



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 111 OF 2019

(Before Hon. Justice Mathews N. Nduma)

VICTOR KIPTANUI.....CLAIMANT

VERSUS

WEVARSITY SACCO SOCIETY LIMITED.....RESPONDENT

RULING

1. By a notice of motion application dated 5th December 2019 and filed on even date, the applicant prays for a temporary injunction to issue directed at the respondent, its employees, workers, agents and/or whomsoever jointly and severally restraining them from advertising a vacancy of a Chief Executive Officer or filling the Applicant's position of Chief Executive Officer or replacing the Applicant as a Chief Executive Officer of the respondent pending the hearing and determination of the cause.
2. The application is based on grounds set out on the face of the application, supporting affidavit and written submissions by the applicant.
3. The facts of the matter are that the applicant was employed on 5th May 2014 as the CEO of the respondent in terms of an Employment Contract dated 10th March 2014 on permanent basis. The Applicant performed his duties continuously until the 26th June 2019 when he was issued a show cause letter by the Chairman of the respondent alleging irregular disbursement of a loan to one Paul Nga'ngá Kamau, a member of the Sacco in the sum of Kshs. 2,000,000 inter alia. The applicant was directed to respond within 14 days to the charge which he did by a letter dated 30th September 2019. The applicant states that he made a reasonable explanation that the loan disbursed to a member was regular and within the mandate of the CEO and the Chairman was simply usurping the powers of the CEO.
4. Meanwhile the applicant was placed on compulsory leave which leave expired on 12th October 2019. The said leave was extended for two months by a letter dated 11th October 2019. The applicant was invited to a disciplinary hearing on 30th October 2019 and he appeared to defend himself. The applicant deposes that he demonstrated his innocence.
5. The applicant received a letter dated 15th November 2019, demoting him from the position of CEO to a non-existent position of Internal Auditor and the applicant was surcharged Kshs. 2,795,411.
6. The applicant appealed the decision upon which the surcharge of Kshs. 2,795,411 was reversed but the demotion was upheld. That the demotion was meant to humiliate the applicant and force him to resign since no breach of contract had been proved against the applicant and the decision as not based on any evidence at all. That the demotion was unlawful and unfair. That if the injunction is not granted, the applicant will suffer irreparable damage. That the applicant is ready to comply with any conditions given by the court. That the application be granted with costs.
7. The respondent filed grounds of opposition on 16th December 2019 to wit that the application is misconceived and an abuse of court process. That no triable issues are raised by the applicant. That the deployment of applicant to the position of internal auditor was lawful, procedural and fair. That the applicant never held the substantive post of CEO. That the position of Internal Audit does exist as per the provisions of the Sacco Societies Act.
8. That the prayers sought are mandatory in nature and could pre-determine the suit if granted before the same is heard on merits. The respondent filed submissions and list of authorities.

Determination

9. The issue for determination is whether the applicant has satisfied the pre-requisites of granting an interim injunction pending the hearing and determination of the main suit. The principles governing the grant of interim injunctions are set out in the case of *Giella versus Casman Brown Ltd (1973) EA358* and in the case of *Mrao Limited versus The first American Bank of Kenya (2003) KLR* as follows:

- i. The applicant must present a prima facie case with a probability of success.
- ii. Demonstrate that he is likely to suffer irreparable harm that may not be remedied by damages and costs.
- iii. If the court is in doubt matter to be determined on a balance of convenience.

10. The court has carefully analyzed the deposition by the applicant and written submissions vis a vis the grounds of opposition and submissions filed by the respondent. The court is mindful not to pre-determine matters of fact that must await hearing and determination of the suit on the merits.

11. The court has considered the case of *Charter House Investments Limited vs Jimo K. Say and others Civil Appeal No. 315 of 2004* which is cited with approval by the Court of Appeal at Nairobi in *Elizabeth Agutu Odhiambo Versus Waumini Sacco Society Limited (2019) eKLR* as follows:

“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 the courts of equity has never been regarded as a matter of right, even when 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”.

12. In the present case, the respondent is a Sacco that is a custodian of members’ savings and its primary obligation is to safeguard the savings by members and ensure principles of fairness and equity are followed in granting deserving members loans as and when applied for. All other interests of individual employees of the respondent are secondary to that primary objective of the respondent.

13. The applicant was subjected to a disciplinary process that led to his demotion. The respondent deployed him to the position of Internal Audit instead of terminating his services or meting on him any other lawful punishment.

14. The applicant was the CEO of the respondent and the respondent disputes that the applicant held that position on a substantive, permanent basis.

16. There are facts in dispute that shall be determined when the matter is heard on the merits. The applicant has not disclosed a case that warrants the court to grant an injunction stopping the respondent from filling up the position of CEO of the respondent.

16. The balance of convenience dictates that the Sacco continue to be managed lawfully, prudently and for the benefit of its members. This is the paramount interest that tilts the balance of convenience in favour of the respondent. The applicant still holds a substantive, and important position in Internal Audit Department of the Sacco in the meantime, if he so wishes to continue serving the respondent.

17. Accordingly, the application lacks merit and is dismissed. Costs in the cause.

Ruling Dated, Signed and delivered at Nairobi this 30th day of April, 2020

Mathews N. Nduma

Judge

ORDER

In view of the declaration of measures restricting court of operations due the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

Mathews N. Nduma

Judge

Appearances

Mr. Odeny for the Applicant.

Mr. Abok for the Respondent

Chrispo – Court Clerk