



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 516 OF 2019

FREDRICK ODUOR LAMBA.....CLAIMANT

-VERSUS-

KENYA ELECTRICITY GENERATING COMPANY PLC.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 3rd July, 2020)

RULING

The claimant filed an application on 28.03.2020 through Hashim & Lesaigor Associates Advocates. The application was by the notice of motion said to be under section 3 (i) and (ii) of the Employment and Labour Relations Court Act, rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016, sections 1A, 1B(1), 3A and section 63(e) of the Civil Procedure Act, Chapter 21 of the Laws of Kenya, Order 40 of the Civil Procedure Rules, 2010, and all other enabling laws. The claimant prays for an order of staying the advertised recruitment exercise for the position of Administration Manager of KENGEN as stated in the press advertisement on 13.03.2020 pending the hearing and full determination of the underlying suit herein; and costs of the application be provided for. The application is based on the attached claimant's supporting affidavit, the further claimant's affidavit filed on 27.05.2020 and upon the following grounds:

- a) The claimant filed the memorandum of claim on 08.08.2019 and one of the prayers is for reinstatement to the position of the Respondent's Administration Manager forthwith without loss of any salary and benefits thereof. The respondent being aware of the nature of claim and prayer has restrained itself for over 2 years from making a substantive appointment to the office.
- b) On Friday 13.03.2020 the respondent by an advertisement in leading local dailies invited applications from interested persons to fill the said vacancy.
- c) If the recruitment process is allowed to go on the claimant's prayer for reinstatement shall be rendered nugatory and otiose as overtaken accordingly.
- d) Prior to the impugned dismissal the claimant held the position of the respondent's Administration Manager in charge of the Human Resource and Administration Division on permanent and pensionable terms.
- e) If orders sought are not granted the claimant will suffer prejudice and if granted the respondent will suffer no prejudice.
- f) The orders when granted as prayed will be in the interest of justice and safeguard the claimant's constitutional right to a just and fair trial.
- g) The application has been brought without undue delay and ought to be granted.
- h) In the further supporting affidavit, the claimant urges that the allegations in the notice to show cause were altered by the disciplinary committee during the disciplinary hearing. Further he was not given the report by the Security and Integrity Department. Further, the report by the disciplinary committee was not accurate and evidence was varied. Further, the appeals committee was improperly constituted and was partial and biased.
- i) Thus the recruitment process ought to be stayed as prayed for until the suit is heard and determined.

The respondent opposed the application by filing on 06.05.2020 the replying affidavit of Martin Makallah, the respondent's Chief Human Officer and learned counsel Mr. John M. Ohaga of TrippleOKLaw LPP appeared for the respondent. The respondent urged as follows:

- a) The respondent employed the claimant as Administration Manager in the Human Resource and Administration Department effective 01.05.2016 per the letter of offer of employment dated 22.04.2016. the parties signed employment agreement on

15.08.2016 to constitute the contract of service. By clause 3 thereof the claimant agreed to conform to staff orders in place from time to time and agreed to work diligently and faithfully, and promote the respondent's interests. By letter dated 08.06.2016 the respondent delegated to the claimant authority to perform functions set out in the letter. The claimant accepted the delegation on 17.06.2016.

b) On 22.07.2017 the respondent's motor vehicle Mitsubishi Lancer KBL 869G driven by one Eliazaro Ouma was involved in a road accident in Yala whereby it hit a pedestrian who died.

c) The respondent assigned its Security and Integrity Department to investigate the matter. The report indicated that the accident occurred at a time the motor vehicle was transporting the claimant's three family members from Kisumu International Airport. The report by the Security and Integrity Department was dated 18.08.2019 and recommended disciplinary action against the claimant for allowing the respondent's motor vehicle to operate during the weekend on unofficial business and misusing the respondent's motor vehicle to ferry his family members.

d) The respondent issued the notice to show cause dated 25.08.2017 and the claimant replied. The claimant was found guilty of the allegations and his employment terminated by the letter dated 19.01.2018 on grounds of negligence of duty. The summary dismissal was commuted to normal termination. The reasons for terminating the employment were valid and fair.

e) The claimant appealed against the termination and by letter dated 24.05.2018 the termination was upheld.

f) It is over two years since the termination and in view of the delay, the claimant is undeserving of the Court's discretion. Further filling of the vacancy does not render reinstatement nugatory or impracticable. The applicant's job was not skilled or technical but administrative and can be able to secure an alternative job in a similar position he held in the respondent's establishment.

g) Thus the claimant has not established a prima facie case with a likelihood of success. Further the balance of convenience favors dismissal of the application to allow the respondent to undertake its obligations optimally.

Parties filed their respective submissions. The Court has considered the submissions and the parties' respective cases. The Court makes findings as follows.

First, in considering whether the claimant has established a case to justify the Court's intervention, 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."

The claimant seeks to stay the recruitment process as prayed for. The Court has considered all the material on record and returns that the claimant has failed to show a provision in the constitution, statute, contract, lawful policy or practice which the respondent is said to have breached in advertising and recruiting for the vacancy in issue. Further, the respondent has confirmed that the role of Administration Manager has various openings in the respondent's establishment so that if the orders prayed for are not granted and an order of reinstatement is granted, there would be no impracticability to implement the order as the case may be. In the circumstances the Court returns that the claimant has failed to establish a *prima facie* case to justify the Court's intervention by way of an order of stay of recruitment process for the vacancy and as prayed for.

While making that finding the Court follows **Mrao Ltd –Versus- First American Bank of Kenya Ltd & 2 Others [2003]eKLR** cited for the applicant and where the Court of Appeal stated that a *prima facie* case with a reasonable probability of success is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. Further, it is a standard which is higher than an arguable case. The Court has found that the claimant's concern was enforcement of the reinstatement order as may be granted after full hearing of the suit and the respondent has confirmed there would be no such difficulty in view of the respondent's establishment that would facilitate implementation of such an order. In view of that finding the Court returns that the claimant has not established an irreparable injury that would accrue should the prayer of temporary stay of recruitment be declined. Further, in view of the findings, the balance of convenience would favour denial of the prayer as made. In particular, and as submitted for the respondent, the balance of convenience tilts in favour of the respondent to recruit a competent person to fill the vacancy and should the order of reinstatement issue, the respondent will accommodate the claimant in its wide establishment. The Court observes that the claimant has not disputed the existence of the respondent's establishment as urged that may readily accommodate him in event of an order of reinstatement.

The parties have urged and submitted considerably on the issues of the circumstances and the merits of the termination of the contract of service between the parties and the Court returns that it will not delve into such matters which are best reserved for full hearing and judgment in the suit.

In conclusion the application filed on 28.03.2020 is hereby dismissed with costs in the cause and parties are directed to take steps for the expeditious hearing and determination of the main suit.

Signed, dated and delivered in court at **Nairobi** this **Friday, 3rd July, 2020.**

BYRAM ONGAYA

JUDGE