



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 116 OF 2020

JOSEPH WAIHENYA KABIRU.....CLAIMANT

VERSUS

BRITISH COUNCIL.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday 09th April, 2020)

RULING

The claimant filed an application on 26.02.2020 through Okweh Achiando & Company Advocates. The application was by way of the notice of motion under Articles 22, 23(3), 27, 28, 41(1), 47, 50 (1), 162, 165 (5), 258, of the Constitution of Kenya 2010; section 12(1) (a), (2), 3(i) & (ii) of the Employment and Labour Relations Court Act; rules 17(1) (3), (4), (5) & (6) of the Employment and Labour Relations Court (Procedure) Rules 2016. The application was based on the annexed supporting affidavit of Joseph Waihenya Kabiru. The claimant prayed for orders:

- 1) That pending the hearing and determination of the claim, the Honourable Court be pleased to issue and hereby issues an order suspending the implementation of the respondent's letter dated 12.12.2020 by Jill Coates, Country Director of the Respondent.
- 2) That upon order 2 being granted and pending the hearing and determination of the claim, an order of injunction do issue that the applicant continues to hold the position of the Head of Communications Sub Saharan Africa.
- 3) That pending the hearing and determination of the claim, the Honourable Court be pleased to grant an order of injunction prohibiting or restraining the respondent, its servants, officials, representatives and or agents from advertising or having so advertised from acting thereupon, interviewing, recruiting, filling or otherwise in any manner replacing the applicant in his position as the Head of Communications Sub Saharan Africa.
- 4) That pending the hearing and determination of the claim the Court issues an interim order of injunction restraining the respondent from appointing to the office of the Head of Communications Sub Saharan Africa, any person to replace the claimant, whether temporarily, permanently or in an acting position.
- 5) That pending the hearing and determination of the claim, The Honourable Court be pleased to grant an order that the respondent pays the applicant Kshs.121, 982.00 as salary different withheld by the respondent from the months of January 2020.
- 6) That costs of the application be provided for.

The application is based upon the following grounds:

- 1) The applicant was employed by the respondent on 14.07.2014 and performed diverse duties as an employee of the respondent up to 20.12.2019 when he received a notice of intention to be declared redundant. The respondent served in diverse position and held a clean record of service.
- 2) On 22.01.2015 the claimant was substantively appointed on an indefinite contract with the respondent as Head of Communications & Digital effective from 14.01.2015 based at the respondent's office in Nairobi.
- 3) The applicant's role as Head of Communications & Digital at the respondent's establishment entailed providing strategic leadership of the communications and digital communications for all the respondent's work in Kenya in Arts, English, Education and Society including delivery of communications to internal and external audiences.
- 4) The applicant performed his duties diligently and in an exemplary manner and as a result, in 2016 the applicant won the first

story-telling competition held by the respondent. His experience and skills were tapped at regional level whereby in 2016 he was appointed as a Brand Champion representing the respondent's Sub Saharan Africa region. Later in 2016 he was seconded to the regional communications team of the respondent and tasked to report on the visit of the respondent's Trustee Chairman to Nigeria for which the applicant received numerous accolades for the way in which he had profiled the region's team leaders and the work done by those leaders in 19 countries. Further the respondent's Country Director for Kenya one Jill Coates made good remarks about the petitioner in his performance assessment done by the applicant's line manager in 2018.

5) Sometimes in 2017 the respondent announced a major change programme for its Marketing Directorate under which Directorate the claimant's position fell. Sometimes in 2019 following the completion of the restructuring of the Marketing function, the applicant was formally notified that his substantive position as Head of Communications and Digital had been suppressed and the applicant was encouraged to look for alternative roles to apply for within the new structure. Looking at his skills and experience both at local and regional levels the applicant considered that he was a strong candidate for the role of regional Head of Communications for Sub Saharan Region and all other roles within the Marketing Directorate required marketing skills for which the applicant had neither been trained for nor worked in purely marketing functions. In March 2019 the role of regional Head of Communications for the respondent's Sub Saharan Africa region became vacant and the applicant successfully applied for the position on a temporary promotion of a period of six months. The temporary promotion was for a period of 6 months from 01.05.2019 and was expected to end on 31.10.2019. The applicant started service in that position on 01.05.2019 and in view of his exemplary performance he was granted a two months extension to 31.12.2019.

6) On 26.09.2019 the applicant was served with a notice which was to the effect that his substantive position was to be suppressed and the applicant was provisionally at risk of redundancy. The applicant was advised to apply for an alternative role within the new marketing structure or a suitable alternative role available elsewhere within the respondent. The position of Head Communications for the respondent's Sub Saharan Africa was subsequently formally advertised both internally and externally and the applicant considered himself a strong candidate in that regard as the immediate holder of the position. It was the respondent's policy on managing redundancies that employees who were at risk of redundancy should be supported to fill any roles that became available as redundancy was a last resort which the respondent uses and to avoid redundancy at all costs. The applicant further considered that he was particularly a strong candidate because the position profile for the job he was performing on a temporary promotion and the substantive one were the same. Further he had been appraised during the mid-year review to which he received praises in the appraisal. The applicant was interviewed for the position but not selected for the position upon the respondent's reason that the applicant lacked strategy and measurement of the activities in his work history. Further the respondent contended that the applicant ought to work more on being clearer about the purpose of communications activities and how he evaluates their impact. The applicant had been subjected to a two-phase interview process wherein he had been asked to submit a presentation based on 5 things he would prioritize if he was appointed to the position.

7) About 20.11.2019 a member of the respondent's Sub Saharan Region Human Resource Team called the applicant and informed him that he had been unsuccessful at the interview on the ground that he lacked strategy and his measurement of activities could not be ascertained. The applicant's case is that there had been no questions at the interview about strategy and measurement of activities and the basis of the conclusion was strange to the applicant. The claimant received a formal reply about the outcome of the interview and had a face-to-face feedback with his line manager one Mabatlane Matube who informed the applicant that the respondent's Human Resource Panel member at the interview one Tina Ndolo had informed the panel that there were "HR" issues around the applicant and which were the issues the panel considered in rejecting the applicant's application and which "HR" issues the applicant was not aware of and was not shown the records of current, past or on-going disciplinary proceedings against him. The applicant lodged an appeal immediately questioning the fairness of the process and the interview outcome especially about the unfavorable "HR" reports given to the interview panel. The applicant received feedback on the appeal on 29.01.2020 and which feedback the applicant was informed was final and the appeal had been dismissed for lack of evidence – yet the applicant had provided email evidence to support the appeal.

8) Subsequently the applicant has received a notice of risk to compulsory redundancy. The applicant says that the respondent has acted in a manner actuated by acute malice and personal vendetta against the applicant. It is the applicant's case that if he has committed any misconduct or poor performance the respondent does not want to subject him to due process. The decisions to deny the appointment and to render the applicant redundant is said to amount to unfair labour practice based on unknown allegations, a figment of the respondent's imaginations based on personal vendetta. The respondent's action is not bona fide, smacks of malice, bias, oppressive, an abuse of office and discriminatively against the applicant and is therefore void *ab initio*, unlawful and inoperative. The declaration of redundancy is traumatizing, undignified, irresponsible, shocking, careless, sudden, smacks of arrogance and impunity. The applicant further urges that the unlawful and un-procedural declaration of redundancy is tantamount to termination of employment and denying the applicant an opportunity to serve in a position that he has been exemplarily performing on a temporary promotion is occasioning irreparable injury and wanton damage to the livelihood of the applicant. Further the applicant has not been paid the salary difference of Kshs.121, 982.00 with effect from January 2020. Articles 10, 27, 41, 47, 50, and 236 of the Constitution; sections 5, 6, and 41 of the Employment Act will be violated if the Court does not uphold the supremacy of the Constitution. The orders sought are within the Court's duty to promote and safeguard constitutionalism and the rule of law. The applicant has established a prima facie case and the balance of convenience tilts in favour of the applicant. The orders sought should therefore be granted.

The respondent filed the grounds of opposition on 27.02.2020 through Hamilton Harrison & Mathews Advocates and Michi Kirimi Advocate appeared in that behalf. The respondent also filed on 03.03.2020 the replying affidavit of Tina Ndolo, the respondent's Head of Human Resource Kenya & East Africa Cluster. The respondent opposes the application upon the following grounds:

1) The application is an abuse of the court process because:

a) The application does not disclose any violation of the law by the respondent with respect to its intention to terminate the claimant's employment.

- b) The applicant attempts to seek an order of specific performance to compel the respondent to appoint him a role that he was interviewed for and was unsuccessful or to retain him in a position that has ceased to exist.
 - c) The position the applicant seeks to be appointed to has already been filled after the competitive interviews and recruitment process.
 - d) The applicant is inviting the Court to compel the respondent to breach its contract with the candidate who has already been appointed to the position of Regional Head of Communications.
 - e) The claimant has failed to disclose that he rejected all invitations to apply for other open roles within the organization and which those at risk of redundancy were being given due consideration.
- 2) No grounds have been set to persuade the Court to interfere with the respondent's decision to restructure and re-organize its workforce and all provisions of law have been complied with in that respect because the restructuring of the organization affected several employees of the respondent and not the claimant only. Further the position of Head of Communication Sub Saharan Africa has been abolished and a mandatory injunction should not issue for the claimant to continue holding an office which has been abolished.
- 3) The application is intended to disrupt the business of the respondent. The orders sought are disproportionate and unwarranted as the claimant is seeking to use the courts to achieve his personal objectives.
- 4) There has been inordinate delay on the part of the claimant because on 26.09.2019 he was notified that his position would be suppressed and he was at risk of redundancy; and he was further notified that unless he was appointed to an alternative role within the new marketing structure or to a suitable alternative role within the respondent, he would leave the respondent on account of redundancy. The claimant received a second notice on 20.12.2019 following a second consultation held on 29.11.2019 informing him that he remained at risk of redundancy having been unsuccessful for the role of regional head of communication for which he had applied and, he was encouraged to apply for various open roles that were being advertised. The applicant then received the letter dated 12.02.2020 giving him notice of intention to terminate his employment on account of redundancy.
- 5) No grounds have been established for the grant of the orders sought and the application should be dismissed with costs to the respondent.

The applicant filed a further affidavit on 05.03.2020. Written submissions were filed for the parties. The Court has considered all the material on record and the parties' respective positions and makes findings as follows:

1) It is clear that the present case relates to redundancy decision against the claimant by the respondent and further relates to the position held by the claimant after 31.12.2019 and whether in seeking to offer the claimant alternative employment, the respondent has thereby subjected the claimant to unfair labour practices as alleged for the claimant. It is not in dispute that parties were in a contract of service as per the letter of contract of employment dated 22.01.2015 by which the claimant was appointed to the position of Head, Communications & Digital effective from 14.01.2015. There is also no dispute that the respondent engaged in the restructuring leading to a new marketing organization structure. The claimant by his own words at paragraph 9 of the further affidavit has stated that the respondent's new marketing structure was unveiled sometimes in February 2019 and he realized that his substantive pay band 7 role as Head of Communications and Digital for the respondent's Kenya operation was missing. To that extent the Court returns that the reason for termination namely redundancy on account of re-organization and restructuring leading to abolition of the respondent's office of Head of Communications and Digital has at this interlocutory stage appears to have been established to be genuine and valid as per sections 43 and 45 of the Employment Act, 2007. Further, the Court finds that parties engaged in consultations and advisories were given to the claimant. It is also clear that the claimant was the only holder of the only position that was being abolished so that the Court returns that issues of selection criteria targeting the claimant for redundancy do not arise. Further the respondent has established that the claimant and the area local labour officer were served separate notices dated 12.02.2020 on the scope and nature of the redundancy that was looming. In view of that evidence the Court returns that the respondent appears to have so far complied with the provisions of section 40 of the Employment Act, 2007 on the substantive and procedural aspects on redundancy.

2) The Court follows its opinion in Geoffrey Mworira-Versus- Water Resources Management Authority and 2 others [2015]eKLR thus, "The principles are clear.

The court will very sparingly interfere in the employer's entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of the Constitution or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process." In the present case, the Court has found that so far the respondent has established that it is acting in compliance with the terms of the contract of service between the parties and the provisions of section 40 of the Act. Further the evidence shows that the parties' agreed grievance handling procedure by way of appeal has been available and the claimant has invoked it. Accordingly, the Court returns that in the circumstances of this case the claimant has failed to establish a *prima facie* case to justify the intervention by the court by way of an interlocutory injunction or other interim order stopping or staying the redundancy process. As submitted for both parties, in Giella – Versus- Cassman Brown & Company Limited [1973] EA 358 at 17 – 20, it was held that in considering to grant a prohibitory injunction, the applicant must show the court a *prima facie* case with a probability of success; if the injunction is not granted, the applicant stands to suffer irreparable harm which would not adequately be compensated by an award of damages; and if the Court is in doubt, then the Court will decide the application on a balance of convenience. Both parties have also relied on the Court of Appeal

holding in Wrao Ltd –Versus- First American Bank of Kenya and 2 others [2003] KLR 125 thus, “ **A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.**” The claimant urges that the role of Head of Communication Sub Saharan Africa which he held on temporary promotion existed and there was no reason to render him redundant. The respondent says that the role of Head of Communication Sub Saharan Africa was domiciled in the respondent’s London establishment and the same had ceased to exist and further, the claimant has shown interest in the new role of Regional Head of Communication but he was not successful at the interviews. The Court finds that it is trite law that parties are bound by their own contracts. In the instant case, the evidence is clear that the respondent temporarily promoted the claimant to the role of Head of Communication Sub Saharan Africa for a term of 6 months from 01.05.2019 to 31.10.2019 per the letter dated 15.04.2019 and upon the terms, “**...Please note that at the end of this temporary promotion, you will revert back to your substantive post in pay band 7. This is therefore a temporary promotion to cover for the post I the interim until we advertise and substantially fill the role and does not affect your substantive employment contract in pay band 7.**” The temporary promotion was extended to lapse on 31.12.2019 as per the respondent’s letter dated 11.10.2019 upon the terms, “**...This is a temporary promotion and does not affect your substantive employment contract.**” The claimant signed both letters in acceptance of the temporary promotions. It is urged for the claimant that the post he held on temporary basis still exists and the injunction as prayed for should issue. As per the claimant’s exhibit at page 35 of the claim bundle and as urged for the respondent, the Court finds that the job of Head of Communication Sub Saharan Africa was clearly based in London, UK. The Court further finds that the claimant held the job on temporary promotion for the tenure that was agreed upon between the parties and at this interlocutory stage, the Court returns that the claimant’s temporary service in that regard lapsed as was agreed between the parties. The parties are bound accordingly and no *prima facie* case has been established in that regard to justify a temporary injunction to forestall the redundancy process as no right has so far been established to have been infringed.

3) It was submitted for the respondent that the claimant is not entitled to Kshs. 121, 982.00 being salary withheld in January 2020 because the temporary promotion upon whose basis the amount was due had lapsed on 31.12.2019. The claimant says he continued to perform the duties for the position he held on temporary basis even if the contract for temporary promotion had lapsed on 31.12.2019. The undisputed position at this stage is that the temporary promotion lapsed on 31.12.2019. Whether thereafter the claimant continued to perform the duties of that position is a matter of evidence and the Court considers that the same should be left for the full hearing when evidence on the duties performed after 31.12.2019 will be tested by way of examination and cross-examination of witnesses. At this stage it cannot be said that the temporary promotion contract having lapsed on 31.12.2019, it is obvious that the claimant continued to perform functions of the office as per the temporary promotion. By the claimant’s own submission, in Moses C Muhia Njoroge & 2 Others –Versus Jane W. Lesaloi & 5 Others [2014]eKLR where Gacheru J held, “**In prayer No. 8, the applicants have sought for a mandatory injunction. I have considered all the facts of this case and have taken into account that granting of a mandatory injunction as an interlocutory relief is a very exceptional form of relief to grant but it can be granted (See Canadian Pacific Railway –Versus- Rand (1949) 2KB 239 at 249. I also refer to the case of Locabail International Finance Ltd –Versus- Afro-Export (1988) ALL ER 901 where the Court held that the principles governing the grant of Mandatory Injunction are as follows: “A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied or if the defendant attempted to steal a march on the plaintiff mandatory injunction will be granted on an interlocutory application.**” The respondent equally relies on the same authority and The Court considers that to be the true position of the law on the subject. As submitted for the respondent, the prayer for the payment of sums of money and directing that the claimant continues holding the position he had been temporarily promoted to and lapsing on 31.12.2019 are in the nature of mandatory injunctions and can only be granted in the clearest of the cases. The Court has found that the entitlement to the money as prayed and the continued service as Head of Communication, Sub Saharan Africa are intricate and not simple or obvious claims and they ought to go to full trial for a proper and complete determination.

4) Returning to the prohibitory temporary injunction to stop the redundancy the Court has found that the claimant has failed to establish a *prima facie* case with a probability of success. Thus it would be superfluous for the Court to delve into whether the claimant has satisfied the other principles as to whether the claimant would suffer irreparable injury which would not adequately be compensated by an award of damages if the injunction is denied; and the Court not being in doubt in that regard that a *prima facie* case has not been established, there will be no assessment on the balance of convenience. While making that finding the Court considers that the position the claimant was initially appointed to of Head, Communication & Digital based in the respondent’s Nairobi office has indeed been abolished and the claimant’s case appears to rest on whether he can continue to serve the respondent on temporary promotion in the position of Head of Communication Sub Saharan Africa and whether he was fairly treated when the respondent made the decision that he was unsuccessful at interview for the alternative job of Head of Communications (Region). The Court considers that the two issues are clearly separable from the issue of redundancy and they are best left for the full hearing of the suit.

5) While the Court scheduled to deliver this ruling on 20.03.2020 the delivery as was scheduled became impossible due to the disruption arising from the COVID 19 global pandemic and the related directions by the Judiciary making it impracticable for the Court to sit and deliver the ruling as was scheduled.

6) In view of the interim orders which were lapsing on 20.03.2020 and the findings in this ruling, to balance justice for the parties, the interim orders are revived and to remain in place until close of today which will be the last claimant’s day in the service of the respondent and the respondent to pay the claimant as per section 40 of the Act all the dues as communicated in the letter of notice of intended termination on account of redundancy dated 12.02.2020 and to pay within 7 days from the date of this ruling failing, interest to accrue thereon at court rates from the date of this ruling till full payment.

In conclusion the application filed on 26.02.2020 for the claimant herein by the notice of motion dated 26.02.2020 is hereby determined with orders:

1) The interim orders given herein as scheduled to lapse on 20.03.2020 are hereby revived and to remain in place until close of today

which will be the last claimant's day in the service of the respondent and the respondent to pay the claimant in view of section 40 of the Employment Act all the dues as communicated in the letter of notice of intended termination on account of redundancy dated 12.02.2020 and to pay within 7 days from the date of this ruling failing, interest to accrue thereon at court rates from the date of this ruling till full payment.

2) In view of the COVID 19 pandemic there be stay of execution of the order to pay in (1) above until 09.05.2020.

3) The costs of the application to be in the cause.

4) Parties to take the necessary steps towards the expeditious hearing and determination of the main suit.

Signed, dated and delivered in court at Nairobi this Thursday, 09th April, 2020.

BYRAM ONGAYA

JUDGE