



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**PETITION NO. 216 OF 2019**

*(Before Hon. Lady Justice Maureen Onyango)*

**IN THE MATTER OF THE ENFORCEMENT OF FUNDAMENTAL RIGHTS**

**UNDER ARTICLES 22, 23, 41 AND 47 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015**

**AND**

**IN THE MATTER OF THE PROVISIONS OF SECTIONS 43, 49 AND 50 OF THE EMPLOYMENT ACT 2007**

*BETWEEN*

**JACOB OMONDI GUMA.....PETITIONER**

*VERSUS*

**EAST AFRICAN PORTLAND CEMENT.....RESPONDENT**

**AND**

**JAPHETH OMBOGO.....INTERESTED PARTY**

**JUDGMENT**

The Petitioner was employed by the Respondent on 16<sup>th</sup> July 2008 as a quality manager on permanent and pensionable terms. The employment terms were changed to renewable contractual terms on 11<sup>th</sup> March 2013 when he was appointed as the Plant Performance Manager. During the subsistence of this contract, he was appointed as the acting Production Manager on 14<sup>th</sup> January 2013.

He was issued with a five-year contract for the substantive position of Production Operations Manager. He served the Respondent in different capacities during this time. His contract to serve in the position of Production Manager was renewed for a period of 4 months on 3<sup>rd</sup> July 2019 before he was issued with another contract on 24<sup>th</sup> September 2019, whose expiry was 25<sup>th</sup> September 2022. Prior to this, he had been issued with a redundancy notice dated 19<sup>th</sup> September 2019 and take effect on 25<sup>th</sup> September 2019.

The Petitioner avers that on 6<sup>th</sup> November 2019, he was served with a termination notice dated 31<sup>st</sup> October 2019 but the notice indicated that the termination was to take effect on 1<sup>st</sup> November 2019. His appointment for the position of Acting Head of Operations had been revoked on 30<sup>th</sup> October 2019 before he was served with the termination notice. He viewed this as irregular and malicious since it was only two months after his appointment and suitability test by the Board.

According to him, the termination was a witch hunt as the person earmarked to be interviewed for the position and subjected to a suitability test served the Respondent as his junior.

The Petitioner avers that the Respondent's decision to terminate his employment was a scheme to deny him the opportunity to be heard. He argues that the termination will deny him the opportunity to serve the Respondent under his latest contract hence should be declared null and void. It was his case that he stands to suffer irreparable loss if the notice is effected because his job is the source of his livelihood.

It is the Petitioner's case that the Respondent's actions contravened Articles 41, 47 and 50 of the Constitution, Section 7 of the Fair Administrative Action Act, Sections 41, 43, 45, 49 and 50 of the Employment Act, and the principles of natural justice. This is because he was condemned unheard. He therefore sought the following reliefs: –

- a. A declaration that the Respondent's letter/notice dated 31<sup>st</sup> October 2019 terminating the Petitioner's contract of employment dated 24<sup>th</sup> September 2019 is unfair, unlawful, irregular, unprocedural, illegal, unconstitutional and is therefore null and void and of no effect in law.
- b. A declaration that the Petitioner should immediately be reinstated and remain in employment of the Respondent under the contract dated 24<sup>th</sup> September 2019 until the expiry thereof on 25<sup>th</sup> September 2022 without any loss of benefits therefrom unless lawfully terminated by law required.
- c. And order for compensation by way of damages for the violation of the Petitioner's fundamental, constitutional and statutory rights by the Respondent as may be assessed by this Court.
- d. Costs of this Petition together with interest on the damages at Court rates from the date of filing this Petition until payment in full.
- e. Any other further relief as the Court deems just and fair to grant in the circumstances.

The Respondent opposed the petition vide its Response to Petition filed on 10<sup>th</sup> December 2019 denying that the termination notice of 31<sup>st</sup> October 2019, took effect retrospectively as the Respondent offered to pay the Petitioner one month's salary in lieu of the notice period.

The Respondent also denies the allegation that the Petitioner's termination was driven by malice and contends that the termination was as a result of his poor performance during his probationary period. It is its position that under the Petitioner's contract, his services could be terminated while he was on probation without giving him any reasons so long as he was issued with a month's notice.

The Respondent avers that the board resolved to place all the employees having new contracts on probation for six months, to assess their suitability and performance. This is because the Petitioner had previously not performed well, causing the Respondent's financial problems.

It is the Respondent's case that Japheth Ombogo was appointed to the position of Production Manager with effect from 1<sup>st</sup> November 2019, after an interview and a suitability test.

It is the Respondent's case that the Petitioner's position of Acting Head of Production was invalidated on 30<sup>th</sup> October 2019 after further suitability tests and was substantively filled by Stanley Ngari Irungu, who was qualified. The Respondent contends that there was nothing precluding it from hiring a qualified production manager.

The Respondent avers that the Petitioner did not possess the required qualifications hence his termination, by invoking the probation clause. It is contended that by dint of section 42 of the Employment Act, an employee who was on probation was not entitled to the rights accruing to a confirmed employee like the issuance of a reason for termination.

The Respondent posits that section 42 was a limitation of the rights under section 41, 47 and 50 of the Constitution hence the Petitioner's rights were not infringed as alleged. The Respondent avers that the petition does not disclose any constitutional violations and that mere citation of constitutional provisions would not suffice. The Respondent contended that the Petitioner could not be reinstated as the position had already been filled, and urged this Court to dismiss the petition with costs.

The Petition was disposed of by way of written submissions with only the Petitioner and the Respondent filing their submissions.

### **Petitioner's Submissions**

The Petitioner submits that the decision to terminate his employment a month after he had been issued with a three-year contract, without being given the reasons for the termination or being subjected to a fair hearing violated his rights under articles 41, 47 and 50 of the Constitution. He submits that failure to follow due process amounted to a violation of an employee's rights as was held in the case of **Beatrice N. Mosiria v Judicial Service Commission [2019] eKLR**.

The Petitioner further submits that the conservatory orders issued on 18<sup>th</sup> November 2019 were still in force despite the Respondent's contempt of the same even after the issuance of orders directing it to purge the contempt.

It is the Petitioner's submissions that he is entitled to compensation for the violation of his rights and relies on the case of **Wacuka Barbara Wanjiku & 17 Others v Nairobi City County Public Service Board [2018] eKLR** where each of the Claimants were awarded Kshs.1,000,000.00 for discrimination and the violation of their fundamental rights and freedoms.

He further submitted that he is entitled to reinstatement because due process was not followed in the termination of his employment and relies on the case of **Public Service Commission v Christine Mwambua [2018] eKLR** where the Claimant's termination was declared null and void since the Respondent failed to adhere to the provisions of the Constitution, Employment Act and the Fair Administrative Actions Act. The Petitioner urges this Court to make a final order for reinstatement having already issued orders that the post of Production Manager should not be filled substantively.

## The Respondent's Submissions

The Respondent submits that pursuant to the provisions of section 42(1) of the Employment Act, the Petitioner was not entitled to due process and issuance of reasons for termination as envisioned in Sections 41, 43 and 45 of the Act as he had been on probation. According to the Respondent, it was its managerial prerogative to determine the suitability of employees while on probation. The Respondent relied on the cases of **Abraham Gumba v Kenya Medical Supplies Authority [2014] eKLR** and **Danish Jalang'o & Another v Amicabre Travel Services Limited [2014] eKLR** where it was held that Section 42(1) did not place an obligation on the employer to give an employee on probation, any formal charges or hear the employee in his defence as contemplated under Section 41.

The Respondent submits that the Petitioner is not entitled to an order for reinstatement as the position has been substantively filled. Further, that due process was followed in terminating the Petitioner's employment. To support this position, the Respondent relied on the case of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR** where the Court observed that before reinstating an employee, a Court should take into consideration the factors stipulated in Section 49(4) of the Employment Act.

## Analysis and Determination

I have carefully considered the pleadings filed, the evidence adduced and the submissions by parties. From the issues outlined by the parties in their submissions and my understanding of the matter before this Court, the issues for determination before this Court are: –

- a. Whether the termination of the Petitioner's employment was fair and in accordance with due procedure.
- b. Whether the Petitioner is entitled to the reliefs sought as a result of the violation of his rights.

## Termination

The Respondent's case is that the Petitioner's employment was terminated because of poor performance that resulted in financial loss to the Respondent. It avers that the procedure was proper since the Petitioner was still on probation hence it was exempted from subjecting him to disciplinary proceedings by dint of Section 42(1) of the Employment Act.

On the other hand, the Petitioner viewed the Respondent's failure to follow procedure, as a violation of his rights under articles 41, 47 and 50 of the Constitution and sections 41, 43 and 45 of the Employment Act. In his view, he ought to have been given the reasons for his termination and accorded due process before he could be summarily dismissed.

The Petitioner received the termination letter dated 31<sup>st</sup> October 2019 on 6<sup>th</sup> November 2019. The letter read as follows–

*“Ref: EAPCPLC/HR. Appt./011119/SKN/lm(002)*

*October 31, 2019*

*Jacob Omondi Guma*

*W/No. 3087*

**PRODUCTION OPERATIONS**

*Dear Jacob,*

**RE: TERMINATION OF CONTRACT ON NOTICE**

*The Board of Directors during a Board Meeting held on 31<sup>st</sup> October 2019 resolved that your contract be terminated on notice.*

*In accordance with your terms and conditions of service as enshrined in your letter of appointment and contractual obligations Ref: EAPCPLC/HR.Appt/240919/SKN/lm(001) dated September 24, 2019 the contract may be terminated during probation period by either party giving one (1) month notice or payment of the salary in lieu.*

*Consequently, your contract is hereby terminated and you will duly and procedurally be paid off in lieu of one (1) month notice with effect from 1<sup>st</sup> November 2019.*

*The pending leave days will be handled as per the prevailing Human Resource Policy.*

*Yours sincerely*

*For: E.A Portland Cement PLC*

**SIGNED**

STEPHEN K. NTHEI

AG. MANAGING DIRECTOR”

The happenings before the petitioner was issued with the letter terminating his contract are very curious and raise a lot of doubt as to the propriety thereof. To put this into perspective, it is important to give a narrative of the same.

The petitioner was first appointed by the Respondent by letter dated 16<sup>th</sup> July 2008 to the position of Quality Manager. By letter dated 26<sup>th</sup> March 2012 he was confirmed to the position of Plant Performance Manager, which he had been occupying in acting capacity from 22<sup>nd</sup> March 2012. He was confirmed to the position by letter dated 11<sup>th</sup> March 2013, on a 5 year contract commencing 1<sup>st</sup> March 2013 and expiry on 28<sup>th</sup> February 2017.

While holding the substantive position of Plant Performance Manager, he was appointed to act as Production Manager with effect from 1<sup>st</sup> November 2013. By letter dated 23<sup>rd</sup> June 2014 he was appointed to the position of Production Operations Manager effective 1<sup>st</sup> July 2014. He was to hold this position on a fixed term contract of 5 years until 30<sup>th</sup> June 2019.

By letter dated 19<sup>th</sup> May 2016, his job title was changed to Quarry and Mobile Plant Manager. His terms of employment renewed the same. Again by letter dated 30<sup>th</sup> September 2016, he was appointed to the position of Research and Development Manager, with no change of terms.

By letter dated 22<sup>nd</sup> March 2017 he was appointed Manager (Research and Development) to take charge of Research and Development Department, effective 21<sup>st</sup> March 2017.

By letter dated 27<sup>th</sup> June 2018, the Petitioner was again re-deployed as Manager – Production with effect from 1<sup>st</sup> July 2018.

On 3<sup>rd</sup> July 2019, he was appointed in acting capacity to Head of Production Operations, where he would draw an acting allowance of 20% of his basic salary or the minimum salary of Head of Department Grade 2 whichever is higher.

By another letter dated 3<sup>rd</sup> July 2019, he was appointed Manager-production on 4 months’ contract. However, by letter dated 19<sup>th</sup> September 2019, he was issued with notice of termination of employment effective 25<sup>th</sup> September 2019. However, by letter dated 24<sup>th</sup> September 2019, a day before the termination was to take effect, he was issued with a letter appointing him to the position of Manager – Production effective 26<sup>th</sup> September 2019.

It is important to reproduce the notice of termination dated 19<sup>th</sup> September 2019 for appreciation of the purport thereof. The letter is reproduced below –

“Ref: EAPLCPLC/MD/SR/VOL 1.007

September 19, 2019

Jacob O. Guma

W/No 3087

**Production Operations**

Dear Mr. Guma,

**RE: NOTICE OF TERMINATION OF EMPLOYMENT.**

We write with respect to the above matter and to the Company’s general notice dated 14<sup>th</sup> day of August 2019.

Further to our general meeting held on the day of 23<sup>rd</sup> August, 2019 and subsequent departmental meetings, I am writing to confirm that the Company can no longer sustain your current position.

Pursuant to the meeting with all of the employees held on 23<sup>rd</sup> August 2019, the Company explained why it was considering undertaking reorganisation and restructuring which would eventually lead loss of employment, including your position. This situation has been actuated by the Company’s dismal financial position and consequent inability to sustain operations at the present level.

In accordance the terms of your contract of employment, the Company, by this letter, hereby notifies you that your contract is hereby terminated with effect from 25<sup>th</sup> September, 2019.

As earlier explained at our meeting and through the general notice, following termination of your employment you will receive:

1. One (1) months' salary being the notice period as provided under your employment contract
2. Gratuity
3. Payment of Accrued leave days, if any.
4. Salary earned up to the date of termination.

*The above payments are subject to the statutory deductions and any liabilities, you may owe to the Company. The payments shall be made upon clearance with the Company.*

*Yours sincerely*

*For: K.A Portland Cement PLC.*

*SIGNED*

*STEPHEN K. NTHEI*

*AG. MANAGING DIRECTOR”*

On 26<sup>th</sup> September 2019, the Petitioner was appointed to act as Head of Production Operations. The letter is also reproduced below–

*Ref: EAPCPLC/HR.Appt./260919/SKN/lm(013)*

*September 26, 2019*

*Jacob O. Guma*

*P. O BOX 20 - 00204*

*ATHI RIVER*

*Dear Jacob,*

*RE: APPOINTMENT AS ACTING HEAD OF PRODUCTION OPERATIONS*

*Following approval by the Board of Directors during a meeting held on 24<sup>th</sup> September 2019, you are hereby appointed to act as Head of Production Operations with effect from 26<sup>th</sup> September 2019.*

*Your role as the Acting Head of Production Operations will be to drive the Board Strategy and policy execution and steer the Management of the Company.*

*During the period of acting, you will be paid an acting allowance 20% of your current consolidated salary.*

*All other terms of your employment contract as currently' stated remain unaltered.*

*I wish to take this opportunity to wish you well as you take up the appointment.*

*Yours faithfully,*

*For: E. A. Portland Cement Pic.*

*SIGNED*

*STEPHEN NTHEI*

*AG. MANAGING DIRECTOR”*

On 30<sup>th</sup> October 2019, the Petitioner was issued with a letter of revocation of appointment to act as Head of Production Operations. Again the letter is reproduced below –

*Ref: EAPCPLC/HR.Appt./301019/SKN/lm(001)*

October 30, 2019

Jacob O. Guma

P. O BOX 20 - 00204

ATHI RIVER

Dear Jacob,

RE: REVOCATION OF APPOINTMENT TO ACT AS HEAD OF PRODUCTION OPERATIONS

We refer to our letter Ref:EAPCPLC/HR.Appt./260919/SKN/lm(013)

dated September 26, 2019 appointing you to act as Head of Production Operations.

This is to notify you that the appointment has been revoked with effect from 30<sup>th</sup> October 2019.

The Board of Directors is going through a restructuring of the product supply chain of the business and has since appointed a Head of Plant Operations.

We thank you for the services offered during the acting period.

Yours faithfully,

For: E. A. Portland Cement Pic.

SIGNED

STEPHEN NTHEI

AG. MANAGING DIRECTOR”

By letter dated 31<sup>st</sup> October, 2019 which the Petitioner received on 6<sup>th</sup> November 2019, his contract dated 24<sup>th</sup> September was terminated without assigning any reason. However, in the replying affidavit of JOEL KEMEI sworn on 28<sup>th</sup> November 2019 stated at paragraph 8 and 16 and stated follows: –

8. That it is not contested that the Respondent had been experiencing financial downfall and in a bid to salvage itself declared redundancies for all positions and employees and undertook re-organisation and restructuring exercise.
9. That the Petitioner was among the affected employees in the first phase and his termination was through the letter dated 19<sup>th</sup> September 2019 to which was took effect on 25<sup>th</sup> September 2019 and the Petitioner duly released from the Respondent's employment.
10. That I am aware that the Petitioner, as a former employee of the Respondents and other former employees re-applied for employment with the Respondent under new terms of employment.
11. That apart from carrying out the redundancy exercise; the Respondent was undergoing restructuring and reorganization. Therefore, upon the Board of Directors carrying out a suitability assessment on 24<sup>th</sup> September 2019, the Petitioner was offered a new three (3) year contract as Manager Production which was to last from 26<sup>th</sup> September 2019 to 25<sup>th</sup> September 2022.
12. That I am aware that former employees who had re-applied for vacancies were offered employment upon carrying out suitability assessment tests. (I attach and mark as JK1 a copy of the Board Minutes held on 24th September 2019)
13. That the terms of the contract was that the Petitioner was placed on probation for a period of six months in accordance with Clause 6 of the Contract. That the Petitioner could be terminated while on probation with no reason being assigned and/or provided as long as a one month notice is given in writing or the payment of one (1) month's salary in lieu thereof.
14. That the rationale for placing the Petitioner and other employees on a six month probation period was to assess the suitability and the performance of the employees. This was necessitated by the fact that the Petitioner had held the said position of Manger Production during the previous contract period and no positive results seen leading to financial constraints within the company. Therefore, it was necessary to monitor the performance o the Petitioner while on probation.
15. That further I am aware that the Respondent was appointed as Acting Head of Productions on 26<sup>th</sup> September 2019, which appointment was revoked on 30<sup>th</sup> October 2019 as further suitability assessment had been carried out and the position of Head of

*Productions (now Head of Plant Operations) was filled by a qualified person.*

*16. That on 31<sup>st</sup> October 2019, the Respondent invoked the provisions of Clause 6 of the contract and terminated the probationary contract by offering to pay the one month salary in lieu of notice.”*

Further, at paragraphs 12 – 15, and 18 of the response to petition, the Respondent pleads as follows –

*12. The Respondent avers that upon termination of the petitioner's employment, a replacement in the name of Mr. Japheth Ombogo was appointed into the position of Production Manager with effect from 1<sup>st</sup> November 2019 vide an internal memo dated 1<sup>st</sup> November 2019. Subsequently the Respondent engaged Japheth Ombogo and issued him with an employment Contract dated 31st October 2019. The Respondent avers that this process was undertaken after a suitability assessment test and interview being conducted and the said Japheth Ombogo having successfully qualified.*

*13. That without prejudice to the foregoing, on 25<sup>th</sup> October 2019, the Respondent's Board of Directors resolved that the positions of “Head of Plant Operations” and “Production Manager” be headed by persons holding a degree in Engineering which is relevant to the Cement business, i.e. mechanical, chemical, process, electrical or industrial engineering.*

*14. That it is to be noted that the Petitioner herein does not possess the required qualifications for holding the position of Production Manager thereby necessitating his termination by invoking the probation clause.*

*15. In further response to paragraph 9 of the Petition, the Respondent states that subsequent to further suitability tests, the Petitioner's position, as Acting Head of Production, was invalidated on 30<sup>th</sup> October 2019 and the position of Head of Productions (now Head of Plant Operations) was filled by a qualified person, Mr. Stanley Ngari Irungu.*

*18. That there was nothing precluding the Respondent from appointing a much more qualified employee to the position of Production Manager, even though they held junior positions than the Petitioner, as they were much qualified than the Petitioner and had performed higher than the Petitioner on assessment and the Petitioner had failed to perform according to the Respondent's goals.”*

All these averments are not supported by any evidence. There is no evidence of the qualifications of the persons appointed or of the Petitioner's, no evidence of Board's resolutions and no evidence of suitability tests after 24<sup>th</sup> September 2019.

Again at paragraph 27 of the Respondent's response to petition, it pleads that –

*“27. That the Petitioner was placed on probation in order to determine his capability and suitability for the position of Production Manager prior to his confirmation to the substantive position. However, the performance of the Petitioner during the probation period was found wanting and necessitated termination and appointment of a new Production Manager. Further, the Petitioner was found no longer suitable to hold the position of Production Manager as he was not academically qualified with a degree in Engineering which is relevant to the Cement business, i.e. mechanical, chemical, process, electrical or industrial engineering.”*

Again no evidence of assessment of the petitioner's performance in the period between 24<sup>th</sup> September and 30<sup>th</sup> October 2019 has been adduced. In any event, this was not stated in the letter of termination of the contract, as is evident from the said letter which has been reproduced herein above.

It is from the foregoing that I would agree with the Petitioner that the unexplained changes can only point to either malice or witch-hunting or both as the reason for the termination of his contract.

## **Remedies Sought**

### **1. Nullification of the Termination Letter**

The Petitioner has sought a declaration that the letter dated 31<sup>st</sup> October 2019 terminating his employment contract dated 24<sup>th</sup> September 2019 is unfair, unlawful, irregular, unprocedural, illegal, unconstitutional and is therefore null and void.

In light of the holding in **Nelson Ogeto Mogaka & 15 others v Geothermal Development Company Limited [Supra]**, the Respondent was required to treat the Petitioner fairly before terminating his employment. In essence, if the Respondent was aggrieved by the Petitioner's performance, it ought to have given him the opportunity to defend himself before his contract was terminated.

The Respondent did not prove the validity of the reason for the Petitioner's termination. The termination letter was silent on the reason for termination. The board's resolution that resolved to terminate the petitioner's contract was not adduced before this Court. Neither was there any evidence to show that the Petitioner had been performing poorly as alleged. In any event, the Petitioner had been passing his suitability tests prior to his dismissal, the last one having been on 24<sup>th</sup> September 2019. There was further no evidence of a suitability test carried out for his replacement, or another suitability test which found him unsuitable between 24<sup>th</sup> September and 30<sup>th</sup> October 2019.

I find that the said letter violated the Petitioner's right under Article 47(1) of the Constitution for failing to disclose the reason for the termination of his contract. Further, the effect of that letter was that the Petitioner was summarily dismissed without being afforded a fair hearing thus violating his right under article 50 of the Constitution and section 4 of the Fair Administrative Actions Act. As such, the same is

declared null and void.

## **2. Reinstatement**

Section 12(3)(vii) of the Employment and Labour Relations Court Act and Section 49(3) of the Employment Act grants this Court the power to order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under the circumstances contemplated under any written law. The circumstances contemplated by this section are outlined in Section 49(4) of the Employment Act as follows–

- i. the wishes of the employee;**
- ii. the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and**
- iii. the practicability of recommending reinstatement or re-engagement;**
- iv. the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;**
- v. the employee's length of service with the employer;**
- vi. the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;**
- vii. the opportunities available to the employee for securing comparable or suitable employment with another employer;**
- viii. the value of any severance payable by law;**
- ix. the right to press claims or any unpaid wages, expenses or other claims owing to the employee; any expenses reasonably incurred by the employee as a consequence of the termination;**
- x. any conduct of the employee which to any extent caused or contributed to the termination;**
- xi. any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and**
- xii. any compensation, including ex gratia payment, in**  
  
**respect of termination of employment paid by the employer and received by the employee.**

The period within which to order a reinstatement has not lapsed neither did the Respondent give any indication that its relationship with the Petitioner had irretrievably broken down. Further, there was no evidence adduced to show that the Petitioner had contributed to his summary dismissal by poor performance or lack of qualifications that has been raised in the Respondent's submissions.

The Respondent's case is that the Petitioner's position has been substantively filled by the Interested Party. The Respondent has only annexed the Interested Party's appointment letter of 1<sup>st</sup> November 2019. It never produced the letter dated 25<sup>th</sup> October 2019 appointing the Interested Party to the Petitioner's position which was to take effect on 28<sup>th</sup> October 2019.

As was held in this court's ruling on the contempt application delivered on 12<sup>th</sup> May 2020, at the time the Interested Party was allegedly issued with his appointment letter, the Petitioner's contract was still in force. The Petitioner's position that the Respondent had not filled his position by the time the conservatory orders restraining the Respondent from substantively filling the position were issued was never controverted by the Respondent. There are also inconsistencies in the Respondent's account of events as it is clear that the Interested Party's appointment did not take effect on 28<sup>th</sup> October 2019 or 1<sup>st</sup> November 2019 as alleged **by the Respondent.**

Further, as was found in the ruling of 12<sup>th</sup> May 2020, no evidence was adduced to show that the Interested Party had applied for the position of production manager. The Board's decision that resolved that the positions of Head of Plant Operations and Production Manager would be headed by persons holding Engineering degrees that were relevant to the cement business was not produced before this Court. It is not even clear when such a resolution was made by the Board.

The internal memo communicating that the Interested Party's appointment was to take effect on 1<sup>st</sup> November 2019 was issued when the Petitioner was still in office as he left on 6<sup>th</sup> November 2019, the day which he received his termination letter. As such, the Interested Party did not assume office on 1<sup>st</sup> November 2019 as alleged. The Respondent's Acting Managing Director ought to have known there had been material changes to the Petitioner's position between 31<sup>st</sup> October 2019 and 6<sup>th</sup> November 2019. The fact that the Petitioner was never told to vacate his office for the Interested Party, means the Respondent is not being honest.

In light of the above, I find that the Petitioner's position had not been filled by the time the conservatory orders of 18<sup>th</sup> November 2019 were issued. As such, the Interested Party's appointment to that position despite there being court orders if at all it was done, which as pointed out

above and in the ruling of 12<sup>th</sup> May 2020 is doubtful, was in vain and therefore null and void. **The Petitioner is thus reinstated to his position of Production Manager in accordance with the contract dated 24<sup>th</sup> September 2019 until the expiry thereof, on 25<sup>th</sup> September 2022 without any loss of benefits therefrom, unless lawfully terminated as required by law.**

Having reinstated the Petitioner, and considering the relationship between the parties, I will not award the Petitioner any damages or compensation as the court considers the reinstatement to be adequate compensation.

The Respondent shall bear the costs of this suit. Any payments arising from this decision shall attract interest from the date of judgment.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13<sup>TH</sup> DAY OF NOVEMBER 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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, the 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 the 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**