicant as the Chief Technology Officer of Living Goods Kenya and in particular, barring the respondent from removing the applicant from office without due process of the law, pending the reference, hearing and determination of the matter by arbitration

d. That the court be pleased to issue a temporary order of injunction prohibiting the respondent, whether by themselves, or any of their employees, agents or any person claiming to act under their authority from enforcing the letters or notices dated 26th February and 13th April 2021, purporting to terminate the claimant's contract pending the inter-partes hearing and determination of the arbitration matter

e. That the court do issue an order compelling the respondent to suspend the letters dated 26th February and 13th February 2021 pending the hearing and determination of the case

f. That the court be pleased to issue a conservatory order prohibiting the respondent from recruiting new persons to the office of Chief Health Digital Officer or an interim Chief Technology Officer to replace the Applicant's office of Chief Technology Officer pending the hearing and determination of the arbitration matter.

g. The court do issue an order compelling the respondent to

reinstate the applicant back to the position of Chief Digital Officer pending hearing and determination of this case

h. Any other orders or directions as may be necessary to give effect to the foregoing orders or in furtherance of the cause of justice

i. Costs of the application

2. The application is based on the grounds that the respondent seeks to terminate the claimant's services in an irregular, unlawful and underhanded manner by passing it off as redundancy. It is supported by the affidavit of Asif Akram sworn on 27th April 2021. He deposes that he was employed by the respondent vide a contract dated 2nd November 2017 as a Chief Technology Officer. The applicant avers that he was an exceptional employee in terms of performance as evidenced by the respondent's assessment reports and correspondences. During the Covid-19 pandemic, he offered excellent service even though work at the organization had slowed down due to the pandemic and a technical

hitch; a fact that was admitted by his supervisor. Despite his commendable service, he received a letter dated 26th February 2021 stating that the role of the Chief Technology Officer (CTO) would cease to exist with effect from 1st May 2021. On 3rd March 2021, the respondent confirmed the same by circulating a memo concerning offices that were to be abolished on account of redundancy. The applicant then wrote an email to the respondent on 7th March 2021 addressed to a Mr. David Ssegawa and Mr. Chuck Slaughter expressing his concerns to the letters, specifically citing that the roles created under Chief Digital Health Officer were a replica of his roles as the Chief Technology Officer; just worded differently with a cosmetic change of the office name. He also stated that the respondent acted unfairly by tricking him to apply for the new role considering that he has rendered the same services since his engagement.

3. It is the applicant's case that the respondent's unlawful decision to terminate his contract may have stemmed from incidents where he challenged and exposed his employer on issues of discrimination, transparency and accountability in handling funds from donors. He believes the respondent is punishing him for the same by throwing him out of the organization. The applicant did not receive a response on the matters raised in his email. However, on 15th April 2021, the Respondent sent him a letter dated 13th April 2021 stating that his office of Chief Technology Officer would cease to exist from 1st May 2021. Following the expiry of the deadline for advertisement of the new positions, the applicant was to be separated from the respondent with effect from 1st May 2021 on grounds of redundancy. No reasons were given.

4. On 27th April 2021, the CEO, Liz Jarmin communicated with the applicant via skype and sent a text to the executive team via Whatsapp to the effect that one Mr. Peter Kamonde would be appointed the interim Chief Technology Officer from 1st May 2021, yet the respondent had indicated that the organization was to adopt a new structure without the said position. The applicant contends that this action confirmed that the organization is still operating under the same structure and the office of the CTO is still in existence. He imputed malice on the part of his employer who intended to unlawfully deprive him of his employment. The applicant sought court redress as he believes that his removal from office amounts to unfair termination as opposed to removal on grounds of redundancy, despite the respondent issuing him a redundancy notice vide the letter dated 26th February 2021. From the newly created positions of Chief Program Officer and Chief Digital Health Officer his expertise only suits the latter whose roles are identical to those of his current office, a testament to the fact that his services are still needed by the organization. Moreover, the respondent indicated that they were open to working with the applicant under new terms being a consultancy arrangement yet he had not expressed interest to do so. This was another indicator that his services were still required.

5. In response to the application the respondent filed a replying affidavit sworn by its Chief People and Culture Officer, David Ssegawa on 6th May 2021. He underscored that the respondent is a Not For Profit Organisation whose operations are donor funded with conditions and timelines tied to funds received for the benefit of its targets. The deponent admitted that the applicant was indeed employed on 2nd November 2017 as the respondent's Chief Technology Officer. He pointed out clause 33 of the applicant's contract that provided for resolution of any dispute, controversy or claim arising out of the agreement, its breach, validity or termination by way of arbitration as a first avenue for legal recourse in accordance with the Arbitration Act No. 5 of 1995. The appointing authority would be the Chartered Institute of Arbitrators, Kenyan Chapter and the place of arbitration to be Nairobi, Kenya.

6. The deponent stated that the applicant had received both positive and negative assessment and appraisal reports from his supervisor from time to time and not fully positive appraisals as pleaded. That the respondent's management bears the sole prerogative of determining the direction of its operations in line with its mission and availability of funding from its donors and partners. For this reason, the leadership team in consultation with the Board of Directors reviewed the respondent's participation and change establishing role in Community Health and Digital Health prompted by global trends in the sector. They decided to improve and strengthen the office of the Chief Technology Officer by replacing it with a new role of the Chief Digital Health Officer. It is the respondent's case that the change affecting the Technology Department was also replicated in two other departments, namely Impact and Evidence and New Country Expansion. It was therefore not a reorganization aimed at getting rid of the Applicant as alleged.

7. The respondent communicated its decision to the applicant as well as other employees vide a letter dated 26th February 2021. In various discussions between the parties the applicant challenged the respondent's decision insisting that he should be left to stay in his role as is. He was explained to the reasons for the intended change, the core functions of the new role and the additional qualifications required for it. Further, the applicant was offered a chance on priority basis to re-apply for the enhanced roles before they were floated to the general public so as to give him an opportunity to prove that he possessed the skills and qualifications required if indeed his role and the new ones were similar. The applicant refused to apply and threatened to file suit, despite efforts by the Board to mediate and clarify the respondent's position.

8. It is the respondent's case that if the applicant expected to be transitioned into the new position, he needed to go through a certain administrative process as it pertained to a new role distinct from the one he currently holds. The respondent resolved to give him a soft landing out of good will and for the reason that the reorganization was not in bad faith. The deponent continues that the applicant slept on his rights by filing this suit last minute so as to paralyse the respondent's operations. That he should have taken steps to refer the matter to arbitration on 26th February 2021, when he received the letter informing him of the planned organization. Moreover, he has concealed the fact that his terminal dues of USD 63,376.49 after tax were transferred to his salary account on 29th April 2021 which development was communicated to him prior to the date of filing suit.

9. On the issue of the appointment of Peter Kamonde as interim CTO the respondent replied that the screen shots of its Chief Executive Officer communicating the same which were the initial thoughts of the respondent's leadership on the handling of the Technology Department in the face of the applicant's imminent separation. Had the applicant applied for the new CDHO role and been unsuccessful, the respondent would have still separated with him on account of redundancy and appointed someone in acting capacity pending the recruitment of a suitable professional to the position. The CTO role is therefore not substantively available to the applicant. The deponent argued that there is a raft of reliefs available to the applicant should the court find that his termination was unlawful such as compensation or reinstatement. However, there are no corresponding reliefs for an employer compelled to keep a lawfully separated employee with the resultant disruptions to its internal operations as well as the risk of failing to meet its donor requirements risking funding cuts that may ultimately risk the jobs of its entire workforce. Further, it was not clear how long the arbitration process would take. It would be a travesty to keep the applicant in his role for an indeterminate time. For these reasons the respondent prays that the application be dismissed with costs

and interim orders vacated.

10. In his response to the replying affidavit the applicant recapitulated the contents of his application and supporting affidavit. He averred that the respondent was misleading the court. There was a forced restructuring of the department of Impact and Evidence because the Chief Impact Officer resigned on 19th February 2021, prior to its announcement. On 26th February 2021, the applicant was informed by the respondent's Human Resource Manager that his termination was not based on redundancy. Even if the CDHO role was to be actualized, there would be a recruitment followed by on-boarding, transition and he would have to serve the notice period. Suddenly, in mid-April, the applicant was informed that his last day of work would be 30th April 2021. The applicant asserted that he had no option but to seek legal redress. Regarding the payment of his terminal dues the applicant replied that he swore the supporting affidavit to his application filed on 29th April, on 27th April 2021. At the time he had no knowledge of the funds transfer that was effected on 28th April 2021. Obviously, the respondent knew his salary account details and deposited the monies therein without his approval. The applicant asserted that he has not touched the funds.

11. The application was canvassed by way of written submissions.

Claimant's Submissions

12. After briefly rehashing his version of events the applicant cited Section 7 of the Arbitration Act to justify the interim orders thus;

> **"It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure."**

13. He also cited the case of **Safaricom Limited v Ocean View Beach Ltd & 2 Others (2010) eKLR** where the Court while recognizing that interim measures of arbitration take different forms stated that such include measures relating to preservation of evidence and maintenance of status quo. The court then set out essentials to be taken into account before issuing interim measures of protection in the arbitration context thus:

> *a) The existence of an arbitration agreement*
>
> *b) Whether the subject matter of arbitration is under threat*
>
> *c) In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application*
>
> *d) For what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunal's decision making power as intended by the parties."*

14. The applicant submitted that the only issue for determination was whether he was entitled to the granting of temporary injunctive orders. He cited the essentials for the same stipulated in the celebrated cases of **Giella v Cassman Brown & Co. Ltd (1973) EA 358** and **Mrao Ltd v First American Bank of Kenya & 2 Others (2003) KLR 125**. The applicant contends that he has a prima facie case with a probability of success as the respondent is purporting to terminate his services irregularly by way of redundancy as opposed to section 45 of the Employment Act yet his services and skill set are still relevant and not superfluous to the respondent. He cites the case of **Angela Shiukuru Ilondanga v Airtel Networks Kenya Limited [2018] eKLR** in which an employee was terminated on account of redundancy and another person hired to take up the same position. The court held that the employer must provide a valid and reasonable reason to an employee whose contract was terminated on account of redundancy.

15. On the requirement of irreparable harm and the balance of convenience it is the applicant's case that his employment contract is open ended giving him legitimate expectation from the respondent that it will not be terminated save in accordance with the law. It is submitted that the remedy of reinstatement suggested by the respondent is impractical because in such instances the employment relationship has already been lost. The applicant contends that he stands to lose his employment in the event that the interim orders are vacated and his contract is terminated yet the respondent will suffer no harm.

Respondent's Submissions

16. The respondent agreed with the applicant that the sole issue

for determination at this preliminary stage is whether conservatory orders sought by the applicant should be granted. It focused heavily on the criteria of irreparable harm and the balance of convenience as enunciated in the case of ***Giella v Cassman Brown (supra)***. The respondent reiterated that sections 49(1) and (3) of the Employment Act provide alternative remedies that should be applied by the court. That the respondent suffers structural disorganization and an unfriendly work environment brought about by the applicant's obstinacy. The overall outcome if interim orders are confirmed will be loss of goodwill and donor support for which the respondent cannot be compensated in the event that it emerges successful in the main suit hence the balance of convenience lies in its favour. Further, the respondent was of the position that the orders are sought are not merited because the applicant has approached a court of equity with unclean hands. It cited the case of **Esther Nungari Gachomo v Equity Bank Ltd (2019) eKLR** in support.

17. The respondent also cited the case of **Kishan Builders v Chebara Boys Secondary School (2018) eKLR** in which the court faced with an application for conservatory orders held that damages would be sufficient to compensate the applicant should the arbitrator find that the respondent had breached the contract. Regarding the balance of convenience, in that case the applicant's failure to refer the matter to arbitration tilted the balance in favour of the respondent. However, the court notes that in the authority cited which involved construction services the applicant had failed to refer the matter to arbitration for over 4 years after the dispute yet the contract set a time limit of 90 days.

It has no bearing on the application at hand.

Analysis and Determination

18. The court agrees with the parties that the only issue for determination is whether the applicant is entitled to injunctive orders sought to preserve the status quo pending the determination of this matter or handling of the dispute by way of arbitration. In accordance with the celebrated case of **Giella v Cassman Brown (supra)**; the applicant must demonstrate that he has a prima facie case with a probability of success; that he stands to suffer irreparable harm that cannot be compensated by way of damages and that the balance of convenience tilts in his favour.

19. At this stage it behoves the court to consider the application without delving too deeply into the merits of the case which shall be determined on consideration of evidence presented by the parties at the main suit. As defined by the court in **Mrao Ltd v First American Bank of Kenya and 2 Others (supra)**, a prima facie case is a genuine and arguable case upon which a tribunal can conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the other. It is not in dispute that the applicant has been in the respondent's service from 2nd November 2017 and that the respondent now seeks to terminate his services by way of redundancy.

20. The question arising is whether due process as stipulated in section 40; particularly section 40(b) of the Employment Act has been adhered to. In the respondent's notice to the applicant dated 26th February 2021 the applicant is informed that his office will cease to exist effective 1st May 2021. However, no reasons for and the extent of the intended redundancy are given. The authorities cited by the applicant are relevant in this regard. Specifically **Africa Nazarene University v David Mutevu & 103 Others [2017] eKLR** cited in the case of **Angela Shiukuru Ilondanga v Airtel Networks Ltd (supra)** whereby the Court of Appeal in agreement with the holding in **Thomas De La Rue (K) Ltd v David Opondo Omutelema [2013] eKLR** *observed as follows:*

> *"We agree with that construction as well as the observation that subsection (b) says nothing about the length of the notice or the contents. In our view, however, the only difference in both sub-sections is whether an employee is a member of a trade union or not. A proper construction of both subsections would show that the phrase, "...the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy..." is common to both kinds of employees. So that, whether an employee belongs to a trade union or not, the reasons and period of notice should be spelt out."*

21. The conduct of the parties also comes into play. The applicant has in his pleadings and submissions expressed his wish for the matter to be referred to arbitration yet the respondent faults him for being indolent by failing to do so. The respondent also has a corresponding if not higher prerogative to do the same but has not demonstrated any attempt to have the dispute resolved by arbitration as stated in the contract it is bound by. Instead, the respondent seems to have ignored the applicant's queries and rushed to process his final dues during the impending litigation so as to defeat the applicant's case. The appointment of an acting CTO even on temporary basis yet that office has "ceased to exist" also warrants further interrogation by the court. In light of the foregoing I am convinced that the essential of a prima facie case has been proven.

22. With regard to irreparable harm and balance of convenience, it is evident that the applicant stands to suffer abrupt loss of employment which is a drastic and permanent measure as opposed to the temporary inconvenience, if any, to be suffered by the respondent. The respondent admits to appointing one Peter Kamonde as an acting CTO/Global Head of Technology pending recruitment of a new officer to occupy the role of CDHO. Similar to the case of **Angela Shiukuru Ilondanga v Airtel Networks Kenya Limited [2018] eKLR**, the question of the continued existence of the office of CTO and whether it is essentially identical to the Global Head of Technology/CDHO arises and once again warrants further interrogation by the court. Moreover, the perceived potential disruptions particularly in terms of funding that would affect the respondent's operations have not been sufficiently proved.

Conclusion

23. From the totality of affidavit evidence, pleadings and legal arguments advanced by the parties, I find that the Applicant meets the threshold for grant of the orders sought. I accordingly allow the application and make the following orders: -

> **(1.) That the matter be and is hereby referred for arbitration.**
>
> **(2.) That an interim conservatory order be and is hereby issued to protect, preserve and/or conserve the status of the applicant as the Chief Technology Officer of Living Goods Kenya and in particular, barring the respondent from removing the applicant from office without due process of the law, pending the hearing and determination of the matter by arbitration.**
>
> **(3.) That a temporary order of injunction be and is hereby issued prohibiting the respondent, whether by themselves, or any of their employees, agents or any person claiming to act under their authority from enforcing the letters or notices dated 26th February and 13th April 2021, purporting to terminate the claimant's contract pending the inter-partes hearing and determination of the matter by arbitration.**
>
> **(4.) That the letters dated 26th February and 13th February 2021 by the Respondent are hereby suspended pending the hearing and determination of the matter by arbitration.**
>
> **(5.) That a conservatory order be and is hereby issued prohibiting the respondent from recruiting new persons to the office of Chief Health Digital Officer or an interim Chief Technology Officer to replace the Applicant's office of Chief Technology Officer pending the hearing and determination of the matter by arbitration.**

24. There shall be no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF JULY 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 had 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