



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO E171 OF 2021

FREDRICK OCHIENG OLENDU.....CLAIMANT

VERSUS

JOHN KIPKORIR CHUMO.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. This ruling proceeds from the Claimant's application dated 24th February 2021, by which he seeks the following orders:

- a) A temporary injunction barring and restraining the 1st Respondent from performing any duties of the Claimant as set out in the Claimant's letter of appointment dated 29th June 2016 or any other letter/memo confirming the Claimant's appointment;
- b) An order preserving the employment of the Claimant as Administrator/Accounting Officer, with all duties and receivable emoluments plus payment of salary;
- c) An order directing the Cabinet Secretary, Ministry of Environment and Forestry and the Board of EMCA to enforce the orders of the Court;
- d) A declaration that the Claimant is an employee of the National Environmental Complaints Committee (NECC) and that the Claimant continues to serve as its Administrator/Accounting Officer.

2. The application is supported by the Claimant's own affidavit and is premised on the following grounds:

- a) That the Claimant is an employee of NECC but has never been paid his salary from 1st July 2016 to date;
- b) That it is reasonable to pay the Claimant his salary pending the hearing and determination of the suit;
- c) That the Claimant is apprehensive that there may be malicious intention to terminate his employment upon service of the suit, hence the need to protect him from such acts;
- d) That the Claimant's responsibility to the State and the Institution as regards the operation of finance remains and should something go wrong he will be to blame hence the need to restore those functions to him solely.

3. The Respondent's response to the application is by a replying affidavit sworn by the 1st Respondent, John Kipkorir Chumo on 19th March 2021.

4. Chumo, who describes himself as the Secretary of the National Environmental Complaints Committee (NECC) depones that NECC is established under Section 31 of the Environmental Management and Coordination Act (EMCA) as a department of the National Environment Management Authority (NEMA).

5. Chumo further depones that NECC is the successor of the Public Complaints Committee under the EMCA, 1999.

6. He adds that the Claimant had been appointed as a member of the Public Complaints Committee vide Gazette Notice Number 3023 for a period of 3 years effective 30th April 2014.
7. Chumo contends that the Claimant's appointment lapsed with the amendment of EMCA in 2015.
8. Chumo further contends that the Claimant's appointment, which was for a fixed term of 3 years, lapsed on 29th April 2017.
9. Regarding his own entry into NECC, Chumo depones that he was gazetted as a nominee of the Council of Governors, whose representative replaced that of non-governmental organisations, under whose umbrella the Claimant had been appointed.
10. He states that he was appointed for a period of 3 years from 2016 to 2019 and adds that he is currently serving his second 3 year term, running from 2019.
11. Chumo points out that under EMCA, NECC is not a body corporate nor is it classified as a board to be able to employ any staff in its name and run a payroll.
12. With respect to the Claimant's position, Chumo states that when he was appointed as a representative of non-governmental organisations, he took over the role of Secretary and CEO in which capacity he was overseeing administrative duties of the Public Complaints Committee for the period he was a gazetted member of the Committee.
13. Chumo maintains that after the amendment to the law, the Secretary to the Committee became the Council of Governors' nominee, who is by tradition, mandated to run the affairs of the Committee.
14. With respect to recruitment of staff, Chumo depones that the Committee has been engaging staff on casual basis to support in executing the mandate under Sections 31-35 of EMCA. He adds that measures have been put in place to amend the law to provide for corporate status and a secretariat to be headed by the Secretary to the Committee.
15. In the meantime, the Committee is manned by; four staff seconded from the Ministry of Environment and Forestry, two staff from NEMA and researchers employed on an internship programme.
16. Chumo discredits the letter dated 29th September 2016, produced by the Claimant as his letter of employment on the following grounds:
 - a) That the letter does not define the salary payable to the Claimant;
 - b) That it does not specify the period of employment;
 - c) That it does not provide for any benefits at all.
17. Regarding the Claimant's retention after 2016, Chumo states that because all the committee members appointed then were new, the Claimant, who had acted as Secretary to the Public Complaints Committee, was retained on a daily allowance.
18. Chumo depones that this retention did not create employment rights in favour of the Claimant.
19. Chumo concludes that there is no position of CEO/Administrator to be preserved.
20. The first three prayers sought by the Claimant fall within the purview of injunctions while the fourth prayer seeks a declaration that he is an employee of the National Environmental Complaints Committee (NECC) holding the position of Administrator/Accounting Officer.
21. In determining this application therefore, the starting point must be to ask whether the following conditions set out in ***Giella v Cassman Brown & Co Ltd (1973) E.A*** have been established:
 - a) That the applicant has a *prima facie* case with a probability of success;
 - b) That if the order sought is not granted, the applicant will suffer irreparable harm, which would not be adequately compensated by an award of damages;
 - c) That the balance of convenience tilts in favour of the applicant.
22. Looking at the pleadings filed by the parties in this application, it is evident that the position of the Claimant vis- a-vis NECC is a matter that is highly contested. On his part, the Claimant relies on a letter dated 29th September 2016, as evidence of his employment. The Respondents on the other hand maintain that there has never been an employment relationship between the Claimant and NECC. The Respondents go further to state that NECC has no capacity to employ anyone, as it is not a body corporate.
23. The prayers sought by the Claimant in this application are premised on the existence of that employment relationship, which in my view, is not a matter that can be determined at the interlocutory stage.

24. It seems to me therefore that the Claimant has not established a *prima facie* case as contemplated in ***Giella v Cassman Brown*** (supra).

25. Moreover, the Claimant has not demonstrated that if the orders sought are not granted, he will suffer irreparable harm, which would not be adequately compensated by an award of damages.

26. That said, the balance of convenience does not favour the Claimant and his application dated 24th February 2021 is consequently declined with costs in the cause.

27. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OCTOBER 2021

LINNET NDOLO

JUDGE

Appearance:

Mr. Omino for the Claimant

Miss Kinyua for the Respondents