



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 6 OF 2020

(Before Hon. Lady Justice Hellen S. Wasilwa on 28th July, 2020)

D.I.P.....CLAIMANT

VERSUS

KENYA POWER PENSION FUND.....RESPONDENT

RULING

1. Before this Court is the Claimant's Application dated 12/3/2020 seeking the following orders:-

a. Spent.

b. THAT pending the hearing and determination of this Application inter partes and of the Claim, a conservatory order of temporary injunctions do issue restraining or prohibiting the Respondent from interviewing and employing or appointing persons to fill in the vacant position of head of procurement as per the advertisement dated 10/3/2020.

c. THAT pending the hearing and determination of this Application inter partes and the Claim, this Honourable Court be pleased to issue an order against the Respondent to unconditionally reinstate the Claimant to their employment services and former position with the Respondent without loss of benefits or seniority without conditionality.

d. THAT this Honourable Court grant an order declaring that the advertisement for the position of Head of Procurement by the Respondent in the local dailies dated 10/3/2020 as illegal and the same should be withdrawn with immediate effect.

e. THAT the costs be provided for.

2. The Application is supported by the grounds set out therein and the Applicant's Supporting Affidavit sworn on 12/3/2020, his Further Supporting Affidavit sworn on 8/6/2020 and his Supplementary Supporting Affidavit sworn on 26/6/2020.

3. The Respondent has opposed the Application vide the Replying Affidavit of Edwin Kiprono Ruttoh, sworn on 8/5/2020. The Respondent's also filed the Further Affidavit of Edwin Kiprono Ruttoh sworn on 16/6/2020, in response to the Applicant's Further Supporting Affidavit.

The Applicant's Case

4. The Applicant avers that on 10/3/2020, the Respondent advertised the position of head of procurement in the local dailies, in which position, the Applicant had served until the termination of his employment.

5. It is averred that if the advertisement and subsequent employment of a head of procurement by the Respondent is not stopped, the Applicant will suffer irreparable harm and the claim herein will be rendered nugatory. As such, it is in the interests of justice that the orders sought be granted.

6. The Applicant avers that the Respondent did not follow the laid down policies in terminating. It is his position that the Respondent stands to benefit from his expertise and denies having strained relationships with his colleagues or that his reinstatement will give rise to a toxic work environment.

7. He avers that he has suffered irreparable damage economically and psychologically after the termination of his employment and in light of the current COVID-19 pandemic, which has made finding alternative employment and providing for his family challenging. He asserts that he has established a *prima facie* case with a probability of success and if the orders sought are not granted, he will continue to suffer

irreparably.

8. It is the Applicant's position that the law allows for extension of a probation period hence the Respondent was not under any pressure to terminate his employment as the concerns regarding his performance did not go to the root of the employment contract.

The Respondent's Case

9. The Respondent contends that the Applicant's employment was terminated on 19/12/2019 while he was on probation. The Respondent further contends that the Applicant's former position is critical and if the orders sought are granted the Respondent will be immensely prejudiced as procurement procedures will be halted.

10. It is the Respondent's view that the position of Head of Procurement cannot be left unfilled for a long duration without risk of exposure to costs associated with breaches of procurement laws.

11. It is averred that it would be impractical to reinstate the Applicant to work with the very employer and colleagues whom he falsely accuses of being malicious towards him as it would cause disruptions and negatively impact on other employees' productivity thereby making the working environment toxic.

12. The Respondent avers that the Applicant has failed to establish a basis for the grant of the temporary injunction but contends that they will be prejudiced as they will have been condemned unheard. The Respondent further avers that the matters raised in the application are *sub judice* as they have been raised in the claim that is pending before this Court for hearing and determination.

13. The Respondent urges that the Application should be dismissed with costs to the Respondent and the claim set down for hearing on merit as both parties have filed their pleadings.

14. The Respondent contends that at the time of the Applicant's termination, he was still on probation hence the provisions of Section 42 (1) of the Employment Act applied and not Section 41. It is the Respondent's position that the Applicant's probationary contract was lawfully terminated.

15. The Respondent further contends that an employee cannot serve in an acting capacity for more than 6 months hence they were under a statutory obligation to recruit a permanent holder of the position before the lapse of that period.

16. The Respondent avers that the recruitment process was conducted in an open and transparent process which was completed and Ms. Consolata Mbuiya was appointed to fill the position.

17. It is contended that if the orders sought are granted, then according to the Applicant's contract, he would only be reinstated to serve the remaining 10 days of his probationary contract.

18. It is further contended that the confirmation of the Applicant's employment was conditional on his performance, which did not improve even after he was put on a Performance Improvement Action Plan (PIAP).

19. The Application was disposed of by way of written submissions with both parties filing the same.

20. In his written submissions filed on 15/6/2020, the Claimant submits that he has established a *prima facie* case as he has demonstrated that the Respondent failed to adhere to the procedure under its HR manual which spelt had out the procedure for performance evaluation.

21. It is submitted that the Claimant stands to suffer irreparable harm that cannot be compensated by way of damages owing to the shame that the loss of his employment brought upon him.

22. The Claimant reiterated his assertion that he had established a *prima facie case* with a probability of success, in his Supplementary Written Submissions filed on 30/6/2020.

23. In their submissions filed on 22/6/2020, the Respondent submits that the Applicant has failed to satisfy the conditions set out in **Giella vs. Cassman Brown [1973] EA 358** as he had been employed for a probationary period, which was lawfully terminated. Further, the Applicant has failed to prove that he is likely to suffer a loss, which cannot adequately compensated by way of damages.

24. It is the Respondent's submissions that the balance of convenience tilts in their favour as granting the orders sought will reverse the recruitment process undertaken by the Respondent and which position has since been filled.

25. The Respondent submits that they should not be forced to retain a probationary employee whose performance was found unsuitable and relies on the case of **Kenya Airways Limited vs. Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR** which buttresses this position.

26. I have examined the averments of the Parties herein. From the Pleadings I note that the Claimant was employed by the Respondent vide a letter dated 6/6/2019. He even resigned from his job at Kenya Institute of Supplies Management (KISM) on 7/6/2019 following this appointment by the Respondent.

27. On 25/10/2019 he was placed on a Performance Improvement Action Plan (PIAP) by the Respondent and on 19/12/2019 his services

were terminated.

28. The termination was done within the 6 months' probation period as per the employment contract for which Section 42 of the Employment Act 2007 states that would not be subject to provisions of Section 41 of the Employment Act 2007.

29. In the circumstances, I find the application has no merit. I dismiss this application and order the Claimant to proceed with the Main Claim.

30. Costs in the cause.

Dated and delivered in Chambers via zoom this 28th day of July, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Obok for Respondent – Present

Claimant – Absent