



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1440 OF 2018**

*(Before Hon. Lady Justice Maureen Onyango)*

**DR. MILDRED MUDANY.....CLAIMANT**

**VERSUS**

**JHPIEGO CORPORATION (KENYA).....RESPONDENT**

**RULING**

Before this Court is the Notice of Motion Application filed on 15<sup>th</sup> October 2018, brought under rule 17 of the Employment and Labour Relations Court (Procedure) Rules, sections 12(3)(i), (ii) and (iii) of the Employment and Labour Relations Court Act and all other enabling provisions of law. The Claimant seeks the following orders:

1. Spent.
2. That pending the hearing and determination of this Application, the Respondent be and is hereby restrained from taking any adverse action against the Claimant on the basis of her 2017/2018 Annual Performance Appraisal and/or the Performance Improvement Plan commenced on 14<sup>th</sup> August 2018 or in respect of any matters raised by the Respondent against the Claimant from 14<sup>th</sup> August 2018.
3. That pending the hearing and determination of this suit, the Respondent be and is hereby restrained from taking any adverse action against the Claimant on the basis of her 2017/2018 Annual Performance Appraisal and/or the Performance Improvement Plan commenced on 14<sup>th</sup> August 2018 or in respect of any matters raised by the Respondent against the Claimant from 14<sup>th</sup> August 2018.
4. That pending the hearing and determination of this Application and the suit generally the Respondent be and is hereby restrained from harassing, intimidating, bullying, frustrating or interfering with the Claimant's rendering of her services to the Respondent.
5. That this Court be pleased to order the Respondent to investigate and hear the Claimant's representations regarding the results of her 2017/2018 Annual Performance Appraisal.
6. That this Court be pleased to lift the Performance Improvement Plan that the Claimant has been placed on.
7. That this Court be pleased to order the Respondent to investigate and hear the Claimant's representations in relation to any allegations raised against her.
8. That costs of this Application be awarded to the Claimant.

The Application is based on the grounds that the Respondent commenced and has continued steps that portray the Claimant as incompetent and not befitting of her position, despite her committed service to the Respondent. Further, she has been asked to attend a performance evaluation meeting on 17<sup>th</sup> October 2018 (now past) and it was her fear that the Respondent planned to terminate her employment on that date.

The Claimant avers that on 14<sup>th</sup> August 2018, she was put on a Performance Improvement Plan (PIP) on the basis of a performance appraisal carried out by her former supervisor which she had formally contested. On 27<sup>th</sup> September 2018, the Respondent raised new allegations against the Claimant and informed her that a decision had been made to terminate her employment and she was given the option of resigning or being fired.

The Claimant avers that the final PIP evaluation meeting was scheduled for 17<sup>th</sup> October 2018 (now past).

The Claimant avers that the termination of her employment would be unlawful, unfair, unjustified, irregular, unprocedural, actuated by malice and based on unfounded and unsubstantiated allegations. The Claimant further avers that the Respondent's decisions are made in Baltimore hence she risks losing her job should this Court fail to intervene since she has no other avenues of dispute resolution.

The Application is supported by the Claimant's Affidavit sworn on 15<sup>th</sup> October 2018 filed on even date, and based on the grounds on the face of the motion.

On 15<sup>th</sup> October 2015, the Court certified the application urgent, ordered the hearing of the application and further ordered the Claimant's performance to be reviewed but no adverse action taken before hearing.

The Respondent has opposed this Application vide the Replying Affidavit of Rajshree Haria, sworn on 26<sup>th</sup> October 2018 and filed on even date.

The Respondent contends that the 2016-2017 annual performance listed various performance issues where the staff needed to improve on. The Respondent further contends that the Claimant did not submit any grievance or complaints against the Annual Performance Appraisal (APA) and that the appraisal was factual, fair and balanced. The Claimant was given the opportunity and to responded to the supervisor's comment and she did.

The Respondent avers that in June 2018, the Respondent's CEO and Chief HR and Administrative Officer received complaints from staff of the Kenyan office, concerning gross ineffectiveness of the HR. The Global HR Business Partner was sent to investigate the complaint. She discovered that the Claimant had not inquired into or resolved any of the complaints raised. Subsequently, the Vice President for Global Programs and the Chief HR and Administrative Officer organized and informed the Claimant of their visit to the Nairobi office. During the visit, they cautioned the Claimant on her lack of leadership and informed her that she would be under a PIP. The Respondent's expectations were explained to her and on 14<sup>th</sup> August 2018, she signed the PIP. The Respondent avers that there were no ulterior motives of terminating the Claimant's employment.

It is the Respondent's case that on diverse dates in September and October, the Claimant did not co-operate in the PIP process. The Respondent also avers that the PIP process complied with the provisions of the HR Policy, the Claimant was consulted and her feedback concerning each allegation of her underperformance obtained. The Respondent denies stage managing the Claimant's PIP process so as to orchestrate her termination or to replace local staff with foreigners.

It is the Respondent's case that the application is premature since the PIP process is yet to be completed. Further, the Application amounts to inviting the Court to run the disciplinary process and make substantive decisions in respect of contested facts based on Affidavit evidence.

The Respondent avers that the Claimant has a remedy under the Employment Act for a claim for damages or reinstatement if she is dissatisfied with PIP process.

In response to the Respondent's Replying Affidavit, the Claimant filed a Further Affidavit sworn on 20<sup>th</sup> November 2018. She avers that the deponent of the said Affidavit, Rajshree Haria, was not her supervisor and her Affidavit was based on second-hand information.

The Claimant contends that the Grievance Policy does not apply to the County Director. The Claimant also contends that by signing her appraisal form and by failing to make recommendations, her supervisor was contented with her response to his comments.

The Claimant avers that she had expected action to be taken in respect of her concerns regarding her negative appraisal.

The Claimant contends that the staff complaints raised through the suggestion box or her email were addressed exhaustively and timeously. She avers that she would not have known about any complaints made through the home office unless she was made aware.

The Claimant contends that Nancy Caiola never expressed her dissatisfaction with the weekly reports that the Claimant gave her. She further contends that paragraph 15 of the Replying Affidavit contains falsehoods and is character defamation. Paragraph 15 indicates that the Claimant allegedly stated that she was connected and would bring the Respondent down.

The Claimant contends that new allegations were raised against her in the PIP process.

The Claimant avers that the Respondent's donations have reduced hence the plan to lay off staff supported by general funds, especially those earning huge salaries.

On 27<sup>th</sup> November 2018, the parties proceeded with the hearing of the Application and made oral submissions thereafter.

During the hearing of the Application, parties restated the contents of their respective pleadings.

### **Submissions by the Parties**

The Claimant submitted that the PIP process was commenced and continued unfairly, being stage managed with the ultimate goal of terminating her employment. The Claimant relies on the case of *Banking Insurance Finance Union (Kenya) vs. Barclays Bank of Kenya*

**Limited & Another [2016]** where the Court relied on the case of **Christopher Onyango & 24 Others vs. Heritage Insurance Company Kenya Limited Cause No. 781 of 2015** to opine that a performance evaluation targeted to get rid of an employee is contrary to PIP. The Claimant further relied on the case of **Anthony Kavinguha vs. Erica Krug & Another [2014] eKLR**.

It was the Claimant's submissions that the Respondent breached its own processes as set out in the HR Manual. The Claimant further submitted that the Respondent's grievance procedures did not apply to performance appraisals.

On the other hand, the Respondent submitted that the Claimant failed to raise any grievance in response to the 2017 Appraisal. The Respondent further submitted that the Claimant's issues relating to the appraisal were an afterthought as she did not use the provisions of the HR Manual. The Respondent also submitted that they followed what is set out at paragraph 6 (b) of the HR Manual.

It was the Respondent's submissions that authorities 1, 2, 3 and 4 of the Claimant's List of Authorities were not applicable as the Respondent had followed the policy. It is the Respondent's position that the Application herein is premature.

The Respondent submitted that there is need for circumspection in granting any orders because there exist disputed facts especially in relation to the Claimant's performance. The Respondent relies on the case of **Royal Media Services Limited vs. Telkom Kenya Limited & 2 Others [2000] eKLR** where the court stated that in situations where there are conflicting facts, those facts should be decided at a full hearing.

The Respondent submitted that granting orders 2 to 7 was tantamount to granting final orders at interlocutory stage which would be prejudicial to it. The Respondent further submitted that the Claimant has not made a *prima facie* case because:

- a. The Application is made prematurely before concluding all the processes.
- b. The orders have not been proved. The Respondent relies on the case of **Royal Media Services Limited vs. Telkom Kenya Limited & 2 Others [SUPRA]**
- c. The policy has been followed. The Court should be slow to interfere with managerial authority of employers. The Respondent relies on the following cases: **Amos Omollo vs. County Government of Kisumu and Others [2018] eKLR**, **Judith Tsigiga vs. TSC [2017] eKLR** and **Alfred Kimungui vs. Bomas of Kenya [2013] eKLR**.

The Claimant responded to the Respondent's submissions arguing that the Respondent has not proved that its operations have been paralyzed. The Claimant also submitted that the Respondent can always start the PIP process afresh.

## **Determination**

After considering the parties' arguments and the evidence adduced, there is only one issue for determination:

### **Whether the Claimant's Application meets the threshold for granting an interlocutory injunction.**

The principle for granting an interlocutory injunction were set out in the case of **Giella vs. Cassman Brown & Company Limited [1973] E.A. 358** as follows:

1. There must be a *prima facie* case with the probability of success.
2. The Applicant must show the likelihood of suffering irreparable injury which would not adequately be compensated by an award for damages.
3. If the Court is in doubt, it will determine the case on a balance of convenience.

The Claimant made the Application herein because she feared that the outcome from the PIP process would be used to maliciously terminate her employment. At the time of filing this Application, the Claimant was to have a meeting to review her performance as regards the PIP. It is the Claimant's case that a termination would have ensued thereafter. On the other hand, it is the Respondent's position that the Application herein is premature as the procedure in the HR Manual had not been exhausted.

The Claimant's PIP process was commenced on 14<sup>th</sup> August 2018 after an appraisal for the year 2017/2018 where her supervisor made comments on 10 key areas that the Claimant needed to improve on. It is on record that the Claimant was given the opportunity to respond to each and every comment made by her supervisor which she did.

It is evident that the Claimant did not allow the process to reach its logical conclusion thus anticipating certain actions. What the Claimant terms as malice by the Respondents agents, appears to be their attempt to fulfil their mandate as per the Respondent's Employment Manual.

The Respondent's Manual at page 14 and 15 sets out what performance evaluation and PIP entailed. Specifically, the performance evaluation is outlined under Clause 6A as herein below:

*“The performance evaluation provides a record of how well an employee is performing his or her job. It is used to justify a merit increase and identify an employee's learning and development needs... A merit increase is not awarded to an employee whose work is not satisfactory. Instead, the employee and their supervisor will discuss how to improve the employee's performance, the*

*time frame for improvement and the consequences of continued unsatisfactory performance.”*

Paragraph 6B outlines the PIP process as follows:

*“... In developing a PIP, the supervisor should include the following six items in the review with the employee:*

*a. State specific performance gaps or the areas to be improved; citing examples.*

*b. State the level of work performance expectation and that it must be performed on a consistent basis.*

*...*

*c. Establish the plan for providing feedback to the employee. These include meeting dates and other staff involved.*

*d. Specify the possible consequences if performance standards are not met.*

*...”*

From the above, it was to be expected that the Claimant’s performance would be closely monitored and consequences of her non-performance communicated to her. As such, I read no ill motive by the Respondent’s agents’ informing the Claimant of the consequences of her unsatisfactory performance. The Claimant must prove that the Respondent intends to go over and above what is expected of it in the Manual, to ensure that her employment is terminated.

This being a disciplinary process taken towards an employee’s unsatisfactory performance, and which the Claimant consented to, the Court cannot purport to interfere at this stage until it has reached its logical conclusion and what the Claimant feared has actually occurred. The Court in **Amos Omollo vs. County Government of Kisumu and Others [SUPRA]** stated as follows:

*“The role of courts in disciplinary cases...can now be said to be settled, that courts should not intervene unless there are exceptional circumstances. The Court is not expected to enter into boardrooms of the employer to micro manage its affairs. The Court would only interfere if there is proof of the violation of the law or the process of the Respondent...the Applicant has not proved any exceptional circumstances to warrant interference by the court at this investigative stage of the disciplinary process. The Applicant has not demonstrated any violation of his rights... as all that has been done is to ask him to show cause... This being a preserve of the employer, it would be interference by the court in administrative functions of the employer to stop the process and shield the Applicant from investigation even before he responds to the notice to show cause.”*

I have noted that some of the authorities relied upon by the Claimant, are cases where the applicant sought audience of the court after their employment had terminated. This should be a sign that the application before this court is premature.

I also note that some of the orders sought by the Claimant are based on contested facts and granting such orders would be tantamount to rendering a final judgment at an interlocutory stage based on affidavit evidence. The Court in **Royal Media Services Limited vs. Telkom Kenya Limited & 2 Others [SUPRA]** stated:

*“The procedure to be followed is to decide the issues by Affidavit and such applications are meant to effect a speedy and effective remedy to a person aggrieved by a clear breach by another party and where the dispute turns on a question of fact about which there is conflict of evidence the courts will genuinely decline to interfere and leave the matter to be determined through a hearing by evidence.”*

## **Conclusion**

It is my finding that the balance of convenience tilts in favour of the Respondent. It is for this reason that the application fails.

The Claimant’s application dated 15<sup>th</sup> October 2018 is accordingly dismissed with no orders for costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15<sup>TH</sup> DAY OF FEBRUARY 2019**

**MAUREEN ONYANGO**

**JUDGE**