



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION 145 OF 2018

(Before Hon. Justice Hellen S. Wasilwa on 21st January, 2020)

ERNEST MOTURI OGWORA.....PETITIONER

VERSUS

NATIONAL CEREALS AND PRODUCE BOARD.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

THE PUBLIC SERVICE COMMISSION.....3RD RESPONDENT

RULING

1. Before this Court is the Petitioner's Application dated 27/06/2019 seeking the following orders-

a. Spent.

b. This Honourable Court be and is hereby pleased to protect the Applicant from the continued discriminatory and ill-motivated retaliatory actions of the Respondent.

c. This Honourable Court be and is hereby pleased to make a declaration permanently barring the Respondent (NCPB management and more specifically the Board of Directors) from instituting or implementing any actions that are detrimental to the Petitioner or undermine or demean his work or position as a consequence of the Petition.

d. This Honourable Court be and is hereby pleased to issue an order compelling the Respondent to avail the documents/information that were requested for.

e. This Honourable Court be and is hereby pleased to issue an order restraining the Respondent from proceeding with the appointment flowing from the advertisement of 19/06/2018 more so for all positions pending the hearing and determination of this suit.

f. Costs be in the cause.

g. Any other order that this court may deem fit and just in the circumstances.

2. The Application is supported by the grounds on the face of the motion and the Claimant's Supporting Affidavit sworn on 27/06/2019. They are that on 12/04/2019, the Respondent's board of directors resolved to send the Applicant on compulsory leave and to have his performance for the past 1 year appraised.

3. The Applicant went for his normal leave on 7/05/2019 and reported back on 4/06/2019. On 20/06/2019, he received an email on the board's resolutions, which was sent by the acting board secretary, John Ngetich.

4. According to the Applicant, the following are instances where the Respondent acted contemptuously: when the Respondent failed to supply him with the records on his performance evaluation from 2008 to date.

5. Further, that the Respondent contemptuously ignored this Court's order issued on 20/12/2018 stopping it from recruiting the General Manager, Marketing and Operations. In addition, the recruitment process to fill several positions including that of the managing director is ongoing. It is averred that the Respondent did not appear before Court on 14/03/2019. As such, it is clear that the Respondent is treating the

matter before this Court with contempt and needs to be stopped.

6. It is the Applicant's position that no party will be prejudiced if the orders sought are granted.

7. The Respondent opposed the application vide its grounds of objection filed on 8/07/2019 on the grounds that the application has no basis in law and in fact, and that the same is frivolous and vexatious and an abuse of the court process.

8. The Application was disposed of by way of written submissions where the Petitioner filed its written submissions on 18/07/2019 and supplementary submissions on 22/11/2019. The 1st Respondent filed its submissions on 28/10/2019.

Submissions by the Parties

9. The Petitioner has relied on the case of **Giella vs. Cassman Brown and Company Limited [1973] EA 358** to show what a Court needs to consider before granting injunctive reliefs.

10. On the question of a *prima facie* case, the Petitioner submits that he has shown the Respondents continued disregard of this matter like not implementing the orders of 21/12/2018. He also relies on the case of **Kipkurui arap Koech vs. Alice Wambui Magandu & 3 Others [2018] eKLR**.

11. The Petitioner submits that he will suffer irreparable harm if the Court fails to grant the orders of permanent injunction and relies on the case of **Olympic Sport House Limited vs. School Equipment Centre Limited; HCCC 190 of 2012**.

12. He further submits that if the 1st Respondent is left to recruit new senior employees for the positions advertised and implement further retaliatory actions, it will be detrimental to the Petitioner. He relies on the case **Kipkurui arap Koech vs. Alice Wambui Magandu & 3 Others (supra)**.

13. The 1st Respondent submits that the nature of the documents sought by the Petitioner are confidential in nature and relate to information about other applicants and matters which are a preserve of the board and cannot be furnished to the Petitioner for the purpose of this case, and relies on the case of **Magdalene Kiboi & 17 Others vs. Engen Kenya Limited [2019] eKLR**.

14. The 1st Respondent submits that the allegations made by the Petitioner are not substantiated by any tangible evidence hence add no probative value to this case and relies on the case of **Mohamed & Another vs. Haidara [1972] EA**.

15. They further submit that the application has no basis in law hence frivolous, vexatious and an abuse of the Court process and relies on the case of **Mpaka Road Development Limited vs. Kana [2004] EA 161 (CCK)**

16. It is the 1st Respondent's submissions that at the time of filing this Petition, Mr. John Matiri had already been appointed, as such, they are not in contempt as they were served by the orders of 20/12/2018, on 15/1/2019. Further, the order sought regarding the respective positions is overtaken by events.

17. It is the 1st Respondent's submissions that the Petitioner has not met the threshold for granting of the orders sought as set out in the case of **Giella vs. Cassman Brown & Company Limited [SUPRA]**. He has failed to indicate the prejudice he will suffer if the orders sought are not granted.

18. The 1st Respondent submits that this court cannot issue orders that will interfere in its management and rely on the cases of **Dickson Kabiru Muburu vs. Teachers Service Commission & Another [2017] eKLR** and **Theresa Shitakha vs. Mary Mwamodo & 4 Others [1986] eKLR**.

19. The Respondent also submits that the Petitioner has sought orders against the General Manager who is not a party to this suit, as such, the same cannot be issued and relies on the case of **Vogue Hair & Beauty Studios Limited vs. Deposit Protection Fund Board (As Liquidator of Prudential Building Society Limited) & 2 Others [2017] eKLR**.

20. Lastly, it is submitted that the order sought by the Petitioner restraining it from making appointments is of a temporary nature, which cannot be granted without them being granted a hearing. They rely on the case of **Joseph Munagi Keriko vs. Council of Jomo Kenyatta University of Agriculture & Technology & 3 Others [2018] eKLR**.

21. In his supplementary submissions, the Petitioner submits that he is entitled to the documents sought pursuant to article 35 of the Constitution and relies on the case of **Simon Rotich Ruto vs. Judicial Service Commission & Another [2019] eKLR**.

22. The Petitioner further submits that an order suspending the recruitments following the advertisements of 19/06/2018 will greatly advance the course of justice and curtail impunity and relies on the case of **Norton vs. Shelby County [1886]**.

23. I have examined all the averments of both Parties. I note that the Petitioner had sought stoppage of appointment of one John Mbaya Matiri.

24. The Respondent submitted that Mr. Matiri was appointed to the position of Manager, Marketing and Operations vide a letter dated 20/12/2018.

25. The Applicant however obtained orders stopping the recruitment on 21/12/2018 but were served upon Respondent on 15/1/2019 and so had been overtaken by events.

26. In the circumstances, the orders stopping the recruitment were overtaken by events upon being served late and so the issue of contempt of Court does not arise.

27. As to the prayers sought to allow the Petitioner some documents sought to enable him prosecute this Petition properly, I allow the same as prayed. This will allow the Applicant an opportunity to explicitly explain his case.

28. The costs of this application be in the Petition.

Dated and delivered in open Court this 21st day of January, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Sikuta for Petitioner – Present

Lutta for Respondent – Present