



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE NO. E024 OF 2020

MONICAH AKINYI OTIENOCLAIMANT

v

GOVERNING COUNCIL,

KISUMU NATIONAL POLYTECHNIC.....RESPONDENT

RULING

1. On 23 July 2020, the Principal of the Kisumu National Polytechnic (the Respondent) issued a show-cause notice to Monicah Akinyi Otiemo (applicant).
2. The applicant responded to the show-cause on 28 July 2020, and on 28 September 2020, the Respondent sent her on 14-days leave to facilitate further investigations and to further show-cause.
3. The applicant responded on 6 October 2020.
4. On 19 October 2020, the Respondent extended the applicant's leave for a further 14 days.
5. On 18 November 2020, the Respondent issued a summary dismissal letter to the applicant, which prompted the applicant to move the Court on 1 December 2020, alleging unfair termination of employment and breach of contract.
6. The Respondent filed a Response to the Memorandum of Claim on 18 January 2021.
7. On 19 May 2021, the applicant filed a Motion under a certificate of urgency seeking leave to amend the Memorandum of Claim.
8. At the same time, the applicant filed a Motion seeking orders:
 - (1) ...
 - (2) THAT pending the hearing and determination of this application inter-partes, this Honourable Court be pleased to issue an order of temporary injunction restraining the Respondent from advertising the position of Financial Manager and carrying out interviews with respect to the same position.
 - 3) THAT pending the hearing and determination of this application inter-partes, this Honourable Court be pleased to issue an order of temporary injunction restraining the Respondent from advertising the position of Financial Manager and carrying out interviews with respect to the same position.
 - (4) THAT this Honourable Court do issue an order directing the Respondent to unconditionally reinstate the Claimant their employment services and former position with the Respondent without loss of any benefits or seniority and without conditionality.
 - (5) THAT this Honourable Court do issue an order for the Claimant to be adequately compensated for time lost out of employment.
 - (6) THAT this application be heard inter-partes on the day of 2021.
 - (7) THAT the costs of this application be borne by the Respondent.
9. When both Motions were placed before the Court on 20 May 2021, it directed that they be served.

10. The Court also issued an order in the following terms:

Pending further directions, the Respondent is enjoined from advertising or recruiting for the position of Finance Manager.

11. The Court also directed the Respondent to file and serve responses to the Motions ahead of giving further directions on 2 June 2021.

12. The Respondent filed its Grounds of Opposition and a replying affidavit sworn by the Principal on 27 May 2021.

13. On 2 June 2021, the Court directed the parties to file and exchange submissions. The applicant filed her submissions on 7 July 2021, while the Respondent filed its submissions on 21 October 2021.

14. In the course of preparing this Ruling, it has been brought to the attention of the Court that the applicant filed a contempt application against the Respondent on 28 July 2021 (the Respondent filed a replying affidavit to the contempt application on 27 August 2021).

15. The Court will give directions on the contempt application after the delivery of the Ruling.

16. The Court has considered the application, affidavits and submissions.

Amendment of Memorandum of Claim

17. The Respondent did not oppose the grant of leave to the applicant to file an Amended Memorandum of Claim, and the Court will grant the leave.

Interdict on recruitment

18. In support of the plea to stop the recruitment to the position previously held by the applicant, it was contended on her behalf that the Cause would be rendered nugatory and that she stood to suffer irreparable loss if the orders sought were not granted.

19. In opposition to the grant of injunctive orders at this stage of the proceedings, the Respondent asserted that it had resolved to advertise for the position on 14 January 2021, the Ministry of Education approved the recruitment, and an advertisement was published 19 March 2021, that applicants were shortlisted and interviewed on 12 May 2021, and a recommendation made on the same day for an appointment and that an appointment was made through a letter dated 24 May 2021 with a reporting date of 2 June 2021.

20. The Respondent thus urged that the order of injunction sought had been overtaken by events.

21. The Court has considered the Motion, affidavits and submissions.

22. It is correct that the Respondent offered the position hitherto occupied by the applicant to another person after a competitive recruitment process. The Respondent conducted interviews on 12 May 2021, and the appointment letter was issued and accepted on 24 May 2021.

23. The Court, however, notes that it granted an interim order stopping the recruitment process on 20 May 2021, before the completion of the recruitment process.

24. Nevertheless, there is no indication on the record when the applicant served the order upon the Respondent. If the applicant had exhibited evidence that service of the order was effected before 24 May 2021, the Court would have confirmed the orders of 20 May 2021.

25. The orders sought by the applicant have therefore been overtaken by events and cannot be confirmed at this interlocutory stage.

26. In the circumstances, the Court declines to confirm the interim orders which had enjoined the Respondent from proceeding with the recruitment process.

Conclusion and Orders

27. From the foregoing, the Court orders that:

(i) The applicant to file and serve an Amended Memorandum of Claim on or before 24 November 2021.

(ii) The Respondent to file and serve an amended Response if necessary on or before 1 December 2021.

(iii) The applicant to file and serve a Reply if need be on or before 7 December 2021.

(iv) Agreed Issues to be filed on or before 31 December 2021.

28. Hearing date to be given after filing Agreed Issues.

29. Costs in the cause.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 17TH DAY OF NOVEMBER 2021.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For applicant S.M. Onyango & Associates

For Respondent Sarah Aliongo, Principal Litigation Counsel, Office of the Hon Attorney General

Court Assistant Chrispo Aura