



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 99 OF 2018

**IN THE MATTER OF: ARTICLES 1,2,3(i),10,19,20,21,22,27,28, 41(1),
47(1) & 258(1) OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF: RULES 4, 10, 11, 13 AND 20 OF THE CONSTITUTION OF KENYA

**(SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT**

PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF: THE EMPLOYMENT ACT 2007, CAP 226 LAWS OF KENYA

AND

**IN THE MATTER OF: SECTIONS 4,6,7,10(1) 11 AND 12 OF
THE FAIR ADMINISTRATIVE ACTIONS ACT NO. 4 OF 2015**

BETWEEN

ELIZABETH AGUTU ODHIAMBO.....CLAIMANT

VERSUS

WAUMINI SACCO SOCIETY LIMITED.....RESPONDENT

RULING

Background

1. The application before the Court is the petitioner's Notice of Motion dated 29.1.2019 seeking the following orders:-

a. THAT the application filed herein be certified URGENT and service on the respondent be dispensed with at the 1st instance.

b. THAT the honourable court be pleased to grant an interim order for maintenance of the status quo as prevailing in this matter on 20th December 2018 pending the hearing and determination of this application.

c. THAT the honourable court be pleased to extend the interim orders granted on 20th December 2018 for maintenance of status quo in this matter pending the hearing and determination of the notice of motion application dated 8th January 2019 filed under

certificate of urgency in the Court of Appeal on 8th January, 2019.

d. THAT the respondent be condemned to pay the costs of this application.

2. The application is supported by the Affidavit sworn by the Petitioner on 29.1.2019 and the grounds on the body of the motion. In brief, the applicant contended that she was aggrieved by this Court's Ruling dated 20.12.2018 and has since lodged a Notice of Appeal with intention to challenge the entire ruling. That in the meanwhile she has filed application for injunction at the Court of Appeal and the same was certified urgent and fixed for hearing on 4.4.2019. That in the interest of justice she prays that her present application should be granted for the interest of justice pending the outcome of the Application before the Court of Appeal.

3. The respondent opposed the application by the Replying Affidavit sworn by Sylvia Gumo on 27.2.2019. In summary, the respondent contended that it is true an appeal has been preferred and an application lodged at the Court of Appeal by the Petitioner seeking stay of the Ruling dated 20.12.2018. She further contended that the applicant herein has not satisfied the condition set out under order 42 rule 6 of the Civil Procedure Rules (CPRs) namely prove of substantial loss if the order sought is declined. That granting of the order sought would be unjust and unfair to her. She prayed for the application to be dismissed because it lacks merits, it is competent, and an abuse of the Court process.

4. The application was heard *ex parte* in the first instance on 29.1.2019 when the Court granted interim order extending the order for maintenance of the status quo granted on 20.12.2018 till 31.1.2019. The order was again extended on 31.1.2019 to 5.3.19. Once again the order was extended by consent on 5.3.2019 when the Application was scheduled to be heard. On 20.3.2019 I directed the application to be disposed of by written submissions and extended the order till 8.4.2019 when the matter was scheduled for mention to confirm filing of the submissions. On 8.4.2019 I confirmed that the counsel had filed submissions and fixed the matter for Ruling on 7.6.2019 and extended the interim order till then. As at 8.4.2019 when this matter was last mentioned in Court, the counsel never updated me on the progress of the Application before the Court of Appeal therefore I lack any indication whether it was heard or not.

5. The issues for determination herein is whether the order granted on 20.12.2018 for maintenance of status quo in this matter should be extended pending the hearing and determination of the Petitioner's Notice of Motion dated 8.1.2019 before the Court of Appeal. The applicant submitted that the application is primarily brought under the inherent powers of the Court and it is a stop-gap measure pending a determination of her Application for injunction at the Court of Appeal on 4.4.2019. She relied on Rule 28(1)(g) of ELRC procedure Rules to argue that the Court has the power to issue any orders to meet the end of justice. She further relied on section 12(3) (viii) of the ELRC Act to fortify the forgoing submissions.

6. The respondent submitted that the applicant has not met the threshold for granting the orders sought as provided by Order 42 rule 6(2) of the CPR. She contended that the applicant has failed to prove that substantial loss will be suffered if the order is denied and she has further failed to provide any security. She relied on *Kenya Shell Ltd Vs Kabiru and Another [1986]KLR 410* to support the submission that the applicant must prove substantial loss before the order sought is granted. She contended that any loss suffered by applicant if the appeal succeeds after being denied the order sought herein is quantifiable in monetary terms and it should be weighed against her (Respondents) loss caused by restraining her from employing a qualified person to the position previously held by the applicant.

Analysis and determination

7. I have carefully considered the Application, the Affidavits and Submissions by the two sides, there is no doubt that the application before the Court is *sui generis* because it is not grounded on express provision of the law but on the inherent powers of the Court. In the words of the applicant's counsel, the application is a stop-gap, meant to take care of a void pending the hearing and determination of the Application for substantive order of interlocutory injunction before the Court of Appeal. The application before the Court of Appeal according to counsels for the two sides was certified as urgent and fixed for hearing by a 3 judge bench on 4.4.2019. It is hereby presumed that the said application was heard but there is no indication when the Ruling will be delivered.

8. The order being sought in the application before the Court of Appeal is that:-

“... order of injunction restraining the respondent from removing the applicant from her position of Marketing Manager in accordance with the contract of employment dated 15th September 2017 and/or from enlisting/recruiting any other party in the said position and/or demoting her to any other junior position and/or reducing her salary and/or transferring her to any other station other than Nairobi pending the hearing and determination of the intended appeal.”

9. The foregoing is a summary of the several orders I declined by the impugned Ruling dated 20.12.2018 compressed under one prayer. The application before me prays that the claimant be allowed to continue in the position of Marketing Manager stationed in Nairobi and to continue enjoying the benefits for that position. It is however, common knowledge that she admitted that she does not possess the requisite qualifications for the position and that is why she never applied for the same when it was advertised. I do not think that granting the order sought will serve the end of justice because the applicant is not desirous to serve in the position of Marketing Manager and she is not qualified. She will therefore not suffer any substantial loss if the order sought herein is withheld.

10. It has been submitted that the application is a stop-gap measure to fill in the void in the procedure. I sincerely sympathize with the parties who continue to experience the said void in their pursuit for justice at the Court of Appeal. I however can do nothing about the void in procedure there, save to recommend for amendment to the Court of Appeal procedure rules to allow a single judge to grant interim orders to protect the substratum of the appeals that go before the Court pending inter parties hearing by a three judge bench.

11. Having made a finding that no substantial loss will be suffered by the applicant if the order of status quo granted on 20.12.2018 is not

extended pending the hearing and determination of the her application at the Court of Appeal, I decline to grant the said extension.

Conclusion and disposition

12. I have found that the Petitioner has not proved that she will suffer irreparable loss if the order sought is denied especially because it is expressly on record that she is not qualified for the position of Marketing manager and she never even applied for the said position when it was advertised. I have further found that the gaps existing in the Court of Appeal Rules of Procedure cannot be filled by the Trial Court but by the same Court of Appeal Judges or the Rules Committee of the Court.

Consequently the Notice of Motion dated 29.1.2019 is dismissed with costs.

Dated, Signed and Delivered in Open Court at Nairobi this 14th day of June, 2019.

ONESMUS N. MAKAU

JUDGE