



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 145 OF 2018

(Before Hon. Justice Hellen S. Wasilwa on 13th October, 2020)

ERNEST MOTURI OGWORAPETITIONER

VERSUS

NATIONAL CEREALS &

PRODUCE BOARD1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

RULING

Petitioner's Notice of Motion dated 4th August 2020

1. The Petitioner/Applicant, Ernest Moturi Ogwora is seeking to be heard for orders that:-

1. Spent.

2. Spent.

3. This Honourable be and is hereby pleased to stop the forceful retirement of the Applicant by the 1st Respondent's Board of Directors and as such issue an ORDER of injunction revoking the forceful retirement of the Applicant.

4. Pending hearing and determination of Petition No. 145 of 2018 before Hon. Justice Hellen Wasilwa, this Honourable Court do issue an ORDER restraining the 1st Respondent's Board of Directors and/or Management from forcefully retiring the Applicant.

5. This Honourable Court does issue an ORDER revoking the retirement letter reference No. NCPB/3/ST/C/6344/247 of 3rd August 2020.

6. This Honourable Court be and is hereby pleased to protect the Applicant from any discriminatory and ill-motivated retaliatory actions of the 1st Respondent.

7. Pending the determination of Petition No. 145 of 2018, this Honourable Court be and is hereby pleased to issue an ORDER maintaining the status quo of the Applicant and Applicant's position at the 1st Respondent's institution.

8. Costs of this application be paid by the Respondents.

2. The Application is founded on the grounds that on 30/07/2020, the 1st Respondent's Board of Directors resolved and approved the abolition of the Office of Manager, Monitoring & Evaluation, held by the Applicant and which role was merged with Corporate Planning Function.

3. That the said Board consequently decided to forcefully retire the Applicant from the service of the 1st Respondent with immediate effect

and on 03/08/2020, the Applicant was served with a letter and/or notice of immediate retirement and communication of his office having been abolished. That the Petitioner has been subjected to untold continued discriminatory and ill-motivated retaliatory actions by the 1st Respondent's Board of Directors since he instituted this suit.

4. That unless this Court stops the decision of the said Board to illegally, unprocedurally and forcefully retire the Applicant from service, the pending law suit will have been rendered void to the sheer detriment of the Applicant. The Applicant is apprehensive that the 1st Respondent is keen on locking him out from the seat and wheel of justice and contends that the Respondents will not suffer any prejudice if the orders sought herein are granted.

5. In his Supporting Affidavit, the Applicant avers that after filing the Petition herein, the 1st Respondent's Board of Directors discussed the court matter in a full board meeting of 12/04/2019 and resolved that he be isolated for appraisal and further be forced to proceed on all his pending leave days. He contends he is being punished for exercising his rights to institute Court proceedings and that his purported forced retirement is selective and discriminatory and further based on conscience and ethnicity.

6. The 1st Respondent filed a Replying Affidavit sworn on 19th August 2020 by its Corporation Secretary and Head of Legal Services, John Ngetich who avers that the Petitioner/Applicant was all along a participant in the deliberations involving the removal of the office he occupied as shown in the annexed Minutes and the Attendance List signed by the Petitioner and that the Petitioner cannot therefore feign ignorance.

7. That since the Petitioner did not apply for any of the 8 vacant positions of Heads of Departments that had been advertised in an internal memo, he was selected as a panel member to assess shortlisted candidates suitable for the advertised positions. He contends that it is futile for the Petitioner to seek to occupy an office that is non-existent and that granting the Orders sought by the Petitioner would amount to the court managing the affairs of the 1st Respondent.

1st Respondent's Notice of Motion dated 19th August 2020

8. The 1st Respondent seeks Orders for this Court to stay, set aside, vary and or review the Order dated 11th August 2020 issued by the Honourable Court, pending hearing and determination of the Application and such further orders that the Court deems just and expedient to meet the ends of justice.

9. Its application is based on the grounds that the issues raised in the Petitioner's Application are yet to be canvassed before this Court and hence granting the orders prayed for by the Petitioner will determine the suit at an interlocutory stage. That it ought to be accorded a hearing before such orders are granted and contends that the order revoking the alleged forceful retirement of the Petitioner/Applicant is prejudicial and has been overtaken by events.

10. The 1st Respondent also filed a Supporting Affidavit sworn by John Ngetich who avers that the Order granted *ex parte* by the Court on 11/08/2020 revoking the alleged forceful retirement sought by the Petitioner is final in nature and deprives it of the right to be heard under **Article 50(1) of the Constitution**. That the said Court Order has been overtaken by events as it was issued after its Board of Directors had abolished the office of the Manager, Monitoring and Evaluation and a new organizational structure put in place. He contends that unless the said Order is reviewed, verified or set aside, the 1st Respondent will be condemned unheard.

11. In response, the Petitioner filed his Replying Affidavit averring that the Orders issued by this Court on 11/08/2020 are interim in nature and not final as alleged by the 1st Respondent because his Application was to first be heard before this Honourable Court. He avers that the 1st Respondent has contemptuously and with impunity ignored the said Orders despite having been served on 12/08/2020 and that the orders the 1st Respondent's is seeking in its application dated 19/08/2020 were denied on 21/08/2020 by Justice Onesmus Makau.

12. That equity demands that he who comes to equity must come with clean hands but the Directors of the Board of the 1st Respondent continue to be in contempt of the orders of this Court. That the Respondent has failed to disclose it physically locked him out of his office on 05/08/2020, 17/08/2020 and 24/08/2020 in disregard of this Court's orders.

13. That the 1st Respondent has refused to pay him his August 2020 salary and has further terminated his medical cover in disregard of the court orders issued on 11/08/2020. That this Court should thus dismiss the 1st Respondent's application herein with costs and direct that the Orders issued on 11/08/2020 be complied with.

14. He further avers that the question the Respondent ought to answer is why and how they issued him with a letter on 28/11/2016, which re-designated him to the position of Manager, Monitoring & Evaluation. That the 1st Respondent has failed to disclose that the Petitioner had applied for positions that had been advertised on 19/06/2018 but the process having been compromised, he was rigged out and which resulted in the Petition herein.

15. He contends that the said organizational under implementation was unknown to even senior management and was circulated on 10/01/2020 way after the advert of August 2019 after the positions had been filled. That the 1st Respondent purported to forcefully retire him without offering him the opportunity to try a position in the new structure he is qualified for such as General Manager, Marketing & Warehouse that is relevant to his training, experience and interest and which is unoccupied.

16. He contends that for the 1st Respondent's application to be canvassed meaningfully, the Respondent should avail:-

i) The full set of the minutes for the full Board of Director's meeting of 12/04/2019;

ii) *The full set of the minutes of the Board of Director's meeting together with the request from management to abolish Manager, Monitoring and Evaluation, the minutes and resolutions of the Human Resource Committee and the ensuing Board Paper;*

iii) *The organizational structures that have been in operation since 2008 to the latest one approved on 30/07/2020;*

iv) *The record showing where the Petitioner signed to acknowledge and accept the re-designation to the position of Manager, Monitoring and Evaluation.*

17. Pursuant to the directions of this Honourable Court, both Applications were dispensed by way of written submissions.

Petitioner's Submissions

18. In support of his Application, the Petitioner submits that **Article 47 of the Constitution** codifies every person's right to fair administrative action that is lawful and procedurally fair and consequently entitles such a person the right to be given reasons for any action where the person has or is likely to be adversely affected by an administrative action. That **Section 4(6) of the Fair Administrative Action Act** further provides that where the administrator is empowered by any written law to follow a procedure, which conforms, to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.

19. He submits that retirement of an employee from the service is an administrative action that must comply with the law and the laid down legal procedures and that the decision to retire him ought to have been in compliance with the **1st Respondent's HR Policy and Procedures Manual, 2019**. That the Board of Directors of the 1st Respondent purporting to effect the provisions of **Clause 11.7 of the Manual** to retire him under the 50-year rule is malicious since he has never opted to retire from employment nor did he submit any application to that effect. That as such, the decision to retire him was forceful and this court should therefore revoke the letter dated 3rd August 2020 which seeks to forcefully retire him from the service of the 1st Respondent.

20. That secondly, the 1st Respondent never followed the procedure set out in **Clause 11.10 of the Manual** which provides for Retirement on Abolition/Re-organization of office as under **Section 40 of the Employment Act**. That the said Board never notified him or the labour office of the intention to abolish his office which to him is discrimination contrary to **section 5 of the Employment Act** and **Article 27 of the Constitution** which entitles him to equal protection and equal benefits of the law.

21. That this Court has power to intervene in internal likely separation proceedings if such proceedings may result to illegality or if the procedure adopted is manifestly unfair and contrary to the procedure set out by the law or the parties' contract of service. He urges this Court to therefore find in favour of the Petitioner/Applicant and revoke the Board's resolution unlawfully purporting to retire him.

22. He relies on the case of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR** where the Court of Appeal held that consultations in effecting redundancy are meant to enable the parties discuss and negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it is unavoidable.

23. On the issue of discrimination, the Petitioner/Applicant submits that the burden rests on the Respondent, to show that discrimination did not take place as required under **Section 5(6) of the Employment Act**. He further submits that the 1st Respondent engaged in harassing and bullying him is contrary to **Public Service Commission - Human Resource Policies and Procedures for the Public Service 2016** which at **clause J.22** states:-

"A public officer shall not bully any person. For the purpose of this section 'bullying' includes repeated offensive behaviour which is vindictive, cruel, malicious or humiliating and is intended to undermine a person."

24. It is submitted by the Petitioner/Applicant is entitled to costs since the 1st Respondent has deliberately decided to withhold his August 2020 salary and compromised contributions he makes from his salary. That a successful party can be denied costs if it is proved that but for his conduct the action would not have been brought and he relies on the Court's analysis of an award of costs in **UAP Insurance Company v Toiyoi Investment Limited [2020] eKLR**. That the Court should consider his submissions and find in his favour and compel the 1st Respondent to pay the costs of this application to the Petitioner/Applicant.

25. In opposition of the 1st Respondent's Application, the Petitioner submits that the Petition is the foundation of his interlocutory application dated 4th August 2020 for the reason that if his purported forceful retirement was allowed, then the entire petition would have been rendered nugatory.

26. That **Section 63(c) and (e) of the Civil Procedure Act** on supplemental proceedings provide:-

"In order to prevent the ends of justice from being defeated, the Court may, if it is so prescribed:-

a) *grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold;*

.....

e) *make such other interlocutory orders as may appear to the court to be just and convenient"*.

27. That **Section 3A of the Civil Procedure Act** further allows this Court in its inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. The Petitioner relies on the case of **Samuel Mwinami v Social Service League & another [2016] eKLR**, where Mbaru J notes that the natural and legal consequence of an inter parties hearing at an interlocutory stage is for the orders granted ex parte to either be confirmed or vacated after hearing both sides and that it serves to shield the party against violation of his rights or threatened violation of his legal rights.

28. The Petitioner/Respondent submits that he has demonstrated clearly a case of continued discrimination against him concealed in a purported forceful retirement by the 1st Respondent's Board of Directors. That the 1st Respondent's Application dated 19/08/2020 lacks merit and should be dismissed with costs to be paid to the Petitioner.

1st Respondent's Submissions

29. The 1st Respondent submits that the orders sought in the Petitioner's Application have no nexus with the substantive suit pending determination before this Honourable Court and has therefore no foundation. That the Petitioner should file a fresh suit for the Respondent to defend itself and that a cause of action cannot be adjudicated through an application at an interlocutory stage without a substantive suit. In this regard, it relies on the case on **Anastacia Wagiciengo -vs- Ezekiel Wafula (2018) eKLR** where the Court held that interlocutory orders must be premised on substantive proceedings and must be so prescribed to prevent the ends of justice from being defeated. That there being no substantive suit on the retirement of the Petitioner and abolition of his office, the orders sought in the Petitioner's Application cannot be granted.

30. Further, that the Petitioner has also not sought any injunctive relief in his Petition against his retirement and abolition of office and that parties being bound by their pleadings, the orders sought cannot be granted. That this position was supported by the decision in **Stephen Ndolo Wambua -vs- Beatrice Mbula Mutitu & 2 Others [2019] eKLR** which cited with approval the decision of the Nigerian Supreme Court in **ADETOUN OLADEJI (NIG) LTD Vs. NIGERIA BREWERIES PLC S.C. 91/2002**. That the Petitioner's Application is therefore fatally defective, incurable by amendment and that the Petitioner has not given any reasons why he did not file a fresh suit or why he was prevented from doing so.

31. It is the 1st Respondent's submission that the Petitioner has not met the threshold for grant of an interlocutory injunction well settled in **Giella vs Cassman Brown & Company Limited (1973) EA 358**, which requires the Petitioner to establish a prima facie case, demonstrate the irreparable harm he will suffer if the interlocutory injunction is not granted and demonstrate that the balance of convenience tilts in his favour. That irreparable injury is defined in **Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 Others [2016] eKLR** to mean injury which is substantial and which could never be adequately remedied or atoned for by damages. That is imperative to note that all the three conditions for a grant of any order of injunction are to be applied as separate, distinct and must all be met as was observed in the Court of Appeal case of **Nguruman Limited vs Jan Bonde Nielson & 2 Others (2014) eKLR**. The Court of Appeal further held that existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between.

32. That in this case, the Petitioner has not placed before this court a prima facie case to demonstrate he is likely to suffer irreparable harm warranting the Court's intervention to grant him the said orders of injunction. That the balance of convenience would therefore not tilt in his favour as all the three conditions have not been met.

33. The 1st Respondent also submits that this Court cannot injunct an action which has already taken effect as it would amount to issuing orders in vain which would only cause hardship to the respondent. That the alleged loss of employment can be compensated by way of damages and is therefore not irreparable harm and it relies on the case of **Barclays Bank Of Kenya Limited v Banking, Insurance & Finance Union (Kenya) (2019) eKLR**.

34. It is the 1st Respondent's submission that the Petitioner's prayer revoking his alleged forceful retirement granted by this Honourable Court amounts to reinstatement of the Petitioner at the interlocutory stage as his retirement had already taken effect immediately. It cites the case of **Loice Mutai vs Kenya Revenue Authority (2017) eKLR** where the Court held that a court ordering reinstatement is in effect reversing a management decision and it was the Court's view that an employee seeking reinstatement must earn their stripes by going through a full trial.

35. It further submits that for a court to grant a prayer for reinstatement, it must consider the practicability of the same pursuant to **Section 49 (4) (c) of the Employment Act**. The Respondent prays that the Petitioner's Application be dismissed with costs.

36. I have examined all the averments and submissions of the Parties herein. On 21/12/2018, this Court gave orders staying the filling of position of General Manager, Marketing and Operations pending the hearing of this application interpartes. Todate, this application has never been heard interpartes.

37. The Parties however seem to have agreed to compromise the application and proceed with the Main Petition as per the orders of 14/3/2019 where the Petitioner intimated that they would like to proceed with the hearing of this Petition by way of viva voce evidence. This Court ordered that the Parties take a hearing date at the registry. Since then, application after application seem to be filed by the Parties thus delaying further the final determination of this Petition.

38. The current application relate to action now undertaken by the Respondents whilst disregarding orders still in force in that they have now retired the Petitioner from the service which in effect impacts on the implication of the orders granted in 2018.

39. The Respondents want this Court to set aside interim orders given indicating that they have no nexus with the substantive suit.

40. My view is that the only way the issues being raised by the Parties can be resolved is to have the entire Petition determined. However, going by this Petition, the main prayers being sought by the Petition relate to an appointment or promotion to certain offices and in particular as the Respondent's Managing Director. The issue of his retirement is not part of this Petition.

41. The Respondents have already gone ahead and retired him from their employment and this cannot be remedied through this application, which relates to a Petition seeking entirely different orders.

42. I agree with the Respondent that the orders the Applicant seeks vide this Petition should be handled in another Cause/Petition and not this one.

43. In the circumstances, I will proceed and strike out both applications and direct the Parties to proceed with the Main Petition. The Applicant is free to file another Cause/Petition to remedy the issues he had raised in the struck out application.

44. Costs in the Petition.

Dated and delivered in Chambers via zoom this 13th day of October, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Luta for Respondent – Present

Sikuta for Petitioner – Present