



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO. E066 OF 2020

ERNEST MOTURI OGWORA.....PETITIONER

VERSUS

NATIONAL CEREALS AND PRODUCE BOARDRESPONDENT

RULING

The petitioner filed his application and Notice of Motion dated 15th October, 2020 and seeking for orders that there be stay of the retirement letter dated 3rd August, 2020 and the respondent be restrained from removing the petitioner from the payroll and to restore all the benefits including social benefits and pension contributions.

The petitioner is also seeking for orders that the respondent be ordered and compelled to supply him with the Board full meeting minutes for meeting held on 30th July, 2020 that resolved for his immediate and forceful retirement as such minutes are to be relied upon in prosecuting the petitioner.

The application is supported by the petitioner's affidavit and on the grounds that on 30th July, 2020 the respondent board of directors in its meeting resolved and approved the abolition of the office of manager, monitoring and evaluation, a substantive role held by the petitioner and whose roles were merged with corporate planning function. The board of directors in the same meeting subsequently decided to retire the petitioner without affording the opportunity to be heard and or be given the reasons for such action.

Other grounds are that on 3rd August, 2020 the petitioner was served with a letter of notice of retirement communicating the decision of the respondent and that his office had been abolished and should retire with immediate effect. He was then ordered to surrender all materials and equipment in his possession that belongs to the respondent and to leave the premises immediately and his office has remained locked until 12th August, 2020 when the court issued orders staying the retirement and which order has since lapsed.

Upon the issuance of the retirement notice the respondent withdrew the petitioner's salary, medical cover, pension, and NHIF, NSSF and Sacco contributions. Only the petitioner was singled out for retirement in contravention of the law.

Aggrieved by the decision of the respondent, the petition filed ELRC Petition 145 of 2020 and on 13th October, 2020 the court directed him to file a fresh petition seeking for remedies therein since the interlocutory application was raising a new cause of action.

There is a different pending case in court by the petitioner against the respondent, **ELRC Petition No.145 of 2018** set for hearing on 24th September, 2020 in which his claim against the respondent is with regard to unfair treatment and discrimination in employment and which has precipitated further victimisation by the respondent.

Since filing such suit, the petitioner has been subjected to untold discrimination and ill-motivated retaliatory actions by the respondent board of directors and unless the action of retirement and non-payment of his salary and benefits are secured the petitioner shall be greatly prejudiced.

In his affidavit, the petitioner avers that he was employed by the respondent in March, 1992 and worked in various positions the last being the head of services marketing, head of operations and head of monitoring and evaluation. He has had a clean record.

In the year 2009/2010 the position of general manager, marketing and operations fell vacant upon the early retirement of Robert Langat. The practice was to appoint an acting officer and being the most senior officer the petitioner had a legitimate expectation of being appointed but this was not done which was discriminatory.

On 24th February, 2010 the respondent advertised several vacancies and the petitioner applied for the positions of general manager and passed the first interview but after the second interview, the employees who had been suspended following the maize scandal reported back

and the recruitment which was on-going was placed in abeyance. There was no communication thereafter and this action was discriminatory.

The term of the managing director was to end in August, 2013 and 3 employees were promoted but the petitioner was not considered resulting in discrimination.

The petitioner also avers that in the course of his employment he has been discriminated against by the respondent by being denied various promotions and advancement to his career and which actions are contrary to the National Cereals and Produce Board, Human Resource Policies and Procedures Manual. This resulted in his filing ELRC petition No.145 of 2018 which is pending before court.

On 3rd August, 2020 the petitioner as served with letter of retirement from service and abolition of his office of manager, monitoring and evaluation and aggrieved with such decision he filed application under Petition No.145 of 2018 seeking for interim orders to stop the forceful retirement by the respondent as he had an on-going case and the court directed him to file a new suit as this formed the basis of a new cause of action and which is done in the instant petition.

In reply, the respondent filed the Replying Affidavit of John Ngetich the corporation secretary and head of legal services with authority to respond herein and avers that the board of directors, managing director, general manager, finance and procurement, all heads of departments an all regional managers attended the joint induction retreat on 4th and 5th August 2016 to discuss among other things the implementation of the recommendations of the restructuring report.

The petitioner attended a meeting of the heads of departments held on 12th August, 2016 in which members were informed that some of the functions had little impact and it was agreed that they would be merged into a unit.

The board of directors held a meeting on 12th and 13th October, 2016 to deliberate on the implementation of the revised organisational structure proposed by the Ernest and Young Consultants and reviews the organogram of the respondent. The office of manager, monitoring and evaluation was not included in the proposed organogram.

The petitioner attended the meeting of heads of departments held on 31st October, 2016 in which members were informed that the new organisational structure was approved by the board of directors and the petitioner was a participant in the deliberations involving the removal of the office he occupied and cannot feign ignorance of its potential abolition.

An internal memo was issued on 28th August, 2018 inviting interested staff members to apply for 8 vacant positions of heads of departments. The petitioner did not apply and was hence appointed as part of a panel to assess shortlisted candidates suitable for the advertised positions.

Such positions were filled by other persons since the petitioner did not apply for any.

The position of manager, monitoring and evaluation has been abolished and it is futile for the petitioner to seek to occupy a position which does not exist. To allow the application would lead the court in managing the affairs of the respondent. Abolition of office has already taken effect and is irreversible vide internal memo of 30th July, 2020.

The petitioner filed ELRC Petition No.145 of 2018 stopping the retirement. In order not to be found in contempt, the respondent allowed the petitioner to access the board premises for some time from end of August, 2020 to 12th October, 2020. He was not assigned any duties as his office had ceased to exist. The court order has since expired.

The petitioner's dues have been approved and paid. He has been cleared, certificate of service issued and removed from the payroll. The orders sought should be dismissed with costs.

Determination

From the affidavits on record, the petitioners employment with the respondent has since been terminated vide letter dated 3rd August, 2020 which stated that;

RETIREMENT FROM SERVICE AFTER ABOLITION OF OFFICE OF MANAGER, MONITORING & EVALAUTION

The NCPB Board of Directors' at its meeting held on 30th July 2020, approved the abolition of the officer of Manager, Monitoring and Evaluation, whose ole has been merged with corporate Planning Function.

Consequently, it has been decided to retire you from service with immediate effect as provided in the Board's HR Policies and Procedures and the Public Service Commission Act (2017 and attendant Regulations (2020. ...

For the given reasons, the petitioner was retired from the service of the respondent.

The petitioner's case is that he was forcefully retired with immediate effect and without an option of a hearing or being given any reasons for such action.

At this instance, to restore the petitioner back to the service of the respondent with payment of a salary and benefits therefrom would be to effect a reinstatement back to his position without loss of benefits. Reinstatement back into employment upon termination is an order

requiring specific performance and ordinarily such an order should only issue as a final order unless there are exceptional circumstances necessitating the grant of such an order in the interim.

In the case of **National Bank of Kenya versus Samuel Nguru Mutonya [2019] eKLR** the Court of Appeal in addressing the issue of reinstatement of an employee held as follows;

... the common law principle that an order for specific performance of a contract for service should not be made save in exceptional cases, the employee's length of service with the employer, the employee's reasonable expectation of the length of time the employment was to last but for the termination, the employee's opportunities for securing comparable or suitable employment, any conduct of the employee that may have caused or contributed to the termination, any action on the part of the employee to mitigate his losses, etc. What all the above means, is that before exercising the discretion to determine which remedy to award, the court must be guided by the above comprehensive list of considerations.

The rationale is that the order of reinstatement of an employee is a substantive remedy, not a temporary relief. The law does not contemplate that reinstatement as a provisional measure. It is a remedy that should normally be granted upon the full hearing of the employer, and the employee. See **Nyungu Kimungii versus Bomas of Kenya [2013] eKLR**.

In this case, the petitioner has given a chronology of events leading to his employment, continued employment and eventual termination of his employment by retirement due to abolition of his office. He secured interlocutory orders stopping the retirement under ELRC Petition No.145 of 2018. Such matter has since been addressed and the court directed him that this is a new cause of action separate from the cause of action in Petition No.145 of 2018.

The petitioner urges his case on the grounds that he has been discriminated against in the course of his employment by the respondent. That this has culminated in his forceful retirement by abolition of his office as manager, monitoring and evaluation.

The court finds no exceptional cause to allow reinstatement at this instance and as an interim order.

With respect, these are matters which shall comprise the gist of the full hearing and which the court should hear on the merits before consideration of the grant of the order of reinstatement as required under section 12 of the Employment and Labour Relations Court Act, 2011 read together with section 49 of the Employment Act, 2007 and Rule 17(10) of the Employment and Labour Relations Court (Procedure) Rules, 2016 that;

(10) Notwithstanding anything contained in this Rule, the Court shall not grant an ex parte order that reinstates into employment an employee whose services have been terminated.

On the documents, records and board minutes for the meeting held on 30th July, 2020 required by the petitioner to urge his petition, as a rule, a respondent to any suit before the court is required to file and serve the other party with all documentary evidence to be relied upon at the hearing. Rule 13(2) of the Court Rules requires as follows;

(2) A respondent's statement of response shall contain-

(a) the respondent's name and address for purpose of service;

(b) a reply on the issues raised in the statement of claim;

(c) any admission of any statement of facts set out in the statement of claim as the respondent admits, and a denial of any statements made in the suit that the respondent does not admit;

(d) any additional statements of fact which the respondent may wish to make in support of its reply;

(e) any defence or grounds upon which the respondent may wish to rely;

(f) any principle, policy, convention, law, industrial relations or management practice to be relied upon; ... [emphasis added].

The court finds no sufficient cause to allow the orders sought at this instance and in the interim.

Accordingly, since reinstatement is a summative remedy to be determined after a full hearing of the petition, and the applicant has not met the legal threshold for granting interlocutory injunction, application is found without merit and is hereby dismissed. The respondent has 21 days to file response to the petition and abide Rule 13 of the Employment and Labour Relations Court (Procedure) Rules, 2016 read together with Rule 7 thereof. Costs in the petition.

Delivered at Nairobi this 17th day of December, 2020.

M. MBARU

JUDGE