



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 177 OF 2020

(Before Hon. Justice Hellen S. Wasilwa on 25th June, 2020)

FRIDAH A. GOVEDI.....CLAIMANT

VERSUS

THE PERMANENT SECRETARY MINISTRY OF HEALTH.....1ST RESPONDENT

PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. Before this Court are the Applications dated 24/4/2020 and 7/5/2020, filed by the Claimant and Respondents respectively.

2. In brief, the Claimant seeks the following orders-

a. Spent.

b. THAT pending the inter partes hearing and determination of this Application as well as the suit, an order be issued reinstating the Claimant as the Head of the Department of National Blood Transfusion, Tissue & Human Organ Transplant and be at full salary and all benefits.

c. THAT pending the inter partes hearing and determination of this Application as well as the suit, an order do issue restraining the Respondents whether by themselves, their agents, employees and/or servants from advertising, recruiting, approving, appointing or in any way employing in the position of the Head of the Department of National Blood Transfusion, Tissue & Human Organ Transplant or replacing the applicant with any such person to be nominated or recruited or appointed whether in acting or substantive capacity.

d. THAT pending the inter partes hearing and determination of this Application as well as this suit, the 1st Respondent's letter dated 2nd March 2020 deploying the Claimant to Kenyatta national hospital from the Head of the Department of National Blood Transfusion, Tissue & Human Organ Transplant be stayed and the Claimant do continue to execute her duties as the Head of the Department of National Blood Transfusion, Tissue & Human Organ Transplant.

e. THAT pending the inter partes hearing and determination of this Application, the 1st Respondent's letter dated 2/3/2020 deploying one Charles Rombo Oliech as the Head of Department of National Blood Transfusion, Tissue & Human Organ Transplant be revoked.

f. THAT pending the inter partes hearing and determination of this Application, 1st Respondent's letter dated 2/3/2020 requiring the Claimant to show cause be stayed and any hearing, disciplinary process or any removal process in general initiated by the Respondents be stayed.

g. THAT pending the inter partes hearing and determination of this Application as well as this suit, an interim order of temporary injunction do issue restraining the Respondents by themselves or through their agents, servants and employees and any person acting on their behalf from terminating, altering or reviewing any term of the Claimant's employment as Head of Department of National Blood Transfusion, Tissue & Organ Transplant.

3. On the other hand, the Respondents seeks the following orders in their Application-

a. Spent.

b. Pending the hearing and determination of this application inter partes, this Honourable court be pleased to stay the implementation of the orders issued on 28th April 2020.

c. That this Honourable Court be pleased to set aside, vary or discharge the ex parte orders issued on 28th April 2020.

The Claimant's Case

4. The Claimant's application is supported by the grounds set out therein as well as her supporting affidavit. She avers that she was deployed to her current position vide the letter of 24/6/2019 but in December 2019 and without justifiable grounds, the Director General under the 1st Respondent's instructions directed her to stop handling her staff; who were placed under the Director General's supervision.

5. She was summoned to an impromptu meeting on 4/3/2020 wherein charges were tabled against her, which she was required to respond to. Thereafter, it became impossible to perform her duties as there were no directions on how to do so. Further, on 12/3/2020, the 1st Respondent instructed her to handover but gave no instructions on who she was to handover to. As such, there has been no handover to date.

6. The Claimant avers that on 28/3/2020 she received a show cause letter dated 2/3/2020, which had been addressed to the Director General of Health. However, by the time she received this letter, time had lapsed hence she was not able to respond timeously. As such, she responded on 31/3/2020 under protest.

7. On the same day, she also received the deployment letter dated 2/3/2020, which indicated that she had been deployed to Kenyatta National Hospital to serve as a pediatrician. It is her position that the deployment is irregular, unlawful and void *ab initio* as it was a demotion.

8. The Claimant avers that 1st Respondent failed to expeditiously inform the relevant disciplinary body that disciplinary proceedings had been commenced against her for its timeously constitution for that very purpose, yet she made substantive decisions that adversely affected her.

9. It is the Claimant's case that the 1st Respondent's actions have occasioned her loss and damage and if the orders sought are not granted the 1st Respondent will continue perpetuating illegalities and irregularities to her detriment.

10. The Claimant has also opposed the Respondent's application vide her replying affidavit sworn on 19/5/2020. She contends that the deployment procedure adopted did not adhere to the procedure set out in the MHRAC and the Public Service Commission Human Resource Manual. For instance, the 1st Respondent overstepped her mandate by exercising powers bestowed upon the Cabinet Secretary and the 2nd Respondent. That she also failed to advice the Cabinet Secretary to form an ad hoc committee to investigate the allegations against the Claimant.

11. It is her position that this Court has unfettered jurisdiction to grant *ex parte* interim orders in the face of illegalities. She also posits that the urgency of the matter would have been lost if the Respondents had been heard before the *ex parte* orders were issued.

12. The Claimant avers that she met the threshold required for the issuance of the impugned orders. Further, that setting aside the orders will uphold the 1st Respondent's illegal and irregular decision thus occasioning her harm which cannot be compensated by way of damages as she will be unable to find alternative employment.

The Respondents' Case

13. The Respondent's application is supported by the grounds set out therein and the 1st Respondent's supporting affidavit. It is averred the Claimant seeks to enforce the *ex parte* orders issued on 28th April 2020 as if they are final orders.

14. It is their position that the orders should be set aside or discharged as the Honourable Court did not give reasons or a rational explication as to how it arrived at the orders hence the same were issued arbitrarily. Further, the orders constitute a mandatory injunction issued at an interlocutory stage and contrary to the principles of issuing injunctions since they were issued capriciously and injudiciously.

15. It is the Respondents case that the impugned orders have occasioned them great prejudice and denied them a right to a fair hearing as they were condemned unheard.

16. The Respondents have also opposed the Claimant's application vide the 1st Respondent's Replying Affidavit where it is contended that under the Claimant's leadership, the Department of National Blood Transfusion, Tissue & Human Organ Transplant faced a myriad of challenges such as corruption, blood cartels, gross mismanagement and flouting of procurement laws.

17. It is averred that on 5/9/2019, the Claimant directly procured blood bags from Harleys Limited and attempted to commit the government to a liability worth hundreds of millions. Further, that she attempted to determine and influence the outcome of a procurement process on 29/11/2019. As such, there are ongoing investigations against the Claimant and other officers at their Department.

18. It is contended that the show cause and deployment letters were issued on 2/3/2020. It is further contended that the Claimant refused to hand over or report to her new duty station. Instead, she applied for her annual leave and terrorized staff while still on leave.

19. The 1st Respondent contends that the Claimant has been on full pay with benefits between March and April 2020. It is averred that the cabinet secretary is in the process of constituting a disciplinary body.

20. The 1st Respondent avers that after the Claimant obtained interim orders reinstating her to her position, she has made operations at the department impossible and urges that if the orders sought in their application are not granted, the general public will suffer irreparable damage as the department's operations have come to a standstill.

21. It is averred that the Claimant is still on leave and is expected to resume duty on 2nd July 2020. She is also preparing to take her terminal leave as she is set to retire on 1/9/2020 hence it is only fair and logical that someone else heads the department.

22. The applications were to be disposed of by way of written submissions. However, there is no record of the parties' submissions in the Court file.

23. I have examined the averments of the Parties. From the application before me, the Claimant's contention is about her being deployed to another capacity which she avers deemed/demoted her.

24. The Respondents deny this but aver that the Claimant/Applicant was not demoted. The Respondents avers that the Claimant is on leave and is due to resume duty on 2/7/2020 and is also set to retire on 1/9/2020. The Respondents further aver that the Claimant is guilty of gross misconduct.

25. Going by the Respondents' submissions, if indeed the Claimant was guilty of gross misconduct, proper disciplinary process should have been instituted against her.

26. Also if the issue of deployment rendered her demoted, this is against Section 10(5) of the Employment Act which states as follows:-

“(5) where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.”

27. In attempting, to deploy the Claimant to another position, due regard should be had to her position and rank and the employment should be such that it does not render her demoted or unfairly treated.

28. In the circumstances, I find that the Respondent have not explained the reasons for the deployment as stated and if it was due to some gross misconduct disciplinary process would be the solution and not a deployment.

29. In the circumstances, I find the application by the Applicant has merit.

30. I allow the application in terms of prayer (b), (c), (d) and (e).

31. Costs in the cause.

Dated and delivered in Chambers via zoom this 25th day of June, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kioko for all Respondents – Present

No appearance for Claimant