



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

ELRC NO. E6522 OF 2020

DR. GABRIEL MUKURIA MUTURI.....CLAIMANT

VERSUS

KENYA FORESTRY RESEARCH INSTITUTE.....RESPONDENT

RULING

1. This ruling relates to the claimant's application dated 22.2.2021 seeking the following orders:

a. That pending hearing and determination of the application and the suit, an order of injunction do issue that the respondent continues to hold vacant the position as the Deputy Director Forest Biodiversity and Environment Management (DDFBEM) Job Group RF13.

b. That pending hearing and determination of the application and the suit, an order of injunction do issue restraining the respondent, its servants, officials, representatives and or agents from advertising or having so advertised, from acting thereupon, interviewing, recruiting, filling or in any other manner replacing the applicant in his position as the Deputy Director Forest Biodiversity and Environment Management (DDFBEM).

c. That pending hearing and determination of the suit, an order of injunction do issue restraining the respondent from appointing to the office of the Deputy Director Forest Biodiversity and Environment Management (DDFBEM), any person to replace the claimant, whether temporarily, permanently or in an acting capacity.

d. That the costs of this application be provided for.

2. The application is supported by the affidavits sworn by the claimant on 22.2.2021 and 12.3.2021 and it is opposed by the respondent vide the Grounds of opposition dated 3.3.2021 and verified by the Affidavits sworn on 2.3.2021 and 18.3.2021 by the respondent's Corporation Secretary Mr. Philip Kichana.

Factual background

3. The applicant contends that he was employed by the respondent for 34 years before being dismissal on 14.8.2020 for no valid reason and without following a fair procedure. He brought this suit on 4.12.2020 and thereafter brought the instant application after the respondent advertised his position for purposes of recruiting another person to replace him.

4. The grounds of the application are that the termination was contrary to provisions of the Public Service Commission Regulations 2020, Labour Laws and the privileges granted to employee under the Constitution of Kenya; that the position should be preserved pending determination of the suit because he has sought reinstatement to that position as one of the reliefs; that section 67 of Public Service Commission Regulations 2020 bar a public from recruiting or substantive filling of a position where disciplinary process has not been concluded administratively or before the commission or court; that the advertisement and filling of the position is premature; that if the orders sought are denied, he will suffer irreparable damage; and that it is in the interest of justice that the application be allowed.

5. The respondent's case is that the applicant is guilty of concealment of material facts; that he was dismissed for a valid reason and after following a fair process; that he will not suffer irreparable harm if the order sought is withheld since he can be adequately compensated by salary for the remainder of his contract term; that the prayers sought are against the respondent's HR Manual 2011 and public policy; and that on the basis of the interim order issued by the court, it has not acted on the advertisement to fill the position left by the applicant.

6. Finally he contended that even though he has sought compensatory damages in his suit, he maintained that his position in the bank should be preserved pending the trial. To fortify his case, he relied on **Stephen Mbugua Chege Vs Nairobi City Water & Sewerage Co Ltd [2017] eKLR** and **Jediah M. Mwarania Vs Kenya Reinsurance Corporation Ltd 2016 eKLR** where the company reinstate the employees to their positions for being unfairly dismissed.

Submissions

7. The application was disposed of by written submissions in which both parties heavily relied on principles for granting of interlocutory injunction established by **Giella Vs Cessman Brown [1973] EA 358** and **Mrao Vs First American Bank of Kenya [2003] KLR 125** to urge their respective cases.

Issues for determination

8. After considering the materials presented to the court by the two sides, the main issue for determination revolves around interlocutory injunction to restrain the respondent from filing the position held by the applicant before the impugned termination pursuant to Rule 17(5) of the ELRC Procedure Rules, 2016. Therefore the issue for determination whether the application meets the threshold for granting interlocutory injunction.

9. The threshold for granting interlocutory injunction was enunciated in **Giella Vs Cessman Brown [1973] EA 358** where the Court of Appeal held that:

- a. The applicant must show a prima facie case with a probability of success.
- b. The applicant must show that irreparable harm will befall him if injunction is withheld.
- c. If the court is in doubt to determine the application on a balance of convenience.

Prima facie Case.

10. Prima facie case was described by the Court of appeal in **Mrao Vs The First American Bank of Kenya Ltd [2003] KLR** as follows:

“A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

11. In this case the applicant alleges that he is the subject of an unfair termination because the reason cited for dismissal is not valid and the procedure followed was unfair. He further contends that section 67 of the PSC Regulations of 2020 bars the respondent from substantively filing an employee's position before conclusion of disciplinary process before it or the PSC or in court. However the respondent averred that that the applicant was fairly dismissed and that his contract was to expire on 30.6.2021.

12. The foregoing factual allegations by the applicant that he was dismissed for no valid reason and without following a fair process can only be ascertained after the trial. The court notes from the termination letter that there is a possibility that no disciplinary hearing was conducted before the termination as required under section 41 of the Employment Act. The foregoing default amounts to violation of the applicant's right under the contract of employment and it calls for rebuttal during the trial. I gather support from **Postal Corporation of Kenya v Andrew K. Tanui [2019] eKLR** where the Court of Appeal held that:

“It is our further view that Section 41 provides the minimum standards of a fair procedure that an employer ought to comply with...Four elements must thus be discernible for the procedure to pass muster:-

(i) an explanation of the grounds of termination in a language understood by the employee;

(ii) the reason for which the employer is considering termination;

(iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;

(iv) hearing and considering any representations made by the employee and the person chosen by the employee.” [Emphasis Added]

13. Again the Court of Appeal in **New Kenya Co-op Creameries Limited v Olga Auma Adede [2019] eKLR** held:

“The repeated use of the word “shall” in section 41 makes it clear that the section is a mandatory provision...In our view, section 41 provides for a physical interaction in the disciplinary process and therefore, the hearing provided under section 41 of the Employment Act which is a mandatory provision, must be an oral hearing.”

14. Having found that failure to accord an employee an oral hearing under section 41 of the Act amounts to a breach of a legal right protected by the law, I must hold that the claimant has established a prima facie case with a probability of success as defined in the **Mrao Ltd case supra**.

Irreparable harm

15. It is now trite law that irreparable harm refers to some injury which cannot be quantified in monetary value or one which cannot be adequately compensated by an award of damages. It also refers to harm which cannot be cured or reversed.

16. In this case the harm that the claimant stands to suffer is unfair and unlawful termination of his contract of service. Although employment is quite emotive, in the circumstances of this case, I agree with the respondent that if the injunction sought is denied, the applicant will not suffer irreparable because any loss suffered is capable of being quantified and adequately remedied by way of damages under section 49 and 50 of the Employment Act. In deed the claimant has already quantified the damages payable in his view as Kshs. 55,832,063.88.

Balance of convenience

17. The court only considers the balance of convenience if it is in doubt as to who between the parties before it stands to suffer greater harm than the other. In this case, I do not harbour any doubt that the applicant will not suffer irreparable harm. Consequently, I will not waste time on this item.

18. In the end, the court agrees with the respondent that the application does not the threshold for granting interlocutory injunction and it is therefore dismissed. Costs shall be in the cause.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF AUGUST, 2021

ONESMUS MAKAU

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 April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE