



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 119 OF 2020

JOHN WERE OCHIENG.....CLAIMANT

-VERSUS-

AGRICULTURAL DEVELOPMENT CORPORATION.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 9th October, 2020)

RULING

The claimant John Were Ochieng filed a notice of motion on 27.02.2020 through Okweh Achiando & Company Advocates. The application was supported by the attached claimant's affidavit. The claimant prayed that upon inter parties hearing the Court makes orders thus:

- a. That pending the hearing and determination of the claim the Court issues a temporary injunction restraining the respondent from appointing to the office of Complex Manager, ADC Japata any person to replace the applicant, whether permanently or in an acting position.
- b. That pending the hearing and determination of the claim the Court issues a temporary injunction restraining the respondent either by itself, employees, servants or agents from terminating the applicant's employment contract that had been constructively renewed.
- c. Costs of the application be provided for.

The claimant's application is based upon the following grounds:

- a. The respondent employed the claimant by letter dated 16.07.2015 on probationary term of 6 months. He was deployed as a Complex Manager at ADC Seed Unit, Kitale. On 13.08.2015 he was deployed to ADC Namalanda Complex as the Complex Manager.
- b. The appointment letter stated that upon satisfactory completion of the probationary service the claimant would be confirmed in appointment. Further, his terms of service were subject to the provisions of the staff regulations as from time to time amended.
- c. By the letter dated 03.03.2016 the respondent confirmed the claimant's appointment on contractual terms of service, 2016 – 2019. He was placed on contractual terms from 01.03.2016 to 28.02.2019.
- d. Clause 12 (iii) on renewal of the contract (which was to run for 36 months) stated as follows, **“(iii) Three months before expiry of this contract, the Corporation shall inform the person engaged, in writing, whether or not the Contract or Agreement shall be renewed. Likewise, Officers who wish to have their Contracts renewed shall submit their request to the Managing Director in writing three months before expiry of the Contract Agreement.”**
- e. The contract lapsed on 28.02.2019 but the claimant received no notice whether his contract had been renewed or not but he continued to work for the respondent and it is his case that the contract constructively renewed from 01.03.2019 to 28.02.2022.
- f. By the letter dated 18.03.2019 the respondent informed the claimant that he had 94 accumulated leave days and he was advised to submit his leave plan by 25.03.2019 and that any leave days above 30 days as at 31.12.2019 would be forfeited per leave policy.
- g. By the letter dated 13.05.2019 the claimant was transferred to ADC Japata in his current capacity as Complex Manager to be the manager in-charge with immediate effect.

h. By the letter dated 21.05.2019 the respondent suspended the claimant from duty effective 21.05.2019. The suspension was on half monthly salary. The suspension was extended for 2 months to enable completion of investigations as per the letter dated 21.05.2019 (apparently dated erroneously) and forwarded to the claimant on 15.07.2019.

i. The claimant received the letter to show-cause dated 05.08.2019 requiring him to answer the allegation therein by 08.08.2019. His undated reply and forwarded on 07.08.2019 is on record. He received the notice of disciplinary hearing dated 08.08.2019 and fixing the hearing for 15.08.2019. The hearing took place as scheduled.

j. The claimant says he was shocked to receive the letter dated 13.09.2019 on one-year contract and notice of non-renewal. The letter conveyed that in view of the disciplinary hearing the claimant's conduct had been found unethical and in conflict of interest and therefore the respondent's management had given him one-year non-renewable contract effective 01.03.2019 to 28.02.2020. Pending the expiry of the contract the claimant was advised to proceed on leave effective 23.09.2019 to utilise all his accumulated leave days being 98 days as at 28.02.2020.

k. By the letter dated 25.11.2019 the claimant appealed against the decision conveyed in the letter dated 13.09.2019.

l. Between 21.05.2019 and 15.08.2019 the claimant was facing a disciplinary process initiated by the respondent and the claimant's case is that instead of concluding the disciplinary case, the respondent issued the diversionary letter of 13.09.2019.

The respondent opposed the application by filing on 08.06.2020 the replying affidavit of Jane Mugaro, the respondent's Human Resource Manager. The replying affidavit was filed through Limo & Njoroge Advocates. The respondent's case was as follows:

a. It was admitted that the respondent employed the claimant as a Complex Manager on 16.03.2016 for a term of 36 months lapsing on 28.02.2019. The renewal was not automatic but at the respondent's discretion.

b. There was no implied or express communication that the contract had been renewed upon the same terms of service.

c. By the internal memo dated 09.05.2019 the claimant was notified that his contract had been presented to the Board Staff Committee with a view of consideration for renewal. The applicant was then suspended on 21.05.2019 for two months and subsequently the claimant was accorded a disciplinary hearing. It was found that the claimant had acted unethically with respect to ownership of a labour plot and procedures he had invoked in dealing with maize that was confiscated from him. The respondent then decided to renew the contract for one year and communicated the decision to by the letter dated 13.09.2019. The applicant's appeal dated 25.11.2019 was outside the 14 days from the date of the disciplinary decision. The respondent acted lawfully and justly.

a. The Complex Manager at Japata is a crucial officer for productivity at the farm and it will be seriously prejudicial if the prayer for injunction not to have a manager in place as prayed for.

b. The application for injunction should therefore fail.

The Court has considered the parties' respective cases and the material on record including the respective submissions filed.

The parties are in agreement that the principles on temporary injunctions were set out in **Giella –Versus- Cassman Brown & Company Ltd (1973) E.A 358**. The applicant must establish a *prima facie* case with a high chance of success, show if he would suffer irreparable injury if a temporary injunction is not granted, and whether the balance of convenience would favour the applicant.

In considering whether the Court can intervene and whether a *prima facie* case has been established, the Court in **Geoffrey Mworira-Versus-Water Resources Management Authority and 2 others [2015]eKLR** held 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."

In the present case, it is clear that the claimant's lapsing contract of 36 months was due for consideration for renewal. In the process the claimant was transferred and at the same time a disciplinary process was commenced against him. The disciplinary process culminated into a renewal for only one year and retrospectively so. The claimant laments that he expected a decision on the disciplinary case and not renewal for one year on account of the intervening disciplinary case. In other words, was the respondent entitled to make a renewal for one year instead of three years and on account of the findings in the disciplinary case? Further, was the letter to renew for only one year in view of the disciplinary case a sufficient and lawful conclusion of the disciplinary case? The Court has considered the claimant's lamentations that the respondent deviated from the disciplinary case to address the issue of renewal alongside the respondent's submission that the claimant has not established a legal right that has been violated and whether constructive renewal had taken place as at time of the disciplinary hearing and renewal for one year is a matter that cannot be resolved at the interlocutory hearing.

The Court has carefully considered the material on record and the arguments made for the parties. The claimant's case is predicated upon the alleged constructive renewal for 36 months. As submitted for the respondent, a finding on whether a constructive renewal for a further 36 months had taken place is a matter to be determined after full hearing and evaluating the parties' respective evidence. To the extent that the claimant's case is based on alleged constructive renewal and which as of this stage of proceedings remains an allegation and an issue for determination, it cannot be said that the claimant has established breach of contract or law and the Court returns that a *prima facie* case, as

required, has not been established in that regard. While making that finding the Court considers that in any event the parties are in agreement that the respondent granted a retrospective renewal of one year and the validity of such decision will fall for determination at the full hearing. Further, the effect of the belated one-year renewal on the alleged constructive renewal of 36 months is a matter parties have not addressed and submitted upon at this interlocutory stage.

The Court has considered the claimant's prayer to preserve the position of Complex Manager, ADC Japata, his last station of deployment. The claimant in urging for a conservatory order as prayed for has relied on the holding in **Centre for Rights Education and Awareness (CREAW) & 7 Others [2011]eKLR** where Musinga J held that at an interlocutory stage, a party seeking a conservatory order only requires to demonstrate that he has a *prima facie* case with a likelihood of success and that unless the Court grants the conservatory order there is real danger that he will suffer prejudice as a result of violation or threatened violation of the Constitution. The claimant submits that the belated one-year renewal was an unfair scheme to terminate the claimant's employment. As submitted for the respondent, the Court of Appeal in **Nguruma Limited –Versus- Jan Bonde Nielsen & 2 Others [2014]eKLR**, held that in considering whether or not a *prima facie* case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. In finding that the claimant has not established a *prima facie* case, the Court has already found that the legality or otherwise of the impugned decision by the respondent falls for consideration at full trial. In any event the internal dispute procedure appears to have been available and exhausted and the alleged unfairness on the part of the respondent is a matter to be determined after full hearing when the parties' respective cases can be properly tested and evaluated. Further the Court observes that it is undisputed that the claimant was appointed to the position of Complex Manager and the position was tenable at any of the respondent's farms spread across the country. Indeed, the claimant confirmed that he had been deployed to three of such farms. Accordingly, the Court considers that the claimant has not established the prejudice he would suffer if the office he held at ADC Japata was filled substantively or in acting capacity because in any event, other respondent's farms would be available to deploy the claimant to as appropriate if, the claimant turns out as successful in the prayer for reinstatement.

In conclusion, the application filed on 27.02.2020 is hereby dismissed with costs in the cause.

Signed, dated and delivered by the court at **Nairobi** by video link this **Friday, 9th October, 2020**.

BYRAM ONGAYA

JUDGE