



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**PETITION NO. 189 OF 2019**

**IN THE MATTER OF**

**ARTICLES 19, 20, 22, 23, 27, 28, 30, 35, 36, 41, 47, 50 AND 55 OF**

**THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF**

**SECTIONS 3 AND 4 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

**AND**

**IN THE MATTER OF**

**SECTIONS 5, 7, 8, 9, 10, 12, 41, 43, 44 AND 45 OF THE EMPLOYMENT ACT, 2007**

**-BETWEEN-**

**JACOB OMONDI OYUGI.....PETITIONER**

**-VERSUS-**

**SILAFRICA KENYA LIMITED..... RESPONDENT**

***(Before Hon. Justice Byram Ongaya on Friday 17<sup>th</sup> July, 2020)***

**RULING**

The petitioner filed an application on 15.10.2019 through Nyabena Alfred and Company Advocates. The application was by the notice of motion under section 12 of the Employment and Labour Relations Court Act, 2014, Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016, sections 5, 7, 8, 9, 10, 12, 17, 18, 19, 41, 43, and 44 of the Employment Act, 2007, section 3 of the Fair Administrative Action Act, 2015 and Articles 19, 22, 23, 27, 28, 30, 35, 36, 41, 43, 47, 50, and 55 of the Constitution of Kenya, 2010. The outstanding prayers sought are as follows:

- a. That pending the hearing and determination of the application an order do issue and is hereby issued to compel the respondent to pay the petitioner the salaries and allowances due to him for the period preceding his dismissal, which became due on 30.08.2019 and 30.09.2019.
- b. That pending the hearing and determination of the petition, a conservatory order be issued and is hereby issued to restrain the respondent, its servants and agents from carrying or running any advert or notices by way of electronic, print media or whichever the method or way and not to discuss the petitioner with any person whatsoever in matter which has any connection directly or indirectly with the subject matter or the employment of the petitioner with the respondent.
- c. That costs of the application be met by the respondent.

The application was based on the attached petitioner's supporting affidavit, the petitioner's supplementary affidavit sworn on 14.10.2019 and filed on 15.10.2019, supplementary affidavit filed on 28.11.2019, and the following grounds:

- a. The respondent employed the petitioner by a letter of offer of employment dated 17.06.2016 as a sales manager, Kenya, in the

department of trade. The contract was not particularized per section 10 of the Employment Act, 2007 so that the terms and conditions of service upon which breaches could be mounted were not set out expressly.

b. Around April 2018 the respondent appointed a new Chief Executive Officer (CEO). Subsequently there was a systematic and violent takeover of the respondent's management of the respondent herein in which the line managers were treated as criminals and were not accorded dignified exit as it became apparent that they were to give way anyway. The chief managers were asked to resign or be terminated. Between March and August 2019 seven managers including the CEO resigned.

c. The new CEO reduced the chief managers to school children and hurled abuses to them at will and dehumanized, intimidated and harassed employees. By the memorandum dated 17.01.2019 the new CEO depicted the managers as incompetent, complacent and generally technically insolvent and the memorandum indicated the managers would be sacked or required to resign.

d. The group human resource officer issued the memorandum dated 13.06.2019 warning all employees not to have any form of communication or relationship with the former employees and by implication the chief officer who had resigned.

e. On 13.08.2019 the group human resource manager invited the petitioner to a meeting. He met certain white men he had never met before. The petitioner was informed that he had been under investigations and the findings were overwhelming and then the group human resource manager suggested that the best option was for the petitioner to resign. One Fredrick M. Nzomo who had been appointed in July 2019 and introduced to staff on 02.08.2019 had been appointed to replace the petitioner. Thus the said Nzomo had been assigned all the petitioner's duties thereby rendering the petitioner redundant.

f. The petitioner complied with the advice of the group human resource manager and in accordance with the law governing all employment contracts, notified the respondent of his intention to resign from employment on the same day per his letter dated 13.08.2019 and without any known law or contractual provision, the respondent declined by the letter dated 14.08.2019.

g. While resigning by the letter dated 13.08.2019, the respondent purported to serve the petitioner with the letter to show cause dated 26.08.2019 thus forcing a contract of service between the parties contrary to public policy. By the letter dated 30.09.2019 the claimant replied the show cause letter. The respondent purported to dismiss the petitioner by the letter dated 01.01.2019 without complying with sections 41, 43 and 44 of the Employment Act, 2007 and did not apply principles in Articles 19(2), 41, and 50 of the Constitution of Kenya, 2010 and the general principle of common law and international human rights.

h. The petitioner is concerned that the respondent may run notices in the print media in the same manner it did for its employees Ralijendra Gulati, Deepesh Ramji Budhia and Kamaldeep Singh on 14.06.2019. The petitioner seeks protection per Articles 165(3), 22 and 23 of the Constitution of Kenya, 2010 and prohibit circulation of the subject matter.

i. The respondent forcefully retained the petitioner in employment but failed to pay remuneration on 30.08.2019 and 30.09.2019 contrary to sections 17 and 18 of the Employment Act, 2017. The respondent unfairly and retrospectively attached and applied the two months' salaries to settle alleged and unspecified fraud and purportedly per section 18 of the Act.

j. Throughout service the petitioner had not taken annual leave and when he applied for annual leave on 18.04.2019 the respondent declined in writing on 19.04.2019.

k. The petitioner learned about the dismissal on 08.10.2019 and therefore worked up to 07.10.2019.

l. The petitioner understands that by the letter dated 14.08.2019 the respondent is determined to destroy his career in view of the publication of separation by the respondent with its three previous managers. When they resigned the respondent published the same in the Daily Nation and the Standard of 14.06.2019 depicting and profiling them as men of low moral character and a memorandum was issued to suppliers, distributors and customers not to deal with the three managers who had resigned.

m. It will be unlawful for the respondent to proceed and convert the salaries and allowances of the petitioner for another use without a court order or consent of the petitioner contrary to section 19 of the Employment Act, 2007.

a. n. It is unfair that the investigation report or its details were never availed to the petitioner.

The respondent filed the grounds of opposition on 01.11.2015 through Mbai Waweru & Advocates. The respondent also filed the replying affidavit of Eric Nguyo and the replying affidavit of Stephen Kamau both filed on 14.11.2019. The respondent urges as follows:

a. The respondent employed the claimant on 21.06.2016 as the Sales Manager, Trade. The role was to ensure growth of sales volume and revenue for the trade business by implementing and aligning the trade sales and distribution strategy and ensure achievement of company sales targets, growth and profitability. He reported to country CEO.

b. Eric Nguyo reported to Stephen Kamau about alleged misconduct and fraudulent activities against the petitioner. Petitioner was immediate supervisor for Eric Nguyo who feared that the petitioner's failures would lead to Eric facing disciplinary action. The petitioner is alleged to have banked in his personal account sales collections by Eric. Eric Nguyo allegedly provided documents showing petitioner's alleged gross misconduct and fraudulent activities. A private investigator was engaged and confronted with the interim report, the petitioner did not deny the misconduct but opted to resign by the letter dated 13.08.2019. The management declined to accept the resignation letter until full investigations had been concluded and the extent of the fraud established. The respondent assigned the petitioner to work on a reconciliation report.

c. In view of final investigation report the respondent issued a letter to show cause dated 26.09.2019 and the petitioner replied by his letter dated 30.09.2019. The respondent decided to terminate the employment by the letter dated 01.10.2019.

d. The respondent has never sought to carry out or run any advertisement notice adversarial to the petitioner. The petitioner's salary is available to him subject to his completion of clearance procedures as indicated in the respondent's letter dated 01.10.2019.

After the sales department stabilized the petitioner was free to apply for annual leave but he failed to do so.

f. The termination of the petitioner's contract of employment was lawful, fair and as per Articles 41 and 47 of the Constitution, sections 41, 43 and 44 of the Employment Act, 2007, and was not unfair as alleged for the petitioner.

g. The application is brought in bad faith, is mischievous, and deliberately intended to mislead the Court.

h. The applicant does not merit the discretion of the Court in granting the prayers sought.

Submissions were filed for the parties. The Court has considered the parties' respective cases and material on record and finds as follows:

1. While parties have presented material for and against the legality and constitutionality of the termination of the contract of service between the parties, the Court considers that the issue is best left for final determination after the full hearing of the petition. Consideration of the issue will therefore be reserved for the full hearing and final judgment.

2. The respondent is willing to pay the claimant's final salaries for August and September 2019 subject to clearance. The claimant has not placed material before Court to justify why he should not be subjected to such clearance. If at the end of the clearance there would be emerging issues about the salaries as presently claimed, the Court considers that parties would be able to urge their respective cases at the full hearing. Thus in view of the parties' respective cases and that a mandatory injunction for specific performance be granted only in the very obvious of the cases, (the dispute here being whether the amount claimed is subject to recovery of debts owed to the respondent by the petitioner), the Court returns that there is a *prima facie* case established that pending the hearing and determination of the main petition, the respondent to pay the petitioner the remuneration for August and September 2019 but subject to the petitioner clearing with the respondent.

3. The respondent admits that it has no intention to publish in the print or other media adverse information against the claimant flowing from the termination of the contract of service herein. By that admission the Court considers that it is conceded by the respondent that no such adverse publication may issue. A temporary injunction will accordingly issue.

4. Looking at the parties' arguments and respective positions on the application, costs of the application shall be in the cause.

In conclusion the notice of motion filed on 15.10.2019 is hereby determined with orders as follows:

1. That pending the hearing and determination of the main petition, the respondent to pay the petitioner the remuneration for August and September 2019 within thirty days from today but subject to the petitioner clearing with the respondent within fifteen days from the date of this Ruling.

2. That pending the hearing and determination of the main petition, the respondent by itself or by its employees, directors or agents is hereby prohibited from publish in the print or other media adverse or defamatory information against the claimant flowing from the termination of the contract of service or the petitioner's service with the respondent herein.

3. The costs of the application in the cause.

**SIGNED, DATED AND DELIVERED BY THE COURT AT NAIROBI THIS FRIDAY, 17TH JULY, 2020.**

**BYRAM ONGAYA**

**JUDGE**