



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 647 OF 2019

DINAH JEMELLY KIRWA.....CLAIMANT

-VERSUS-

NATIONAL HOSPITAL INSURANCE FUND

BOARD OF MANAGEMENT.....RESPONDENT

RULING

1. The application before me is the claimant's Notice of Motion dated 1.10.2019. It is brought under section 3 & 12 (3)(i)(ii)(iv) & (v) of the ELRC Act and Rule 17 of the ELRC (Procedure) Rules and seeks the following orders:-

a) That the Application herein be certified as urgent and service be dispensed with in the first instance.

b) That the Honourable Court be pleased to grant an order of temporary injunction restraining the Respondents by themselves and/or agents and/or assignees from initiating the process of recruitment and/or hiring any other person in the position of Director Human Resource & Administration or in any other position purporting to carry out similar roles as those of Director Human Resource & Administration pending the hearing and determination of this Application.

c) That the Honourable Court be pleased to grant an order of temporary injunction restraining the Respondent by themselves and/or agents and/or assignees from initiating the process of recruitment and/or hiring any other person in the position Director Human Resource & Administration of in any other position purporting to carry out similar roles as those of Director Human Resource & Administration pending the hearing and determination of this suit.

d) That the Honourable Court be pleased to reinstate the claimant/applicant to her position as the Director Human Resource & Administration, with all her back salary, allowances, benefits and any other legal dues pending hearing and determination of this application *inter-partes*.

e) That the Honourable Court be pleased to reinstate the claimant/applicant to her position as the Director Human Resource & Administration, with all her back salary, allowance, benefits and any other legal dues pending hearing and determination of this suit.

f) That the Honourable Court be pleased to grant an order of temporary injunction restraining the Respondent by themselves, agents or assignees from intimidating and/or harassing and/or threatening the claimant or in any way interfering with industrial peace in relation to the claimant pending hearing and determination of this application *inter-partes*

g) That the Honourable Court be pleased to grant an order of temporary injunction restraining the respondent by themselves, agents or assignees from intimidating and/or harassing and/or threatening the claimant or in any other way interfering with industrial peace in relation to the claimant pending hearing and determination of this suit.

h) That the cost of this application be borne by the respondent.

2. The application is premised on the grounds set out in the body of the motion and is supported by the Affidavits sworn by the claimant.

3. The application is opposed by the respondent vide the Replying affidavit sworn by Ms. Janet Boit on 29.10.2019.

4. On 9.10.2019, the counsels on record for both parties requested the court to allow them attempt an amicable settlement. They further recorded a consent order restraining the respondent from advertising the position of Director Human Resource and Administration pending the said negotiations. On 23.11.2019, the counsel reported that no settlement was reached and agreed to dispose of the application by written submissions. They also extended the interim injunction order by consent pending determination of the application. The counsel highlighted

the same in court on 13.2.2020.

Applicant's case

5. Mr. Change argued the applicant's motion. He sought order 3, 5 and 7 in the application. He contended that the claimant was unfairly dismissed from employment in clear violation of the Respondent's HR Policy and Procedure Manual. He submitted that under section 13 of the said Manual, the procedure for termination starts with the immediate supervisor who is the CEO who escalates the matter to the Staff Advisory Committee for hearing. After the hearing, the committee recommends action to the CEO for approval. Thereafter the employee can appeal to the respondent's Board.

6. Counsel submitted that the said procedure was not followed and instead the Chairperson of the Board is the one who started off the process by serving a show cause letter and which interdicted the claimant for 30 days. Thereafter the interdiction was extended by a further 30 days by the Chairperson who also appointed an *ad hoc* committee comprising Board members to hear the claimant's disciplinary case as opposed to the staff Advisory Committee.

7. He further contended that the *ad hoc* committee tabled its recommendations to the Board for approval after which, the Chairperson served the claimant with a termination letter. He argued that the said process was illegal and against *Mwongozo* which clearly distinguishes between the roles of the respondent's Board and the Management.

8. In view of the foregoing, the counsel submitted that the dismissal of the claimant was a nullity because the Board had no authority to discipline the claimant. He contended that the allegation by the respondent that there was no CEO to handle the matter is false because there was an acting CEO in office.

9. Finally, the counsel submitted that although section 17 of *Mwongozo* allows the Board to create special committees such committees are only intended to carry out the Board's functions.

10. He relied on **Joseph Kiprono Koech v. County Government of Turkana & Another[2014]eKLR** where Ongaya J held that suspension of the claimant was without any authority and as such the suspension was null and void *ab initio*. He further relied on **Republic v. Chairman Lands Disputes Tribunal Kirinyaga District & Another[2005]eKLR** where Khamoni J cited with approval **Macfoy v. United Africa Ltd.[1961]3 ALLER 1169** where Lord Denning held that any proceedings founded on an act that is void is a nullity and incurably bad.

11. In view of the aforesaid matters, the counsel prayed for the order 3,5 and 7 as set out in the motion.

Respondents case

12. Mr. Wilson learned counsel for the respondent opposed the application and urged that granting the orders sought would determine the suit before trial. He contended that for the court to determine whether or not there was unfair termination parties need to tender evidence.

13. He further argued that the issue leading to the dismissal of the claimant is the loss of Khs. 4 billion in the hands of the claimant and allowing her back to the office is likely to prejudice investigations. He contended that there is in force a consent order restricting the respondent from advertising the position of Director HR and Administration and prayed that the said consent order be extended till the determination of the suit.

14. Counsel submitted that reinstating the claimant would be drastic and prejudicial to the investigation contending that no special circumstances warrants such reinstatement before trial.

Issues for determination

15. There is no dispute that the claimant was dismissed from employment on 16.9.2019 for alleged gross misconduct and he has challenged the said termination by this suit. The main issues herein are:

(a) Whether the respondent should be restrained from recruiting or hiring any other person to the position of Director HR & Administration or any other position purporting to carry out similar duties to those of the Director HR and Administration pending the hearing and determination of this suit.

(b) Whether the claimant should be reinstated to the position of Director of Human Resource and Administration with full benefits and protected from any harassment or intimidation pending hearing and determination of this suit.

Interlocutory Injunction

16. The respondent has conceded to the injunction in terms of the interim consent order pending hearing and determination of the suit contending that it will preserve the status quo pending trial. She conceded to the interlocutory injunction but opposed reinstatement at this stage because investigations are ongoing in the office.

17. In view of the said consent, I see no need of belabouring the point. I grant the interlocutory injunction restraining the respondent from advertising, recruiting or hiring any person to the position of Director HR and Administration pending the hearing and determination of the suit herein.

Reinstatement

18. The claimant urged for reinstatement contending that the dismissal was null and void. The prayer for reinstatement is also sought in the main suit. Granting it will require taking and evaluating of evidence. Even if the evidence to be relied upon is already on record, granting the order for reinstatement would determine the suit before the trial. I therefore will not grant the order for reinstatement at this juncture and instead direct that it shall await the trial of the suit.

19. It has not been shown by the claimant that the respondent is intimidating or harassing her and as such order seven (7) in the motion is declined.

Disposition

20. The application is allowed to the extent compromised above, that is;

a) The respondent or her agents are restrained from advertising, recruiting or hiring any other person to the position of Director HR and Administration pending the hearing and determination of this suit.

b) Costs of the application shall be in the cause.

Dated, signed and delivered this 26th Day of June, 2020.

ONESMUS N. MAKAU

JUDGE