



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION NO. 55 OF 2020

URSULA SABINA OYATSI.....APPLICANT

VERSUS

KENYA POST OFFICE SAVINGS BANK LTD..... RESPONDENT

RULING

1. Ursula Sabina Oyatsi (applicant) was offered the position of Head, Corporate Banking by Kenya Post Office Savings Bank Ltd (Respondent) with effect from 1 June 2014 for a period of 3-years, subject to renewal on mutual agreement.
2. Pursuant to clause 14.1 of the contract on renewal, the applicant gave notice of intention to renew the contract on 17 February 2020.
3. In a response dated 26 February 2020, the Respondent notified the applicant that by dint of clause 14.2 of the contract, it would not renew the contract upon expiry on 31 May 2020.
4. Despite the notification of non-renewal, on 4 March 2020, the Chief Executive Officer of the Respondent appointed the applicant as chairperson of a Deposit Mobilisation Committee up to 31 December 2020. The Committee met under the chairship of the Chief Executive Officer and/or was launched on 10 March 2020.
5. On 13 March 2020, the applicant chaired a meeting of the Committee whose substantive agenda were strategies formulation and appointment of a team to collect deposits.
6. A day before the expiry of her contract, on 30 May 2020, the applicant wrote to the Respondent's Chief Executive Officer in the following terms

First and foremost, I wish to thank you so much for allowing me to continue serving the bank after the expiry of my contract on 31st May 2020.

Secondly, I wish to thank the bank for having faith in me to be appointed in my capacity as the Head Corporate Banking and Credit to chair the Deposit Mobilisation Committee for a period up to 31st December 2020 as per the letter of appointment dated 4th March 2020.....

7. In a swift response dated 3 June 2020, the Respondent's Chief Executive Officer informed the applicant that her contract formally terminated on 31 May 2020, had not been extended and asked her to arrange to hand over her office.
8. Alarmed with the turn of events, the applicant filed a motion under a certificate of urgency on 5 June 2020 seeking the following orders

1. ...

2. THAT pending the hearing and determination of this application interpartes, the decision communicated by the Respondent to the applicant on 3rd June 2020 purporting that the applicant's contract has expired and has not been renewed be and is hereby suspended with the applicant remaining an employee of the Respondent and the Respondent is hereby restrained either from directly or through its agents, servants or employees from purporting not to renew the Claimant's (sic) employment contract for a further term of 3 years effective from 1st June 2020 to 31st May 2023 or from terminating the said contract of employment without any or any valid reason nor from advertising the position which is currently held by the applicant, interviewing for, recruiting or appointing any person to the said position.

3. THAT upon hearing and determination of this application inter partes, but pending commencement of arbitral proceedings, the

decision communicated by the Respondent to the applicant on 3rd June 2020 purporting that the applicant's contract has expired and has not been renewed and is hereby suspended with the applicant remaining an employee of the Respondent and the Respondent is hereby restrained either from directly or through its agents, servants or employees from purporting not to renew the applicant's employment contract for a further term of 3 years effective from 1st June 2020 to 31st May 2023 or from terminating the said contract of employment without any or any valid reason nor from advertising the position which is currently held by the applicant, interviewing for, recruiting or appointing any person to the said position.

4. THAT the costs of this application be provided for.

9. Under Court directives, the Respondent filed a replying affidavit sworn by its Corporation Secretary on 15 June 2020. Thereafter, the applicant filed her submissions on 2 July 2020 while the Respondent filed its submissions on 8 July 2020.

10. The Court has given due consideration to the motion, affidavits and submissions.

11. The gist of the applicant's case is that the Internal Memorandum dated 4 March 2020 appointing her to the Deposit Mobilisation Committee and designating her as chairperson up to 31 December 2020 served to renew her contract up to that date.

12. Further, the applicant contended that the extra responsibilities added to her as chair of the Committee and execution of a performance contract to 31 December 2020 gave her a legitimate expectation of renewal of the contract.

13. The grant of the orders sought, the applicant maintained was to enable the parties to go through an arbitration process as contemplated by clause 19.2 of the employment contract.

14. Opposing the application, the Respondent contended that the application was *sub judice* as the applicant's initial contract had lapsed and she had challenged the non-renewal through Petition No. 133 of 2016, *Ursula Sabina Oyatsi v Post Office Savings Bank Ltd* and Cause No. 979 of 2017, *Ursula Sabina Oyatsi v Post Office Savings Bank Ltd*, which suits were still pending.

15. The Respondent also objected to the grant of the orders sought on the ground that the application was brought after the lapse of the applicant's contract of service, and thus orders sought had been overtaken by events.

16. The Respondent further raised an objection on the manner the applicant approached the Court (through Miscellaneous Application and not a substantive suit).

Has the applicant made case for an interim measure of protection?

17. The applicant did not disclose whether she had invoked the arbitration clause in the employment contract and if so how far the proceedings had moved.

18. Even without disclosure, the applicant's gravamen is that her *contract of service* was renewed through to 31 December 2020, a period of about 6 months. And it is not in dispute that the applicant approached the Court after the Respondent had indicated the contract of employment had already lapsed.

19. In the view of the Court, were the arbitrator to uphold the contention by the applicant, it would not pose any complexity in computing, in terms of damages, appropriate loss occasioned by the alleged decision by the Respondent to breach the *contract of service*.

Sub judice and/or abuse of court process

20. The applicant did not deny that she had instituted other proceedings concerning the termination of her contract and that she had only continued to serve on the basis of orders issued in those 2 suits.

21. What has been of concern to the Court is that the applicant did not disclose that her contract had earlier on expired and that she filed a Petition and a Cause to challenge the same and that she continued to serve from 2016 based on court orders.

22. In the view of the Court, the disclosure of the previous/pending proceedings was material and the failure to disclose amounted to material non-disclosure and abuse of court process disentitling the applicant from any interim measures of protection or other discretionary relief.

Lack of a substantive suit

23. Section 7 of the Arbitration Act, 1995 empowers this Court to issue an interim measure of protection including an injunction pending the determination of an arbitration proceeding.

24. In granting interim measures of protection, the Court is not called upon to evaluate the merits of the respective parties' contentions as would be necessary under the principles set out in *Giella v Cassman Brown* (1973) EA 358, nor concern itself with whether there is a substantive suit (see *Joseph Kibowen Chemjor v William C. Kiseru* (2013) eKLR, *Safaricom Ltd v Ocean View Beach Hotel & 2 Ors* (2009) eKLR and *Smatt Construction Co Ltd v County Government of Kakamega* (2016) eKLR).

25. The purpose of an interim measure is so to speak, preserve the *status quo* pending the conclusion of arbitral proceedings and does not

require to be anchored on a substantive suit.

26. The Court holds that the objection to the competency of the application without an existing suit has no merit and in this respect, the Court would endorse the conclusion in the cases referred to in paragraph 24.

27. Consequently, the Court declines to grant any interim measure of protection as sought by the applicant.

28. The motion is dismissed with costs to the Respondent.

Delivered through Microsoft teams, dated and signed in Nairobi on this 5th day of August 2020.

Radido Stephen

Judge

Appearances

For applicant Mr. Wambola instructed by Ongoya & Wambola Advocates

For Respondent Mr. Munyua instructed by

Court Assistant Judy Maina