



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION 191 OF 2019

IN THE MATTER OF ARTICLES 22 AND 258(1) OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF ALLEGED THREAT OF VIOLATION OF ARTICLES 3 AND 10 OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF ALLEGED THREAT VIOLATION AND CONTRAVENTION OF ARTICLES 19, 20, 21, 22, 23, 24, 25 (c), 27, 28, 41, 47, 50, 51 AND 232 OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF THE PUBLIC SERVICE COMMISSION ACT 2017

IN THE MATTER OF THE EMPLOYMENT ACT 2007

BETWEEN

KUSOW BILLOW ISSACK.....PETITIONER

AND

THE MINISTRY OF INTERIOR AND

COORDINATION OF NATIONAL GOVERNMENT.....1ST RESPONDENT

THE PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

THE GARISSA COUNTY COMMISSIONER.....4TH RESPONDENT

RULING

1. The application herein is the Petitioner's Notice of Motion dated 17.10.2019 and it brought under articles 1, 3, 19, 20, 21, 22, 23, 24, 25 (c), 27, 28, 41, 47, 50, 51, 159, 232, 233, 258, 259 (2) and 162 of the Constitution of Kenya 2010 and rules 3, 4, 8, 13, 19 and 24 of the Constitution of Kenya (Protection of Right and Fundamental Freedoms) Practice and Procedure Rules 2013 and All other enabling provisions of the law. It seeks the following orders

a. THAT this application be certified urgent and be heard *ex parte* at the first instance.

b. THAT pending the hearing of this instant application *inter partes*, the Honourable Court do issue an order restraining the 1st and 2nd Respondents jointly and severally, either acting on their own and or through their agents, employees, servants and/or any other person from executing the impugned letter dated 27.11.2018, which purports to cancel the appointment of the Petitioner as the Assistant Chief of Fafi Sub-county.

c. THAT an order do issue directing the 1st and 2nd respondent to reinstate the Petitioner as the Assistant Chief Fafi Sub-county in line with the letter of appointment dated 11.10.2016 and to continue performing his functions and duties in accordance with the law and the said appointment letter.

d. THAT an injunction be issued restraining the respondents from advertising, shortlisting, interviewing or recruiting candidates for the post of the Assistant Chief for Fafi Sub-county pending the hearing and determination of the suit.

e. THAT an order be issued directing the 1st and 2nd respondents to pay the Petitioner the accrued and unpaid salary and allowances from the date of appointment to the date of the purported revocation of the appointment.

f. THAT conservatory order be issued directing the first respondent to process the Petitioner's documents and confirm the appointment in line with the appointment letter dated 5.10.2016 reference number 2001018187/27.

g. THAT the costs of the application be granted.

2. The Application is premised on the grounds set out in the motion and the Applicant's supporting affidavit sworn on 17.10.2019, and it is opposed by the respondents vide the Replying Affidavit sworn by Mr. Benson Giuthua on 4.11.2019.

Applicant's case

3. The Applicant's case is that he was appointed Assistant Chief II by the 1st respondent vide the letter dated 11.10.2016 reference number FAFI/ST.1/26VOL2(27) after successful application; that before the said appointment, he had worked with the General Service Unit (GSU) until 9.5.2007 when he was dismissed for alleged desertion of duty; that after the dismissal from the police force he appealed by the letter dated 6.6.2007 but to date the appeal has not been heard; that after his new appointment he worked for over two years until the first respondent wrote to him the letter dated 27.11.2018 informing him that the 2nd respondent had declined the request for his re-appointment into the public service; that he appealed against the said decision on 25.1.2019 and again on 31.5.2019 but to date the appeal is yet to be heard and determined; that since his appointment as an Assistant Chief he is yet to be paid his salary and allowances; and that in his view the purported revocation of his appointment as an Assistant Chief is unlawful, unconstitutional and it is a nullity.

Respondents' case

4. The respondents' case is that the claimant was employed as Assistant Chief II, Job Group F with effect from 26.10.2016; that before the appointment the claimant filled the Public Service Commission Application for Employment Form on 7.11.2016 but failed to declare that he had previously been engaged as a police Constable between 2001 and 2007 when he was dismissed; that during the interview, he further failed to disclose that he was previously employed in the public service and dismissed; that under Section 14(3) of the HR Policies and Procedure Manual, 2016 a candidate whose appointment in the public service has been terminated for any reason including resignation cannot be employed without prior approval of the Public Service Commission; that when 1st respondent discovered that the petitioner had previously worked in the public service, she wrote to the 2nd respondent for reappointment of the petitioner to facilitate for payment through the IPPD but the request was declined; that the decision was communicated to the petitioner vide the letter dated 27.11.2018 and he appealed; that the appeal was discussed in the MHRMAC meeting held on 19.3.2019 and recommendations forwarded to the Commission for advice/determination; that on 30.7.2019 the Commission wrote to the 4th respondent seeking information whether vetting was done to establish the grounds upon which the petitioner was dismissed from the public service; that vide letter dated 26.8.2019, the 4th respondent informed the Commission that the petitioner did not disclose to the interviewing panel that he had previously worked with the public service; that fundamental rights and freedoms are not absolute and that in this case it would be against the public policy to reappoint an officer who had been previously dismissed from the public service; and finally it is the respondents' view that the claimant has come to equity with unclean hands because he concealed material information from them before his appointment as an Assistant Chief.

Submissions

5. The petitioner submitted that the court has jurisdiction to grant the orders sought by dint of Article 162(2)(a) of the Constitution and section 12(3) of the Employment and labour relations court Act.

6. He further submitted that under Section 14(1) of the HR Manual the onus of verifying and conducting due diligence on candidates seeking appointment is on the appointing officer and it cannot shift to the candidate. He contended that the appointing officer failed in his duty to verify the information availed by him and allowed him to continue serving for over two years.

7. He further submitted that the action by the respondents violated his fundamental rights and freedoms because he worked without any pay for over two years which amounted to slavery and servitude contrary to Article 25 of the Constitution, and also unfair labour practices contrary to Article 41(1) of the Constitution. He further urged that his right to fair administrative action under Article 47 and amplified by section 4 of the Fair Administrative Actions Act were violated when the respondents terminated his appointment without according him a hearing. He relied on **Judicial Service Commission v Honorable Mbalu Mutava & another** where the court held that under the current Constitution, the right to fair administrative action has now been entrenched into the Bill of rights.

8. On the other hand, the respondents submitted that the application should be dismissed because the orders sought are final in nature and cannot be granted at the interlocutory stage. He relied on **East Africa Portland Cement Company Limited v Attorney general & another [2013] e KLR** where Rika J held that interim orders are not suitable if they finally determine the substantive dispute before trial. They further relied on **Antony Omangi Ongara v Teachers Service Commission [2017] e KLR** where Mbaru J held that an order of reinstatement is final in nature and should only issue after hearing the parties at the trial.

9. The respondents further submitted that the applicant has failed to meet the threshold for granting interlocutory injunction as enunciated by the **Giella v Cassman Brown & Co Ltd [1973] EA 358**, that is, first he applicant must show a prima facie case with probability of success, second, prove that the applicant will suffer irreparable harm which cannot be compensated by damages, and third, if the court is in doubt, it will decide the application on a balance of convenience.

10. Finally, the respondents contended that the orders sought should not be granted and the interim orders granted on 24.10.2019 should be vacated because they are not in the public interest. They contended that the office in issue was left vacant from 27.11.2018 when the

Petitioner was discharged and as recruitment to fill it is in the public interest which should override the private interest of the petitioner. They relied on **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR** where the supreme court held that conservatory orders are public law orders which are granted based on the inherent merit in the case bearing in mind the public interest.

Issues for determination

11. There is no dispute that the Applicant was employed by the 1st Respondent as an Assistant Chief in October 2016 and continued working until 27.11.2018 when his appointment was terminated. The issues for determination are: -

- a) Whether the orders sought in the instant application are final in nature.
- b) Whether the applicant has met the threshold for granting the orders sought.
- c) Whether the orders sought should be granted.

Whether the orders sought in the instant application are final in nature.

12. Prayer (a) and (b) in the application are already spent while prayer (c), (e), (f) are final in nature because their net effect is to reinstate the appointment of the petitioner to his position as Assistant chief with full pay since his appointment in October 2016. Such reliefs ought to be sought in the main Petition for determination after taking evidence from witnesses. It follows therefore that the only prayer in the application that is not final is prayer (d) which seeks injunction to restrain the respondents from filling the vacancy left by the petitioner pending the hearing and determination of the suit herein.

Whether the applicant has met the threshold for granting the interlocutory injunction.

13. As correctly submitted by the respondent, the threshold for granting interlocutory injunction in East Africa was enunciated by the **Giella v Cassman Brown & Co Ltd [1973] EA 358**, where the court held that for interlocutory injunction to issue, the applicant must first show a prima facie case with probability of success; second, he must prove that if the order is withheld he will suffer irreparable harm which cannot be compensated by damages; and third, if the court is in doubt, it will decide the application on a balance of convenience.

14. Prima facie case was defined by the Court of Appeal in **Mrao Limited v First American limited & 2 others [2003] e KLR** as follows: -

“...in civil cases is a case in which on the material presented to the court a tribunal properly directed itself will conclude that there exists a right which apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

15. In this case the applicant contended that his rights under the contract of service, the Constitution and the Fair Administrative Actions Act were violated by the respondents when they unilaterally terminated his employment without according him a hearing and without paying him salary for over two years' service. The respondents have not denied that the petitioner was not accorded hearing before the termination and also the fact that the petitioner was never paid salary and allowances for the services he rendered from October 2016 to November 2018 when he was discharged.

16. Article 236 of the **Constitution** provides that: -

“A public officer shall not be-

(a) victimised or discriminated against for having performed the functions of office in accordance with this Constitution or any other law; or

(b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of the law.”[emphasis added]

17. Section 4 of the Fair Administrative Actions Act which amplifies the right to fair administrative action under Article 47 of the Constitution provides that: -

“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) every person has the right to be given written reasons for any administrative action that is taken against him.

(3) where an administrative action is likely to affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and the reason for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard...”

18. Section 45 of the Employment Act protects employee from unfair termination of his employment contract and provides as follows-

“(1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

(i) related to the employee’s conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.”

19. Finally section 41 of the Employment Act provides:-

(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

Considering the foregoing provisions of the Constitution and the statutes, it is apparent that the applicant’s rights herein were or are likely to have been infringed by the respondents. Applying the Court of Appeal decision in **Mrao limited Case, supra**, I return that the applicant has made out a prima facie case which calls for a rebuttal from the respondents at the trial of the main suit.

20. The next question to consider is whether the applicant will suffer irreparable harm if the injunction sought is withheld. In my view the answer is in the affirmative because once the vacancy is advertised and filled, the applicant will not have any chance to recover his job again and the petition herein will become moot. The purpose of interlocutory injunction is to preserve the substratum of the suit. In this case the court has been invited to determine whether the appointment and dismissal of the applicant was procedurally right. In my view, therefore the vacancy in dispute should remain within the reach of the court so that it does not act in vain.

21. Having found that the applicant has shown a prima facie case with probability of success, and that he stands to suffer irreparable harm, I return that the application herein meets the threshold for granting interlocutory injunction as formulated in the **Giella v Cassman Brown case, supra**.

Whether interlocutory injunction should be granted

22. In view of the finding herein above that the applicant has met the threshold for granting the order sought, I proceed to allow the application in the following terms: -

(a) Injunction be and is hereby issued restraining the respondents from advertising, shortlisting, interviewing or recruiting candidates for the post of the Assistant Chief for Fafi Sub-county pending hearing and determination of the suit herein.

(b) THAT the hearing and determination of the petition herein shall be done on priority basis.

(c) THAT the costs of this motion abide the outcome of the petition.

23. Although the respondent alleged that granting the order is not in the public interest, I hold a contrary view because the public interest requires that the respondent must comply with the law and the constitution.

Dated, signed and delivered in open court at Nairobi this 29th day of April, 2020.

JUSTICE ONESMUS N. MAKAU

JUDGE