



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 225 OF 2019**

**SIMON MUNGATHIA ITHAL.....CLAIMANT**

**-VERSUS-**

**KENYATTA NATIONAL HOSPITAL.....1ST RESPONDENT**

**ENG. NICHOLAS GUMBO.....2ND RESPONDENT**

**MS. PERIS BITUTU.....3RD RESPONDENT**

**DR. RICHARD THUO.....4TH RESPONDENT**

**DR. NELSON CHEGE KURIA.....5TH RESPONDENT**

**DR. STANLEY KAMAU MAINA.....6TH RESPONDENT**

**PROF.MICHAEL KIBET KIPTOO.....7TH RESPONDENT**

**PROF.JAMES MACHOKI M'IMUNYA.....8TH RESPONDENT**

**DR. E. KAMURI.....9TH RESPONDENT**

**MR. CALVIN NYACHOTI.....10TH RESPONDENT**

(Before Hon. Justice Byram Ongaya on Wednesday 8th January, 2020)

**RULING**

The claimant filed on 07.10.2019 an application by the notice of motion dated 02.10.2019 through Kamau Kuria & Company Advocates. The application was under section 5 of the Judicature Act, Cap 8 Laws of Kenya, Cap 49 Laws of England and Rules 81.8 and 81.10 of part 81 of the Civil Procedure (Amendment No.2) Rules, 2012 of England and Wales. The applicant prayed for orders:

- a) That the application be certified urgent.
- b) That the Honourable Court be pleased to dispense with service of the application in the first instance.
- c) That the Honourable Court be pleased to declare and hold that, having been served or having been aware of the order of injunction made by the Honourable Court on 08.04.2019, requiring that the respondent by itself, its board, its officers or agents be restrained from advertising, recruiting, appointing or promoting another person to hold the office of Corporate Affairs and Communication or Head of Department Marketing and Communication currently and at all material times held by the applicant, the respondent has, in disobedience of that order purported to advertise, recruit and appoint another person to the said office.
- d) That the Honourable Court be pleased to declare that the purported advertisement of the claimant's post in the issue of the Daily Nation of 23.07.2019 in disobedience of the said order made on 08.04.2019 is null and void.
- e) That the said members of the Board of the respondent i.e Eng. Nicholas Gumbo; Ms.Peris Bitutu; Dr.Richard Thuo; Dr. Nelson Chege Kuria; Dr. Stanley Kamau Maina; Prof. Michael Kibet Kiptoo; Prof. James Machoki M'Imunya; Dr. E. Kamuri and Mr. Calvin Nyachoti be committed to civil jail for a period of 6 months each or any other period or any other or further sanction, as the Court may deem fit and appropriate.

f) That the costs of the application be provided for.

The application was based on the annexed supporting affidavit by the claimant. The claimant filed a further affidavit on 18.11.2019. The respondents opposed the application by filing on 31.10.2019 the replying affidavit of Dr. Evanson Kamuri, the 1st respondent's Chief Executive Officer. The parties filed their respective submissions on the application. The Court has considered the application together with the affidavits and the submissions. The Court makes its findings as follows.

**First**, 08.04.2019 the Court ordered inter alia. **"2. That pending the mention or further orders by the Court the respondent by itself, its Board, its officers or agents is hereby restrained from advertising, recruiting, appointing or promoting another person to hold the office of Cooperate Affairs and Communication currently and at all material time held by the Applicant."** On 10.04.2019 the Court ordered, **"1. That pending the hearing and determination of the suit, order 2 given on 08.04.2019 is extended accordingly."** The respondents have not denied the service of the Court orders or denied being aware of the orders. The Court returns that at all material times the respondents have been aware and were bound by the terms of the orders as given by the Court.

**Second**, the respondents have not denied that they published in the Daily Nation of 23.07.2019 vacancies including the position of Head, Marketing and Communication, Job Group K3 (Q). The claimant's case is that the advertisement contravened the terms of the Court orders because at all material times he held the position of head communication department. In particular the claimant's case is that by the letter dated 31.03.2009 he was promoted to the position of Chief Public Relations Officer, Job Group K5 with effect from 20.03.2009. Further the letter of dismissal dated 13.06.2019 acknowledged that the claimant was a Head of Department when it partly stated, **"It has been noted that your position as a Head of Department was a position of influence that required the highest level of integrity which you failed to uphold."** On the basis of the letter of promotion dated 31.03.2009, the claimant's case is that he has served as a head of department for the last 10 years. It is his case that the department was initially known as Public Relations Department, then in 2012 renamed Corporate Affairs and Communications and in 2016 to Marketing and Communications. Further the 1st respondent's organogram shows that the department is known as Marketing and Communication.

The respondents maintained in the replying affidavit that the job advertised is that of Head, Marketing and Communication, Job Group K3 (Q) and not the one held by the claimant of Chief Public Relations Officer, Job Group K5 (N) and which was subject of the Court order. The respondents therefore urged that they have not disobeyed the Court order.

The Court has considered the parties' respective cases. It is clear that the claimant at all material times performed the duties of Head of Marketing and Communications while he held the position of Chief Public Relations Officer, Job Group K5 (N) and not the position of Head, Marketing and Communication, Job Group K3 (Q). The Court finds that the two positions were obviously different and there is no evidence and suggestion that the position of Head, Marketing and Communication, Job Group K3 (Q) had been irregularly established or calculated to defeat the Court order. There was no order barring the respondents from establishing or filing the position of Head, Marketing and Communication, Job Group K3 (Q) within the 1st respondent's establishment. Upon the material before the Court, there is no reason to find that the advertisement as was published disobeyed the Court order in any material respect.

While making that finding the Court considers that the purpose of the interim Court order was to preserve the position held by the claimant in the 1st respondent's establishment namely, Chief Public Relations Officer, Job Group K5 (N), so that depending with the outcome of the litigation, it would be possible for the claimant to continue in the 1st respondent's service as may become appropriate. There was no order barring the 1st respondent from assigning duties as may have been performed by the claimant to another officer or to another person or office. To the extent that the respondents have confirmed to the Court that the position of Chief Public Relations Officer, Job Group K5 (N) is still preserved in terms of the Court orders, the Court returns that there is no established disobedience as was urged for the claimant.

The Court further considers that subject to applicable law and the terms and conditions of the contract of service, it is not unusual for a holder of a lower office to perform the roles or duties attached to a higher office such as of a Head of Department as the employer may from time to time assign. Further, the Court considers that if the higher office of Head of Department becomes substantively filled, the roles of the lower office in the establishment of the employer (and which lower office or officer had performed or assigned the roles of the higher office of Head of Department) do not thereby become moribund. In the circumstances and there being no material before the Court to show that the usual and substantive roles of Chief Public Relations Officer, Job Group K5 (N) will become moribund if the position of Head, Marketing and Communication, Job Group K3 (Q) is substantively filled as advertised, the application will fail as not justified.

In conclusion, the application filed on 07.10.2019 for the claimant and by the notice of motion dated 02.10.2019 is hereby determined with orders:

- a) The application is hereby dismissed.
- b) The costs of the application in the cause.

**Signed, dated and delivered** in court at **Nairobi** this **Wednesday, 8th January, 2020.**

**BYRAM ONGAYA**

**JUDGE**