



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 769 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

SHEM ANDREW GICHIMU..... CLAIMANT

VERSUS

HIGHER EDUCATION LOANS BOARD.....RESPONDENT

RULING

The Applicant filed a Notice of Motion on 13th November, 2019 seeks the following reliefs:

1. Spent
2. That the Court be pleased to hear and determine this matter in the first instance and service of the application be dispensed with.
3. That the Court be pleased to hear the Claimant urgently to prevent a looming crisis at the Finance Division of the Higher Education Loans Board.
4. That the Board of the Higher Education Loans Board preserve the position of Chief Finance Officer (CFO) and be restrained from hiring or replacing Mr. Shem Gichimu as CFO until the matter is heard and determined.
5. That cost of this application be provided for.
6. That such further and other relief be granted to the applicant as this court deems fit and expedient in the circumstances.

The application is based on grounds that:

1. On 25th March, 2019 the Finance Manager of the Respondent brought to the Applicant's attention a discrepancy in the March 2019 payroll, of the Respondent, where the basic salary of the Chief Operations Officer (COO) had been increased without normal procedure having been followed.
2. The Applicant pointed out the irregular payment to the Chief Executive Officer (CEO) and approved the March 2019 salary for all staff, save for the increased salary of the COO, who continued earning the unincreased salary.
3. On 27th September, 2019 the CEO terminated the Applicant for wilfully neglecting to perform his duty carefully and for disobeying a lawful and a proper command under Section 44(4)(c) and (e) of the Employment Act, 2007.
4. The alleged order given by the CEO for which the CFO was terminated amounted to an unlawful act which if the CFO had acted upon, would have amounted to an offence under the Constitution, various laws and the Respondent's policies and procedures.
5. The Applicant reported the matter to the Ethics and Anti-Corruption Commission but was terminated before the Commission had finalised their investigation.
6. The said termination was discriminatory, wrongful and unfair and may affect other services and staff in the Legal and Finance Department.

The application is supported by the affidavit of the Applicant sworn on 12th November, 2019. He depones that his termination was unlawful and in contravention of section 65 (1) of the Anti-Corruption and Economic Crimes Act and section 22 (8) of the Leadership and Integrity Regulations. He avers that the basic salary increment given to the COO was irregular and illegal and should he have approved the payment he would have been criminally liable.

Respondent's Case

In response to the application, the Respondent filed a Replying Affidavit sworn by Charles M. Ringera, the Respondent's Chief Executive Officer, on 13th December, 2019.

He depones that during the recruitment of the Chief Innovation and Technology Officer, in March 2019, it was noted that the Chief Innovation and Technology Officer (CITO) was to earn a higher salary than that of the COO. He avers that this led to a comprehensive analysis of staff cadres which revealed that there were a number of staff whose salaries had overlapped into higher grades thus junior officers earned more than senior officers.

He states that the Respondent commenced a salary review adjustment to create internal harmony, balance, equity and fairness bearing in mind the portfolio held and strategic responsibilities of the COO, Head of Internal Audit Risk Management and Compliance who earned less than their subordinates.

He states that the COO's salary was adjusted concurrently with the appointment of the CITO and was to be effected beginning of March 2019 whereas the Accounting Officer requested that the salary adjustment of the Head of Internal Audit, Risk Management and Compliance be effected thereafter.

He states that the Applicant advised the Ag. Head of Human Resource to prepare the payroll without the adjustment to the COO's salary and he was only involved via an email from Ag. Head of Human Resource to himself dated 26th March, 2019.

He states upon their review of the salaries payment system transaction log the Applicant had recused himself but had intercepted the salary payment file which had been approved in the online banking system and proceeded to remove the COO's adjusted salary from the payment and later paid the COO's salary without the approved adjustment.

He states that the actual payment of the COO did not reflect the payroll status which already reflected the adjusted salary thereby causing discrepancy to the PAYE, Pension and Net Pay in respect of the COO.

He states that the Applicant failed to inform him of his change in stance and proceeded to disregard his instructions to him and countermanded his instructions to other staff members thereby undermining his authority and disregarding the Board's directive.

He avers that the Applicant's insubordination led to issuance of a show cause letter on 8th April, 2019 which he tendered a written response. He avers that the Applicant's responses to the allegations were found unsatisfactory and the Applicant was invited to appear before Board Disciplinary Committee. He avers that the Applicant was aware of the reasons for his termination.

He contends that the Board Chair, some of the Board members and other staff members were invited by the Ethics and Anti-Corruption Commission (EACC) to record statement on alleged unethical conduct at Respondent's corporation.

He contends that if the prayer for reinstatement is granted will lead to disharmony and fractured working environment as the Chief Strategy and Customer Experience Officer is the Ag. Chief Finance Officer. He urges the Court to dismiss the Application.

The parties made oral submissions on the application.

Applicant's Submissions

Counsel Namasake for the Applicant submitted that the Applicant was dismissed for allegedly disobeying lawful order but the order given to him was unlawful. He submitted that the applicant was diligent in performing his duty as a senior officer dealing with public funds. He submitted that the Applicant could not be terminated under Section 44(4)(c) and (e) of the Employment Act.

Counsel submitted that the applicant having been one of the senior procurement officers, the government requires that all such senior officers be given compulsory leave to ensure that those dealing with procurement matters have been vetted.

He submitted that the Applicant had undergone procurement vetting and he would have committed an offence if he acted on the CEO's instructions. He submitted that it is for this reason that the Applicant declined to obey the CEO's unlawful order.

He submitted that the issue was whether a senior officer was entitled to an increment which the Applicant felt that the increment was not properly done thus he declined to sign the increment. He submitted that this resulted to the Applicant's termination.

Counsel submitted that the matter is yet to be concluded after the Applicant reported to the EACC. He submitted that Section 61 of the Anti-Corruption and Economic Crimes Act an officer who reports a matter should not be penalised in any way. He further submitted section 22 of the Regulations of Leadership and Integrity Regulations provides that a person who lodges an objection should not be punished in any way.

He submitted that the Applicant's case is that he should not have been terminated before the matter was finalised. He submitted that it is not only the Applicant who handled the matter as there was a finance officer, human resource and legal and company secretaries who refused to follow the CEO's order but only the Applicant was terminated. He submitted that the termination is null and void.

Respondent's Submissions

Counsel Bonyo for the Respondent submitted that prayers 1 and 2 of the application were had already been dispensed with. She submitted that in respect of prayer 3, the Applicant has not presented any proof of the existence of a looming crisis in the Respondent's finance division. She argued that the Chief Strategy and Customer Experience Officer is now acting as CFO as she has previously worked in the same division thus there is no crisis.

She submitted that prayer 4 of the application is a presumptive prayer and asked the court to be guided by **Giella v Cassman Brown** case which sets out the conditions to be fulfilled by an Applicant seeking injunction.

She submitted that the Applicant in his supporting affidavit admits that he wilfully disregarded instructions from the CEO to adjust the salary of the COO. She submitted that the Applicant's disregard of the Board directive and instructions of the CEO is what ultimately led to his termination.

She submitted that the Applicant was taken through an elaborate due process and was given an opportunity to be heard. She submitted that the disciplinary process commenced prior to the Applicant lodging his complaint at the EACC.

She submitted that Section 65(1) of the Anti-Corruption and Economic Crimes Act bars disciplinary action on the basis of "assistance given to the Commission or an investigator or on the basis of information to the Commission on an investigation". She submitted that the Applicant was not disciplined because of making a report providing any information or giving assistance to the EACC. She argued that Section 65(1) of the Act is inappropriate as is Section 22(8) of the Leadership and Integrity Regulations 2015.

She submitted that the Applicant has failed to set out a prima facie case. She argued that there is injury that would be occasioned by the Respondent as there is no looming crisis and damages would be sufficient remedy in the Applicant is successful in his claim. She submitted that the law provides sufficient remedy in the event he is successful. She further submitted that the action against the Applicant was not discriminatory as the instructions were to be carried out by the CFO as the head of the finance department.

In rejoinder, Counsel Namasake submitted that prayer 4 is the Applicant's main prayer and urged the Court to preserve the position. He submitted that there was no logic in singling out in respect to the discrepancy in salary as there were 88 other staff members whose salary had a problem. He argued that it is only after the Applicant recorded a statement with EACC that he was invited for the disciplinary hearing.

Determination

The main issue for consideration is whether the Applicant has met the conditions for grant of orders for injunction as set out in **Giella v Cassman Brown [1973] EA 358** where the Court of Appeal held:

"The conditions for the grant of an interlocutory injunction are now well settled in East Africa. First, an applicant must show a "prima-facie" case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is doubt, it will decide an application on the balance of convenience."

The Applicant's main contention is that there was no lawful order which would have led to his termination as the basic salary increment given to the COO was no only illegal but would have made him criminally liable.

It is the Applicant's case that there is a looming crisis thus he should be heard in the first instance. He further seeks that the Court does restraining the Respondent from replacing him as the CFO. The Respondent on its part avers that there is no possibility of a looming crisis in the Finance Division as the Chief Strategy and Customer Experience Officer who is now the Ag. Chief Finance Officer is a certified accountant and has previously worked as the Respondent's Finance Manager.

In **Charter House Investments Ltd v Simon K. Sang and Others, Civil Appeal No. 315 of 2004** stated:

"Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance of the status quo. The award of a temporary injunction by courts of equity has never been regarded as a matter of right, even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them and to third parties. In the Giella case (supra) the predecessor of this Court laid down the principle that for one to succeed in such an application, one must demonstrate a prima facie case with reasonable prospect of success; that he stands to suffer irreparable damage which cannot be compensated for by an award of damages; and that the balance of convenience tilts in his favour."

I do not find that Applicant has established a case for grant of an temporary injunction. In so finding I take into consideration that there is no prima facie case with the likely of success for reason that the Applicant's termination was amongst other as a result of insubordination which occurrences he says led to the applicant reporting the matter to the EACC. There is currently no finding by the EACC on the matter.

The Applicant relies on Section 65(1) of the Anti-Corruption and Economic Crimes Act bars disciplinary actions against persons who

discloses information to the EACC. The said section provides:

(1) No action or proceeding, including a disciplinary action, may be instituted or maintained against a person in respect of—

(a) assistance given by the person to the Commission or an investigator; or

(b) a disclosure of information made by the person to the Commission or an investigator.

The Applicant in paragraph 20 of his supporting Affidavit depones that he reported the matter to the EACC on 4th June, 2019. The Applicant was issued with two show cause letters dated 8th April, 2019 and 16th April 2019. These letters were issued before the Applicant reported the matter to the EACC thus disciplinary action did not commence after informing the EACC of the irregularities at the Respondent. Thus Section 65(1) would be inapplicable in the present case.

The Applicant is not likely to suffer any loss as he has already been terminated and the Respondent has filled the position of CFO. In respect of whether the balance of convenience tilts in favour of the Applicant, I find that the Respondent is more likely to suffer should this court grant the order for injunction as it is expect to continue discharging its mandate to the public. Further, this balance tilts more in favour of public interest as opposed to the Applicant's private rights in respect of his employment.

Consequently, I find that the application has no merit and is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21ST DAY OF FEBRUARY 2020

MAUREEN ONYANGO

JUDGE