



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 163 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

HEDWIG NYALWAL..... CLAIMANT

VERSUS

KENYA INSTITUTE OF SUPPLIES MANAGEMENT.....RESPONDENT

RULING

Before me for determination are two applications. The first is dated 30th March 2020 and is filed by the Claimant seeking the following orders –

1. That this Court be pleased to certify this application as urgent and dispense with the service at the first instance.
2. That this Court be pleased to grant an interim injunction restraining the Respondent either by itself, servant and/or agents from headhunting, advertising, carrying out interviews, recruiting and employing a substantive Chief Executive Officer to replace the Applicant pending the hearing and determination of this application.
3. That this Court be pleased to grant an injunctive order restraining the Respondent either by itself, servant and/or agents from headhunting, advertising and recruiting a substantive Chief Executive Officer to replace the Applicant pending the hearing and' determination of the main claim herein.
4. That cost of this application be provided for.

The application is supported by the following grounds: -

1. That the Claimant herein was initially employed by the Respondent on 16th October 2007 as an Assistant Manager reporting to the Head of Secretariat and the Board (now Council) and on 1st November 2012 was competitively recruited and appointed as the Head of Secretariat of the Respondent which position he held until 22nd February 2017 when the Respondent's Council recruited the Claimant as the Chief Executive Officer of the Respondent.
2. That the Claimant has been discharging his obligations as per the terms and conditions of service approved by the Respondent's Council and has performed extremely well in his position as the Chief Executive Officer of the Respondent.
3. That at all times, the Claimant been the substantive secretary to the Council of the Respondent.
4. That when the Claimant reported to work on 27th March 2020, he was in utter shock when the Chairman of the Respondent's Council delivered to him a letter dated 27th March 2020 titled "*Notice of Termination of Employment*" and stated as follows:
 - (a) That there was a Special Meeting of the Council convened on 26th March 2020 which resolved that the Claimant vacates his position with immediate effect;
 - (b) They cited Section 9(1) of the Supplies Practitioners Management Act which is alleged mandates them to appoint another Chief Executive Officer.

5. That on the same date, the Respondent issued a Memo to all its members of KISM titled “*Management Changes at KISM*” where they informed the members as follows:

(a) The Council had passed a resolution to competitively recruit for the Claimant’s position;

(b) The Council had taken a decision to terminate the Claimant’s services effective 27th March 2020 and to appoint one Mr. James Kaloki in an Acting Capacity until a competitive recruitment is undertaken to fill the position

6. That no justifiable reason was advanced to warrant immediate and abrupt termination of the employment of the Claimant herein, no charges were ever framed against the Claimant herein and was never granted an opportunity to defend himself against any allegations before taking an abrupt and immediate decision to terminate his employment contract.

7. That the Claimant is an appointee of the Council of the Respondent through the relevant organs of the Respondent and has undertaken his duties and responsibilities as required by the Council, acted as Secretary to the Council and has executed decisions of the Council with excellence and is completely taken aback by the rushed decision of the Respondent to terminate his services abruptly and without any due process at all.

8. That the Claimant has never been subjected to any disciplinary action for the entire 13 years that he has worked for the Respondent and even at his current position of the Chief Executive Officer and there was absolutely no valid and justifiable reasons to abruptly terminate his services as the Chief Executive Officer of the Respondent.

9. That the Claimant being a public officer is indeed protected by the Constitution against dismissal or removal from office without compliance with the due process and indeed in this manner, the said provision of the Constitution was flouted by the Respondent with impunity.

10. That the Claimant being a public servant is indeed a servant of the people of the Republic of Kenya and does serve as the Chief Executive Officer under the whims and pleasure of the Respondent’s Council and the actions of the Respondent has indeed entrenched the Pleasure Principle which had long been abolished by the passage of the Constitution.

11. That the Applicant is also entitled to an administrative action that is just and fair which the Respondent by his own actions, have denied the Applicant

12. That the Respondent appointed an Acting Chief Executive Officer and directed him to immediately undertake a recruitment of the Claimant’s replacement

13. That the Applicant has a legitimate expectation that he will be effectively reinstated as there existed no valid and fair reasons for the dismissal and the same is patently irregular and a violation of the Claimant’s labour rights and indeed it is practicable to have the Claimant reinstated to his position

14. That the Applicant is apprehensive that unless the Respondent is restrained by an interim order of this court, it will recruit a new staff to take up the position of the Chief Executive Officer thus defeating the Claimant’s Claim to be reinstated back to his position an action which will render this application of his claim for reinstatement nugatory and an academic exercise.

15. That the Applicant has indeed established a Prima facie Case capable of success at the main trial since proceeding and effecting the recruitment of a substantive officer to take over his position would actually render it impracticable to reinstate him to his position and indeed make it impossible to have him reinstated.

16. That the Applicant having diligently served the Respondent for the last 13 years indeed had a legitimate expectation to continue working for the Respondent and the dismissal happening at a time when the world is under a pandemic and he will suffer great loss should this application not be allowed as prayed.

17. That the Claimant is greatly aggrieved by the Respondent’s decision to terminate his employment without following its own laid down constitutional and statutory and internal administrative procedures and for no valid or justifiable reasons and in total disregard of the Claimant’s contract in place, the Employment Act and the Constitution of Kenya 2010.

18. That the Claimant maintains that his dismissal by the Respondent was discriminatory, unfair, unlawful and wrongful. That by rendering the Claimant jobless, the Respondent totally failed to take into account the fact that the Claimant has a family dependent on him as well as other financial obligations like loans and rent and the resultant damage thereof. The Claimant’s Constitutional rights to fair labour practices protected under Article 41 of the Constitution of Kenya, 2010 was violated and/or contravened as a result of which he has suffered loss and damage.

19. That the dismissal of the Claimant from the Respondent’s employment was malicious, in bad faith and was done with the main purpose of frustrating the Claimant’s known efforts as a performer and further, the illegal termination was also geared towards humiliating the Claimant and ensures he continues to suffer by denting his social standing and stellar career both locally and internationally

20. That the Applicant stands to suffer prejudice and loss as the weaker party if the Respondent is allowed to fill his position as the Chief Executive Officer of the Respondent.

The second is the Respondent's application dated 15th April 2020 seeking the following orders –

1. This application be certified urgent and be heard ex parte in the first instance.
2. The interim injunction granted on 1st April, 2020 and the hearing of the Notice of Motion dated 30th March, 2020 be stayed pending hearing and determination of this application.
3. The interim injunction granted on 1st April, 2020 be set aside.
4. Costs of this application be provided for.

The application is supported by the following grounds: -

- a) Only the Respondent's Council has the mandate to appoint the Chief Executive Officer.
- b) The Respondent's Council came into existence on 10th January, 2020.
- c) The Claimant's appointment by Chris Oanda was illegal and ultra vires Section 9(1) of the Supplies Practitioners Management Act, 2007.
- d) The Claimant's removal was an operation of law and not a disciplinary action.
- e) The Claimant accepted the separation terms offered by the Respondent.
- f) The Claimant misrepresented facts in order to mislead the court.
- g) The interim injunction will hinder the Respondent from performing its exclusive statutory duty of appointing the Chief Executive Officer.
- h) The Claimant will suffer no prejudice or hardship if the interim injunction is set aside

The parties were directed to dispose of the two applications together by way of written submissions.

In his submissions the Claimant states that it is not in dispute that the decision of the Respondent was unilateral as no charges were framed against him nor was he given an opportunity to defend himself before the decision to dismiss him was made. That the decision referred to as the resolution of the Board violates Sections 41, 43 and 45 of the Employment Act. Further that being a public officer, he was protected from termination without due process and that he had worked for the Respondent for 13 years with a clear record.

The Claimant submits that the Respondent has in the replying affidavit approbated and reprobated by acknowledging that the Claimant had worked for the Respondent for 13 years while at the same time alleging that his employment was ultra vires as the pre-formation contract was not binding on the Respondent, relying on the judgment in **Republic v Kenya Institute of Management** delivered on 12th July 2019.

The Claimant submits that he was a legitimate employee of the Respondent and was in office legally, that the Respondent is by virtue of its establishment under the Supplies Practitioner's Management Act, No. 17 of 2007, a corporate body with perpetual succession. That having been employed in 2007 his employment cannot be termed pre-formation contract not binding on the Respondent.

The Claimant submits that Section 3(20) of the Supplies Practitioners Management Act envisages the perpetual existence of the Respondent unless it is dissolved. That prior to the amendment of the Act on 30th October 2007, there was an Executive Committee in charge of the activities of the Respondent as provided in Rule 1 of the Second Schedule to the Act. That the Respondent was not formed in January 2020 as alleged by the Respondent. That it was elections that were conducted under the newly gazetted Regulations of 2015. That the elections did not nullify the business of the Respondent prior to the date of the elections.

The Claimant submits that there has been no question over his appointment as Chief Executive Officer of the Respondent and the Respondent misread the decision in **Republic v Kenya Institute of Supplies Management Ex Parte, Mwaniki Gachuba**, a case instituted by the Counsel of the Respondent herein using skewed interpretation to violate the employment rights of the Claimant.

That it is indeed a conflict of interest for the counsel of the Respondent to now turn and advise the Respondent in this Appeal on the validity of the Appeal where he is the Respondent.

That the Respondent was clearly dissatisfied with the said finding that the interim Council was in the office illegally and preferred an Appeal to the Court of Appeal on 1st October 2019 in **Civil Appeal No. 496 of 2019 Kenya Institute of Supplies Management v R Ex parte Mwaniki Gachuba** which Appeal is pending determination

That the Respondent's position in the Court of Appeal include;

1. *That the declaration by the Court that the current interim Council of the Appellant is irregularly and illegally in office did not flow from any issues framed either by the parties or by the court for determination and was therefore an erroneous conclusion.*

2. *That the learned Judge erred in law by taking into consideration and irrelevant factors not raised or ventilated by the parties and applied the wrong principle of law, thereby arriving at wrong and erroneous decision.*

That having challenged the decision as erroneous, it cannot lie from the mouth of the same Respondent to now turn and seek to utilize the very decision to terminate the Claimant's contract of employment yet they have an active Appeal seeking to overturn the very decision they are still aggrieved about, the Court of Appeal not having made a conclusive finding on the same.

That the Claimant has legitimate expectations to continue discharging his responsibilities and invites the court to continue preserving the position until he proves to this court in a proper hearing that his employment contract bound the Respondent.

That the Respondent is approbating and reprobating on one hand stating that the Claimant's termination was on operation of the law and on the other hand that they did not discuss with him any issue as regards termination of his employment contract except the modalities of handover.

That the Claimant has established a prima facie case capable of being successful.

That the Claimant is likely to suffer injury which cannot be compensated by award of costs and further the balance of convenience lies in granting of the orders prayed for by the Claimant for the following reasons: -

(a) The Claimant's position is statutorily underpinned and being a public servant, Article 2 36(b) prohibits his removal from office without due process of law, which in effect means that if the court were to ultimately find at the final hearing that no due process of law was followed, the prohibition against removal from office would take effect and it is important that the position be preserved and not have the legitimate expectations of the Claimant as outlined in Article 236(b) not to be frustrated.

(b) In the Memo to the staff, the Respondent has directed the Acting Chief Executive Officer to commence the process of competitive recruitment of the Claimant's replacement. If the said recruitment were to proceed during the pendency of this claim, it would effectively lock out the Claimant herein.

(c) In making a decision to reinstate an employee, section 49(4)(c) of the Employment Act requires the court to consider the practicability of recommending reinstatement. Taking that cue, if the Application herein is not granted with the effect that the Respondent is allowed to proceed and advertise for the position, the net effect would be to add to the impracticability of ordering the Claimant's eventual reinstatement as the position would have been substantially filled.

(d) The Claimant was not dismissed out of any wrong on his part and has higher legitimate expectations of being reinstated and has not been able to secure an alternative employment at all.

(e) The position the Claimant occupied is a public position. Section 34(3) of the Public Service Commission Act as read together with Regulation C14 of the Public Service Commission Human Resource Policy and Procedures Manual for Public service, 2016 makes provisions for 'Acting Appointment' in order to await the recruitment of a substantive holder. Acting appointments are lawful in public service and it is incumbent upon the Respondent to demonstrate the actual injury it is likely to suffer now that they had by themselves exercised the option of hand picking another officer to act in the position.

(f) That it would serve the ends of justice to have the orders

herein granted as there already exists continuity of operations and the affairs of the Respondent is not gagged at all. Serving the ends of justice is that a person in an acting capacity having no expectation of being confirmed in the said position makes reinstatement of the Claimant practicable as opposed to having to displace an employee who has been competitively recruited.

(g) That there exists no prejudice at all on the part of the Respondent if the orders herein are granted, an officer in an acting appointment has the mandate of the substantive officer. In support of this proposition, we rely on the provisions of Section 43 of the Interpretation and General Provisions Act provides that where a written law confers a power or imposes a duty on the holder of an office as such, then, unless a contrary intention appears; the power may be exercised and the duty shall be performed by the person for the time being holding that office.

The claimant avers that page 2 of the letter of termination merely required him to sign indicating unconditional acceptance and that he does not have a claim against the Respondent and indeed declined to accede to the coercion of the Respondent and had the part clearly deleted.

That the Respondent is desperate to weave a narrative that the Claimant acquiesced to the unlawful termination. Contrary to the allegations at Paragraph 13 of the Replying Affidavit, merely delivering a letter communicating a termination that already has happened a day before and requiring him to sign receiving the letter is not and cannot be construed to mean either 'acquiescence' or 'mutuality' in any manner.

That the Respondent to date has not paid the Claimant the said sum they have christened 'Ex gratia' and cannot then allege as they do at Paragraph 28 that:

"...the Claimant has failed to mitigate his losses by abandoning the ex gratia send off-package which package he accepted and has never denied or denounced."

The Claimant prayed that the Court finds that his application has merit and allow the same in the interest of justice.

The Claimant also prayed that the application by the Respondent herein seeking the discharge of the orders be dismissed by the court in the interest of justice.

The Respondent filed its submissions which were filed late on 30th September 2020 after the Court called to find out from the Respondent if its submissions may not have reached the court record due to technicalities in the new e-filing system.

The Respondent submits that the claim is a mixture of facts and law that will require the Court to hear the parties to establish the truth. It is submitted that the Claimant has not established a prima facie case with probability of success. Further that the Claimant cannot suffer irreparable injury as Section 50 of the Employment Act provides for reinstatement and compensation. It further submits that the balance of convenience tilts in favour of the Respondent according to Section 9 of the Supplies Practitioners Management Act, 2007 which provides that the Respondent must have a Chief Executive Officer who is the Secretary of the Council, implements directions of the Council and is responsible for the management of affairs of the Institute.

The Respondent relied on the case of **Tom Otieno Odongo v Cabinet Secretary Ministry of Labour Social Security Services & Another [2013] eKLR** the court stated that it would not be in the public interest to halt the recruitment process as the National Social Security Fund was expected to continue running efficiently even as the Claimant's case against it progressed. Nduma J. took a similar position in the case of **Gladys Boss Shollei v Judicial Service Commission [2013] eKLR**.

The Respondent relies on the case of **Joab Mehta Oudia v Coffee Development Board of Trustee (2014) eKLR**, Rika, J. stated that:

“8. To grant the orders sought would mean the Court has entered the employment place, exercising the management prerogative on behalf of the employer. The Court cannot stay termination of the employer's decision. It would amount to the Court unduly interfering with a decision already made by the Management within its discretion. It is likewise not proper that the Court bars the Respondent from recruiting to fill a vacant position, either permanently or provisionally. The Respondent is presumed to know that in doing so, there is the possibility that the Court may issue the Claimant the prayers sought in the Claim, including the prayer for reinstatement. Courts have ruled that a rush to filling of a position that has fallen vacant upon dismissal of that position's holder, does not render the remedy of reinstatement impracticable. It is always advisable that the employer has a contingency arrangement, in case such an order issues, particularly in jobs that are of a singular nature at the workplace. There is no justification for interim reinstatement, stay of termination or orders barring the Respondent from proceeding to fill the position that was held by the Claimant. The law presumes that the wronged employee would be in a position to move the Court expeditiously on the merit, and if deserving, have the substantive orders of reinstatement or re-engagement. Nothing is lost to the Claimant as the law allows him to receive back wages in addition to these remedies.”

The Respondent avers that the Notice of Motion dated 30th March, 2020 by the Claimant lacks merit as it failed to satisfy the requirements for granting of interlocutory orders and it therefore ought to be dismissed with cost and the Respondent's Notice of Motion dated 15th April 2020 be allowed with costs.

No submissions were made by the Respondent in respect of its application, which in any events, seeks to stay the orders of this court of 1st April 22002 wherein the Court granted interim injunction restraining the Respondent either by itself, servant and/or agents from headhunting, advertising, carrying out interviews, recruiting and employing a substantive Chief Executive Officer to replace the Applicant pending the hearing and determination of this application.

Analysis and Determination

The Respondent having failed to make submissions to support its application dated 15th April 2020, the same is deemed to have been abandoned. This ruling is therefore in respect of only the application filed by the Claimant dated 30th March 2020.

The issues arising from the application and the submissions by the parties in respect thereof are whether the Claimant has justified the grant of the orders sought therein and if he is therefore entitled to the same.

The principles for grant of orders of temporary injunction pending determination of a suit were set in the celebrated decision of the Court in the case of **Giella v Cassman Brown & Company Limited [1973] EA** that: -

- (a) *an applicant must show a prima facie case with a probability of success;*
- (b) *an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages; and*
- (c) *if the court is in doubt, it will decide the application on the balance of convenience.*

From the pleadings on record, that is, the claim, the defence and the affidavits in support of and in opposition of the claimant's application herein, there is no dispute that the Claimant was employed by the Respondent by letter of 16th October 2007 in the position of Assistant Manager, reporting to the Head of Secretariat and the Board. The letter is signed by one Mr. Chris Oanda as Chairman of the Kenya Institute of Supplies Management.

By a contract dated 1st November 2012, the Claimant was elevated to the position of Head of Secretariat in Grade 7. His terms of employment are set out in the contract which is annexed to the claimant's affidavit in support of the application at exhibit 3. The contract was attached to a letter to the claimant also dated 1st November 2012 and signed by Chris Oanda as Chairman of the Respondent.

The Claimant worked in that capacity until he received a letter dated 27th March 2020 signed by John Karani as Council Chairman.

The letter is reproduced below

“27th March 2020

Mr. Hedwig Nyalwal

P. O 3678 – 00200

Nairobi

Dear Mr. Nyalwal

Re: Notice of Employment Termination

The Council during the Special Meeting convened and held on 26th March, 2020. resolved that the position of Chief Executive Officer be vacated with immediate effect.

The resolution was informed by Section 9(1) of the Supplies Practitioners Management Act 2017 which mandates only the council to appoint a Chief Executive Officer through a competitive process.

Upon separation you will be entitled to:

- (1) Salary earned from 1st March, 2020 up to 27th March, 2020;*
- (2) Accrued and un-utilised leave days;*
- (3) One (1) month's salary in lieu of notice;*
- (4) 15 days salary for each year worked after 30th October, 2007.*
- (5) Certificate of Service.*

The above will be subject to tax and any other statutory deductions, any amounts owed to the Institute, hand over to and clearance by the Acting Chief Executive Officer.

The Council and members of the Institute wishes you success in your future endeavours

Yours sincerely

SIGNED

John Karani, MKISM

Council Chairman”

In a matter like this where the court is dealing with an interlocutory application, the court must be careful not to deviate into matters that must await the hearing of the suit. All that the court has to determine is whether there is a prima facie case, and whether the applicant is likely to suffer damage that may not be capable of compensation by way of monetary damages. According to the decision in **Giella**, if the court is in doubt it would consider the balance of convenience.

Prima facie case was defined in **Mrao Limited v First American Banka and Others** as a case in which on the material presented to the court or 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. In the instant suit, the Claimant who is the applicant, states that the Respondent violated his rights under Sections 41, 43 and 45 of the Employment Act by terminating his employment without giving him an opportunity to defend himself. He has prayed for reinstatement or in the alternative compensation for unfair termination. In the application he prays for preservation of his position until this suit is determined. He submits that he has legitimate expectation to continue discharging his duties in that position.

The Respondent on the other hand, admits in the submissions that this court has power to reinstate. It submits that because of this power to

reinstate, the Claimant/Applicant is unlikely to suffer irreparable harm.

The Respondent justifies the termination on grounds that the appointment of the Claimant was illegal and ultra vires as he was appointed by a Council which had no power to appoint him and therefore he was illegally and irregularly in office. The Respondent does not deny terminating the claimant's employment without due process.

The issue whether or not the appointment was irregular and or ultra vires are matters that this court will have to determine after hearing and analysing evidence to be adduced at the hearing. Going by the decision in **Mrao** (supra), there is a prima facie case for consideration by the court at the hearing of the suit, thus the first principle under **Giella** is established.

The next issue is whether the Claimant will suffer irreparable loss. In view of the fact that there cannot be more than one Chief Executive Officer of the Respondent, if the position is not preserved, the claimant will not be granted orders of reinstatement. At the same time, in view of the fact that the Respondent does not deny terminating the claimant's employment without due process, should the court find that his appointment by the Board in place at the time of the appointment was properly in office, the termination would be on the face of it be unlawful.

The fact that the Claimant would be entitled to the remedy of compensation alone should not be a consideration not to grant the orders as a remedy of compensation is inferior to a remedy of reinstatement taking into account the manner the termination was executed and the reasons advanced in support thereof.

For the foregoing reasons I find that the Claimant has established that he would suffer irreparable harm should the court not preserve his position as Chief Executive Officer of the Respondent as he would not be reinstated unless the position is preserved.

I accordingly confirm the interim orders to the effect that the Respondent be and is hereby restrained either by itself, servant and/or agents from headhunting, advertising, carrying out interviews, recruiting and employing a substantive Chief Executive Officer to replace the Claimant pending the hearing and determination of claim filed by the Claimant herein.

Costs of the applications shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF OCTOBER 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE